

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

CASE NO. 2010-1049
 2010-1275
 Consolidated for Review

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

*Court of Appeals
 Case No. 2009-CA-0019*

On Appeal for Certified Conflict

REPLY BRIEF OF APPELLANT,
 UNITED FOUNDRIES, INC.

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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.

As indicated by this Court, there currently exists a conflict among appellate jurisdictions as to whether the language in the Gulf exclusion requires a final determination of the employer intentional tort issue before the insurer can refuse to defend a disputed liability employer intentional tort claim. Appellee claims that Appellant is asking this court to disregard “established precedent” with respect to insurance coverage for employer intentional tort cases. This is a complete mischaracterization of Appellant’s argument. Since there is a conflict between jurisdictions, there obviously is not “established precedent” on this particular issue. Further, as to application of general principals of contract interpretation and coverage analysis, Appellant is simply asking this court to apply existing precedent to the specific language that was chosen by and utilized by Gulf in the present case.

In reality, it is Appellee that is asking this Court to disregard precedent with regard to insurance coverage issues. Specifically, Gulf is asking the Court to refuse to distinguish between a duty to defend and a duty to indemnify: Gulf claims that if there is no ultimate duty to indemnify an insured for a loss, then the insurer may automatically deny coverage for the defense of the claim as well. This argument is clearly contrary to

longstanding precedent established by this Court. Rather, this Court has long recognized that an insurer's duty to defend an insured is separate and distinct from its duty to indemnify, and the duty to defend is much broader than an ultimate duty to indemnify the insured against a covered loss. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948. In *Willoughby Hills v. Cincinnati Insurance Co.* (1984), 9 Ohio St.3d 177, 180, this Court mandated that, if the complaint contains an allegation which is potentially or arguably within the scope of coverage, the insurer **must** assume the defense of the claim.

The entire point which is being missed by Gulf in the present case is that, ***based on the language it chose to use in its exclusion***, the claims in the underlying tort complaint may potentially or arguably fall within the coverage of the stop gap endorsement. The exclusion states that the insurance coverage 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. The first half of the exclusion does not require a determination as to whether the insured intentionally caused bodily injury. Thus, the first half of the exclusion clearly and expressly precludes coverage for bodily injury intentionally caused by the insured. (This Court has previously held that it is against public policy to provide insurance coverage for such claims: *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173.) However, the second half of the exclusion applies only in those cases where it has "been determined" that bodily injury has resulted from an act committed by the insured with the belief that an injury is substantially certain to occur. (This Court has previously held that it is not against public policy to provide

insurance for this type of tort: *Harasyn supra.*) It is Gulf which chose to make the distinction in the language within the two halves of the exclusion. Gulf should not now be permitted to ignore its own language to avoid coverage in a case where it most certainly has not been determined that a substantially certain intentional tort has been committed by United Foundries. To the contrary, this Court has held that when reasonable to do so, the court must give effect to each provision of the insurance contract. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306. Further, any ambiguity in the language must be construed in favor of the insured. *Id.*, at 308, citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208. Therefore, each provision of the Gulf exclusion must be given effect and meaning, not simply ignored as Gulf suggests. Moreover, the ambiguity caused by the distinction in the Gulf exclusion must be interpreted to favor coverage for United Foundries.

Contrary to the assertion set forth by Appellee, Appellant is not asking this Court to overrule its prior decision in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373. Appellant merely asserts that the holding in *Penn Traffic* is not controlling in the subject case. As set forth in the merit brief, there are several distinguishing factors between *Penn Traffic* and the present case, including material differences in the policy language used, the fact that the employer intentional tort was undisputed in *Penn Traffic* and disputed herein, the fact that no one made an illusory coverage argument in *Penn Traffic*, and the fact that *Penn Traffic* was silent as to whether there was a premium for the endorsement, as opposed to the \$5,000 collected by Gulf in this case. Despite Appellee's best efforts, it is impossible to construe the language in the *Penn Traffic* stop gap endorsement as being materially similar to the language in the Gulf exclusion.

Likewise, the language utilized in the other cases relied upon by Gulf is also completely distinguishable. Although several cases have examined the same language used in the *exclusion* at issue, there is not one single other case which contains a stop gap coverage *endorsement* that is identical or even similar to the one provided by Appellee Gulf. Rather, the Gulf policy is the single and only policy which fails to set forth a separate provision of what exactly the endorsement is meant to cover. There is no other policy which allegedly supplies coverage solely through the removal and replacement of exclusions set out in the body of the commercial liability policy. There is certainly no other case where the insurer who denied coverage under the stop gap endorsement had collected a \$5,000 premium.

Important to the consideration of this case is the fact that, in the cases relied upon by Appellee, the parties did not assert the argument for coverage based on