ORIGINAL

IN THE SUPREME COURT OF OHIO

DAVID WARD, et al.,	)	CASE NO. 2010-1049
	)	2010-1275
Plaintiffs,	)	Consolidated for Review
	)	
vs.	)	
	)	
UNITED FOUNDRIES, INC., et al.,	)	*On Appeal from the*
	)	*Stark County Court of Appeals,*
Defendant/Plaintiff/Appellant,	)	*Fifth Appellate District*
	)	
vs.	)	*Court of Appeals*
	)	*Case No. 2009-CA-0019*
GULF UNDERWRITERS INSURANCE COMPANY,	)	*On Appeal for Certified Conflict*
	)	
Defendant/Appellee.	)	
	)	

MERIT BRIEF OF APPELLANT,
UNITED FOUNDRIES, INC.

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SUPREME COURT OF OHIO

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STATEMENT OF FACTS

Gulf Underwriters Insurance Company issued an insurance policy to United Foundries, Inc., effective July 1, 2002 through July 1, 2003. The insurance policy included an employer's liability coverage part, sometimes referred to in the industry as a "stop gap" coverage form, which provided as follows:

> 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:
>
> > This insurance does not apply to:
> >
> > * * *
> >
> > 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[.]

CG H3 13 10 89.

Prior to June 3, 2003, United Foundries had been sued by injured employees based on the theory of "substantial certainty" employer intentional torts. Based on the prior cases it was involved in, it was United Foundries' understanding that "stop gap" coverage provided defense and indemnity coverage for substantial certainty employer intentional torts. In obtaining the insurance policy from Gulf, it was United Foundries' express intent to procure insurance which would provide a defense and indemnity for that specific type of claim. The Gulf policy expressly indicated through the declarations page that "employer's

liability/stop gap" coverage for employee injuries was provided. United Foundries paid Gulf $5,000 in premiums for the stop gap coverage endorsement which was incorporated into the policy. (See Aff. Ronald Martin, attached to United Foundries' motion for summary judgment.)

United Foundries' employee David Ward suffered a workplace injury on or about June 6, 2003. Ward and his wife filed a complaint against United Foundries alleging a "substantial certainty" employer intentional tort. Because it had paid a $5,000 premium for coverage to defend against such actions, United Foundries requested that Gulf provide the defense pursuant to the stop gap coverage endorsement. Despite collecting the premium for the stop gap endorsement, Gulf refused to provide the defense.

STATEMENT OF THE CASE

On or about June 3, 2003, David Ward suffered a workplace injury which he claims was the result of a substantial certainty employer intentional tort. Ward and his wife filed a complaint asserting those allegations on or about June 7, 2004. The case was dismissed on or about February 27, 2006. The Wards re-filed their employer intentional tort case on or about April 24, 2006.

After significant discovery was completed, United Foundries filed a motion for summary judgment as to the common law claim for substantial certainty employer intentional tort. The Wards filed a memorandum in opposition, and United Foundries responded with a reply brief and a motion to strike the report of Plaintiffs' expert witness.

On June 1, 2007, United Foundries filed a Complaint for negligence against Terry Dragan, the agent who failed to procure proper insurance coverage, and for declaratory judgment against Gulf, requesting a declaration that Gulf owed a duty to defend and/or indemnify United Foundries against the allegations asserted in the Ward Complaint.

The Wards filed a motion to consolidate the employer intentional tort case with the insurance coverage declaratory judgment case, which was granted by the trial court on November 26, 2007. On that date, the trial court also denied United Foundries' motion for summary judgment as to the substantial certainty employer intentional tort liability aspect of the case. Gulf then filed a motion to stay the liability proceedings against United Foundries and Terry Dragan, until the coverage dispute between Gulf and United Foundries was resolved. On June 24, 2008, the trial court granted that motion and United Foundries and Gulf fully and completely briefed the issue of whether Gulf owed a duty to defend United Foundries against the substantial certainty employer intentional tort allegations.

On July 5, 2009, the trial court granted United Foundries motion for summary judgment as to the duty to defend. Gulf filed an appeal on February 3, 2009. On May 3, 2010, a majority panel of the Fifth District Court reversed; applying the "scope of the allegations" test, the Court determined that if the allegations set fort in the tort complaint proved to be true, coverage was not owed due to the stop gap endorsement exclusion. The dissent found the policy to be illusory. The appellate court remanded the matter for a determination of the liability issues against United Foundries and Dragan.

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 the specific terms and exclusionary language found in the Gulf stop gap coverage form required a duty to defend. A discretionary appeal to this Court was also filed on or about June 22, 2010. The conflict was certified by the Fifth District Court of Appeals on August 2, 2010. On September 29, 2010, this Court accepted the case for review on the discretionary appeal and found that a conflict existed, and consolidated the cases.

LAW AND ARGUMENT

> **CERTIFIED QUESTION:** Whether an exclusion in a commercial general liability insurance policy and/or stop/gap endorsement form, stating 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 made by either a judge or a jury before the defense of a claim for substantial certainly employer intentional tort can be denied.

It is United Foundries' position that the specific language set forth in the Gulf stop gap coverage endorsement requires the insurer to ***defend*** the insured employer against any complaint alleging a substantially certainty employer intentional tort. If at some point a factual determination has been made by the fact-finding judge or jury that such a claim has been established, the coverage exclusions would prevent Gulf from having to ***indemnify*** the employer for any damages awarded to the injured employee. However, since Gulf specifically and expressly set the exclusion in the past tense, it cannot refuse to defend the matter. Rather, the defense must be provided until such time as it ***has been determined*** that the employer committed a tort which would be excluded by the policy language.

The Gulf stop gap endorsement provides that:

> This insurance does not apply to:
>
> * * *
>
> 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[.]

Gulf'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. Unfortunately, a majority of the Fifth District Court of Appeals accepted this argument; the Court applied the generalized "scope of the allegations" test, rather than

assessing the actual language set forth in the Gulf exclusion. As reflected in the Court's entry, there is no discussion whatsoever of the exact language which is at issue in this case. The Court simply ignored the past-tense provision of the exclusion.

In *Cooper Tire & Rubber Co. v. Travelers Casualty & Surety Co.*, 3rd App. No. 5-06-40, 2007-Ohio-1905, however, the Third District Court of Appeals properly examined the specific language utilized in the stop gap coverage endorsement to determine whether the insurer must defend the employer intentional tort claim. The Court 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." The Court in *Cooper* specifically noted that "the mere *allegation* claimed in a complaint is not a *determination.*" Therefore, the Court held that since the insurer had denied both the duty to defend and the duty to indemnify the insured in a substantial certainty employer intentional tort case, the insurer was obligated to repay the settlement which had initially been paid by the insured to resolve the case.

An insurance contract, as with any other contract, must be read as a whole. *Westfield Ins. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849; *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373; *Kelly v. Med. Life Insurance Company* (1987), 31 Ohio St.3d 130. The court must presume that the intent of the parties is reflected in the language used in the contract. *Kelly, supra.* Further, ***all*** of the words in the contract must be given their plain and ordinary meaning, and cannot be simply ignored at the whim of the parties. *Karabin v. State Auto. Mut.*

Ins. Co. (1984), 10 Ohio St.3d 163, 167; *Mapletown Foods, Inc. v. Motorists Mut. Ins. Co.* (1995), 104 Ohio App.3d 345, 347-348.

In the present case, Gulf is attempting to re-write the insurance policy. First, Gulf ignores the past-tense wording of the exclusion, "to have been determined". Secondly, Gulf attempts to construe the word "determined" interchangeably with the word "alleged". If Gulf wanted the policy to exclude all substantially certain employer intentional torts based on the scope of the allegations test, it could have included an exclusion that stated

> "Bodily injury intentionally caused or aggravated by you, or bodily injury resulting from an act with the belief that an injury is substantially certain to occur."

In the alternative, Gulf cold have used an exclusion which provided

> "Bodily injury intentionally caused or aggravated by you, or bodily injury resulting from an act which is ***alleged*** to have been committed by you with the belief that an injury is substantially certain to occur."

However, the Gulf policy does not contain such explicit exclusions. Under the axioms set forth in *Galatis, Kelly, and Karabin, supra*, a party to a contract cannot simply ignore the words which do not support the party's position in a coverage dispute. Furthermore, the party who wrote the contract cannot later claim that the words it chose to utilize should be interpreted in a convoluted fashion to obtain the meaning it meant to provide. Rather, since all of the words in the contract must be considered, and provided meaning, the Gulf exclusion which contains the phrase "to have been determined" must be addressed, and must defeat Gulf's denial of coverage to United Foundries.

As stated by this Court on prior occasions, "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.* The Supreme 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.

Based upon this rationale, in substantial certainty employer intentional tort cases, even where the insurers have refused to indemnify the insured employer, they have provided a defense to the action. *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; *see also, Lt. Moses Willard v. American States* (Feb. 6, 1995), Clermont App. No. CA-94-06-049. These cases were

directly relied upon by Appellee in the underlying proceedings; yet the insurers in those cases clearly acknowledged that the duty to defend is always much broader than the duty to indemnify. Gulf, on the other hand, is attempting to completely disregard that duty altogether.

In the present case, the Gulf policy excludes coverage for bodily injury intentionally caused or aggravated by [United Foundries], or bodily injury resulting from an act ***which is determined to have been committed by [United Foundries]*** with the belief that an injury is substantially certain to occur. There is no allegation that United Foundries intentionally caused or aggravated an injury to David Ward. Further, it has not yet been determined that there has been an act committed by United Foundries which United Foundries was substantially certain would result in injury to David Ward. Therefore, based on the language chosen by Gulf and included in the insurance contract, Gulf must defend United Foundries against the substantial certainty employer intentional tort claim asserted by David Ward.

> **PROPOSITION OF LAW:** An insurance policy or endorsement which contains an exclusion for bodily injury intentionally caused or aggravated by the insured, or bodily injury resulting from an act which is **determined to have been committed** by the insured with the belief that an injury is substantially certain to occur, requires that the insurer provide a defense to the insured employer for a substantially certain employer intentional tort claim.

Appellee has 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 United Foundries.

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 holding in *GNFH, supra*, is similar to and based in part upon the holding of this Court in *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173. In *Harasyn,* this Court noted that if an insurer wishes to exclude coverage for "substantial certainty" employer intentional torts, public policy allows it to do so, but the policy exclusionary language must be explicit and unambiguous to that effect. In addition, this Court noted that if the coverage was denied, the insured would be left with essentially no coverage in return for the premiums paid for the stop gap endorsement. This Court specifically rejected the claim that coverage for "dual capacity" torts made the endorsement valid, as those claims were covered under the main commercial general liability portion of the policy.

The present case is also similar to *Talbert v. Continental Cas. Co.*, 2004-Ohio-2608. In *Talbert*, 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 Gulf endorsement is interpreted in a manner which would exclude coverage for those actions. If Gulf'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, Gulf actually prevented any coverage with respect to employees injured in the course and scope of employment.

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. In the case at bar, United

Foundries 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." United Foundries, on the other hand, paid $5,000 for the stop gap endorsement. **In the cases relied upon by Appellee, the provision of a defense, coupled with a very low premium for the coverage, is what kept the policy from being considered illusory.** In contrast, Appellant in this case paid a huge premium, but received no defense. Therefore, the alleged "coverage" here is illusory.

Appellant anticipates that Appellee will rely on *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373. However, *Penn Traffic* is obviously distinguishable from the present case. First, the parties in *Penn Traffic* agreed that the underlying injury was caused by a "substantial certainty" employer intentional tort. Here, however, that is a disputed question. Second, the parties in *Penn Traffic* did not allege that the employer liability endorsement was illusory or failed to provide the coverage which was purchased. Obviously, Appellant herein is making the argument of illusory or failed coverage. Further, the opinion in *Penn Traffic* does not indicate whether a separate premium was charged and paid for that coverage form. In the case at bar, a huge separate premium was paid for the employer liability/stop gap coverage form. Therefore, while this Court in *Penn Traffic* held that it was not generally against public policy for an insurer to exclude coverage for both direct intent and substantial certainty employer intentional torts, this Court did not hold that all stop gap coverage forms which contain exclusions necessarily prevent coverage for employer intentional torts. Rather, the holding in *Penn Traffic* was

based specifically on the exact language used in that particular coverage form, which is not present in the case at bar.

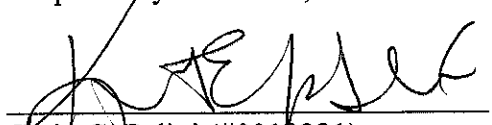
Based on the facts set forth in the present case, the policy issued by Gulf would be illusory and meaningless if it do not provide, at the very least, a defense to the employer intentional tort claim asserted by David Ward against United Foundries.

CONCLUSION

In the present case, Appellee Gulf is trying to re-write the insurance contract in order to preclude a defense for the employer intentional tort case filed against Appellant United Foundries. As the policy written by and provided by Gulf contains an exclusion only for acts which have already been determined to qualify as substantial certainty employer intentional torts, the stop gap endorsement only limits indemnity for such acts; it does not allow Gulf to ignore its duty to provide a defense to its insured for these claims.

Accordingly, Appellant United Foundries, Inc. respectfully requests this Court to reverse the judgment of the Fifth District Court of Appeals on the discretionary appeal, to affirm the judgment of the Third District Court of Appeals in *Cooper Tire* on the certified question for review, and to hold that Appellee Gulf Underwriters Insurance Company owes a defense to Appellant United Foundries for the employer intentional tort claims filed by David and Mary Ward.

Respectfully submitted,



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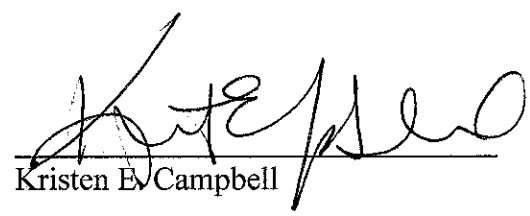

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ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 10-1049

DAVID WARD, et al., Plaintiffs, vs. UNITED FOUNDRIES, INC., et al., Defendant/Plaintiff/Appellant, vs. GULF UNDERWRITERS INSURANCE COMPANY, Defendant/Appellee.	*On Appeal from the Stark County Court of Appeals, Fifth Appellate District* *Court of Appeals Case No. 2009-CA-00019*

NOTICE OF APPEAL OF APPELLANT UNITED FOUNDRIES, INC.

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Notice of Appeal of Appellant
United Foundries, Inc.

Appellant United Foundries, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Stark County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 2009-CA-00019 on May 3, 2010.

This case is one of public or great general interest. In addition, Appellant, United Foundries has requested the Fifth District Court of Appeals to certify a conflict.

Respectfully submitted,

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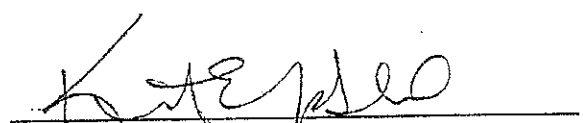

Kristen B. Campbell

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

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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

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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:

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By T. Chiarinzi Deputy
Date 5/4/10

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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 capacity[1]; 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.

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[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.

{¶87} 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.

{¶95} 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.

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

{¶97} 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.

{¶98} 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.

{¶99} 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 SUPREME COURT OF OHIO 10-1275

DAVID WARD, et al.,	)	CASE NO. *2010-1049*
Plaintiffs,	)	*On Appeal from the Stark County Court of Appeals, Fifth Appellate District*
vs.	)	
UNITED FOUNDRIES, INC., et al.,	)	*Court of Appeals Case No. 2009-CA-00019*
Defendant/Plaintiff/Appellant,	)	
vs.	)	
GULF UNDERWRITERS INSURANCE COMPANY,	)	
Defendant/Appellee.	)	

NOTICE OF CERTIFIED CONFLICT

FILED
JUL 2 6 2010

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Notice of Certified Conflict

Appellant United Foundries, Inc. hereby brings the appeal within based on a certified conflict issued by the 5th District Court of Appeals. According to the judgment entry certifying the conflict, the 5th District Court of Appeals' opinion in *Ward v. United Foundries v. Gulf Underwriters Insurance Company*, 5th App. No. 2009 CA 00019, is in conflict with the 3rd District Court of Appeals' decision in *Cooper Tire and Rubber Company v. Travelers Casualty and Surety Company*, 3d App. No. 5-06-40, 2007-Ohio-1905. The Court of Appeals has issued the following certified question:

I. WHETHER AN EXCLUSION IN A COMMERCIAL GENERAL LIABILITY INSURANCE POLICY AND/OR STOP/GAP ENDORSEMENT FORM, STATING 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 MADE BY EITHER A JUDGE OR A JURY BEFORE THE DEFENSE OF A CLAIM FOR A SUBSTANTIAL CERTAINTY EMPLOYER INTENTIONAL TORT CAN BE DENIED.

Copies of the order certifying the conflict, the 5th District Court of Appeals case, and the 3rd District Court of Appeals case are attached hereto pursuant to Supreme Court Practice Rule 4, Section 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Notice of Appeal was sent by regular U.S. mail this 19th of July, 2010 to:

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DAVID WARD, ET AL. Plaintiffs	
-vs-	JUDGMENT ENTRY
UNITED FOUNDRIES, INC., ET AL. Defendant/Plainitiff/Appellee	CASE NO. 2009CA0019
-vs-	
GULF UNDERWRITERS INSURANCE COMPANY Defendant/Appellant	

This matter came on for consideration upon a motion to certify conflict filed by Appellee United Doundries, Inc.

The Ohio Supreme Court set forth the requirements necessary to properly certify a conflict in *Whitelock v. Gilbane Building Company* 1993-Ohio-223, 66 Ohio St.3d 594. The Court held:

"Accordingly, we respectfully urge our sisters and brothers in the courts of appeals to certify to us for final determination only those cases where there is a true and actual conflict on a rule of law. In so urging, we hold that (1) pursuant to Section 3(B)(4), Article IV of the Ohio Constitution and S.Ct.Prac.R. III, there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper; and (2) when certifying a case as in conflict with the judgment of another court of appeals, either the journal entry

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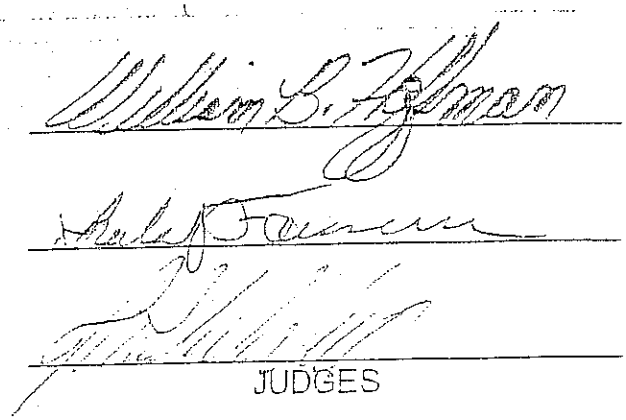
or opinion of the court of appeals so certifying must clearly set forth the rule of law upon which the alleged conflict exists."

Appellee United maintains this Court's May 3, 2010 Opinion and Judgment Entry is in conflict with the decision of the Third District Court of Appeals in *Cooper Tire and Rubber Company v. Travelers Casualty and Surety Company* No. 5-06-40, 2007 Ohio 1905.

Upon review, this Court finds a true and actual conflict does exist, and hereby certifies the same to Supreme Court for review and a final determination as to the following:

Whether an exclusion in a commercial general liability insurance policy and/or stop gap endorsement form, stating 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 made by either a judge or a jury before the defense of a claim for a substantial certainty employer intentional tort can be denied.

IT IS SO ORDERED.



JUDGES

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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

DATE OF JUDGMENT ENTRY:

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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 capacity[1]; 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.

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[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.

{¶87} 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.

{¶95} 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.

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

{¶97} 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.

{¶98} 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.

{¶99} 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

FILED
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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

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

Court of Appeals of Ohio,
Third District, Hancock County.
COOPER TIRE AND RUBBER COMPANY,
Plaintiff-Appellant,
v.
TRAVELERS CASUALTY AND SURETY COMPANY, Defendant-Appellee.
No. 5-06-40.

Decided April 23, 2007.

Civil Appeal from Common Pleas Court.
Robert S. Walker, Attorney at Law, Reg. # 0005840, Mark J. Andreini, Attorney at Law Reg. # 0063815, Cleveland, OH, Gregory E. Meyers, Attorney at Law Reg. # 0011394, Findlay, OH, for Appellant.

David W. Mellott, Attorney at Law Reg. # 0019485, Edward J. Stoll, Jr., Attorney at Law, Reg. # 0063533, Cleveland, OH, Jennifer M. Turk, Attorney at Law, Reg. # 0073781, Columbus, OH, for Appellee.

WILLAMOWSKI, J.

*1 {¶ 1} Plaintiff-appellant Cooper Tire & Rubber Company ("Cooper") brings this appeal from the judgment of the Court of Common Pleas of Hancock County granting summary judgment to defendant-appellee Travelers Casualty and Surety Company ("Travelers").

{¶ 2} On February 24, 1993, Kim Caudill ("Caudill"), a Cooper employee was injured while working at Cooper's plant in Findlay, Ohio. Caudill filed a suit for bodily injury resulting from the accident on February 28, 1995. The complaint alleged that Cooper failed to provide a safe place of employment and required Caudill to work in a location with hazards which were substantially certain to cause serious physical harm. The complaint was promptly passed on to Travelers, the insurance company for Cooper at the time of the accident. On June 20, 1995, Travelers agreed to pay defense costs under a reservation of rights. A few months later, Travelers determined that it was not under any obligation to defend the suit and denied coverage. Cooper then filed suit against Travelers on December 7, 1998, requesting damages for breach of contract and requesting declaratory relief. Travelers moved for summary judgment on March 5, 1999. In June of 1999, Cooper settled the suit with Caudill. Cooper then filed its own motion for summary judgment on July 27, 1999. Cooper on December 3, 1999, moved the court for leave to amend its complaint to add a claim for bad faith. This motion was never resolved and is presumed denied. *Georgoff v. O'Brien* (1995), 105 Ohio App.3d 373, 663 N.E.2d 1348. On July 26, 2006, the trial court granted Travelers motion for summary judgment and denied Cooper's motion for summary judgment. Cooper now appeals from this judgment and raises the following assignments of error.

The trial court reversibly erred in holding in its July 26, 2006, Judgment Entry that Exclusion 5 precluded coverage for the *Caudill* lawsuit even where there was no determination by a court or jury that Cooper committed the alleged act with the belief that injury was substantially certain to occur.

The trial court reversibly erred in failing to find that Travelers is obligated to pay the full amount of the settlement of the *Caudill* law- suit.

{¶ 3} The first assignment of error claims that the trial court erred in granting summary judgment to

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Travelers. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408, 672 N.E.2d 245. " Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issues as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589, 639 N.E.2d 1189. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*, supra.

*2 {¶ 4} Here, Travelers provided Cooper with a Workers Compensation and Employers Liability Policy that was in effect from April 1, 1992, until April 1, 1993. This policy states in pertinent part as follows.

> This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
>
> 1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
>
> 2. The employment must be necessary or incidental to your work in a state or territory listed in item 3.A. of the Information Page.
>
> 3. Bodily injury by accident must occur during the policy period.
>
> * * *
>
> We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability insurance.
>
> * * *
>
> This insurance does not cover
>
> * * *
>
> 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. (emphasis added).
>
> * * *
>
> We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.
>
> We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

Policy, 2-3, and Ohio Coverage Endorsement. This court notes that there is no dispute that the premiums were paid or that Cooper did not comply with its notification duties. The sole dispute before this court is whether the policy requires Travelers to defend and /or indemnify Cooper in the suit.

{¶ 5} When the complaint brings the action within the coverage of the policy, the insurer is required to provide a defense, regardless of the ultimate outcome of the action or its liability to the insured. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094 (citing *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, 294 N.E.2d 874). "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 action." *Id.* at ¶ 18. However, "where the conduct which prompted the underlying * * * suit is so indisputably outside coverage, we discern no basis for requiring the insurance company to defend or indemnify its insured simply because the underlying complaint alleges

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conduct within coverage." *Id.* at ¶ 21 (citing *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, 407 N.E.2d 1118). Unless the claims alleged in the complaint are indisputably outside of coverage, the Plan would have a duty to defend, regardless of whether it must indemnify the insured. *The Ohio Government Risk Management Plan v. Harrison, et al.*, 161 Ohio App.3d 726, 2005-Ohio-3235, ¶ 5, 831 N.E.2d 1079. "The duty to defend an action is not determined by the action's ultimate outcome or the insurer's ultimate liability." *City of Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, ¶ 13, 846 N.E.2d 833.

*3 {¶ 6} In this case, the policy specifically excludes liability for bodily injury from an act "determined to have been committed by [the insured] with the belief that an injury is substantially certain to occur." Because this type of coverage, is denied, the policy also provides for an exclusion of the duty to defend on this type of claim. However, the question is whether the act, or failure to act as is claimed in this case, has been "determined" to be committed by Cooper with the belief that harm was substantially certain to occur. The policy does not specify how this is to be determined or by whom.

{¶ 7} "[A]n ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 13, 797 N.E.2d 1256. "Words and phrases used in an insurance policy must be given their natural and commonly accepted meaning." *U.S. Fidelity and Guar. Co. v. Lightning Rod Mut. Ins. Co.* (1997), 80 Ohio St.3d 584, 585, 687 N.E.2d 717. "An exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded." *City of Sharonville*, supra at ¶ 6. The exclusion must be clear and exact in its language to be given effect. U.S. Fidelity, supra at 586.

{¶ 8} Here, Travelers claims that the clear intent of the exclusion was to bar all coverage and defense for all employer intentional torts. Cooper responds by claiming that since the exclusion contains the term "determined," the exclusion is not clear. "Determined" is defined as "decided or resolved." The American Heritage Dictionary (2d Ed.1985), 388. Cooper claims that this means that a finder of fact must decide whether the exclusion applies. A review of the policy does not indicate that this argument is unreasonable. The clear language of the exclusion requires that a determination must be made prior to the exclusion being enforceable. The only context in the law for the language "determined to have been committed by you with the belief that an injury is substantially certain to occur" is found in the three part test for proving intent during a trial stated by the Ohio Supreme Court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. By using the words of *Fyffe*, the plain meaning of the policy language implicates a determination made by either a judge or jury. In addition, the question is raised whether the determination can be made prior to the duty to defend being raised. Since no judicial determination can be made prior to the conclusion of the case, Travelers may still have a duty to defend without the subsequent liability. [FN1]

FN1. Whether Travelers would be entitled to recover the cost of the defense is not an issue before this court at this time.

{¶ 9} When reviewing a motion for summary judgment, the court must make every reasonable inference in favor of the nonmoving party, which in this case is Cooper. Since Cooper's interpretation of the language is not unreasonable, the trial court erred in granting summary judgment as a genuine issue of material fact exists as to the interpretation of the terms of the policy. The first assignment of error is sustained.

*4 {¶ 10} Next, Cooper claims that the trial court erred in denying it summary judgment on the claim that Travelers should be required to pay the full settlement of the *Caudill* lawsuit. As discussed above, the plain language of the statute is ambiguous about when the exclusion actually applies. "If the language of the insurance policy is doubtful, uncertain,

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or ambiguous, the language will be construed strictly against the insurer and liberally in favor of the insured." *Progressive Ins. Co. v. Heritage Ins. Co.* (1996), 113 Ohio App.3d 781, 682 N.E.2d 33.

> The promises to defend and indemnify impose separate duties, triggered by different events. The duty to indemnify is triggered by the insured's actual legal liability. The duty to defend is a prior duty that's triggered by the insured's demand that the insurer provide a defense to a claim of alleged liability.

Gideone Mut. Ins. Co. v. Reno, 2nd Dist. No. 01-CA-68, 2002-Ohio-2057 at ¶ 17.

{¶ 11} The exclusion in dispute in this case states that there will be no coverage for "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." Policy, Ohio Coverage Endorsement. Here, there has been no determination that injury resulted from an act of Cooper committed with the belief that an injury was substantially certain to occur. This court notes that the mere allegation claimed in a complaint is not a determination. Travelers chose the language of its exclusion and possessed the ability to define all the terms included within the policy. While Travelers does not have a duty to indemnify Cooper for damages resulting from a determination per the plain language of the policy, no such determination has been made in this case as the matter was settled prior to a determination. "Unless it is clear and unequivocal that the insurer has no duty of coverage, coverage must be provided." *Gideone,* supra at ¶ 18. Since the exclusion does not clearly deny coverage in this case, coverage must be provided. The second assignment of error is sustained.

{¶ 12} The judgment of the Court of Common Pleas of Hancock County is reversed and remanded for further proceedings.

Judgment reversed and remanded.

SHAW, J., concurs.
ROGERS, P.J., concurs in judgment only.
Ohio App. 3 Dist.,2007.
Cooper Tire & Rubber Co. v. Travelers Cas. & Surety Co.
Not Reported in N.E.2d, 2007 WL 1175183 (Ohio App. 3 Dist.), 2007 -Ohio- 1905

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(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)

Supreme Court of Ohio
Cooper Tire & Rubber Co.
v.
Travelers Cas. & Sur. Co.
NO. 2007-1035

July 24, 2007

MISCELLANEOUS DISMISSALS

Hancock App. No. 5-06-40, 2007-Ohio-1905. This cause is pending before the court as a discretionary appeal. Upon consideration of appellant's application for dismissal,

It is ordered by the court that the application for dismissal is granted. Accordingly, this cause is dismissed.

Ohio 2007.
Cooper Tire & Rubber Co. v. Travelers Cas. & Sur. Co.
114 Ohio St.3d 1472, 870 N.E.2d 726 (Table), 2007 -Ohio- 3722

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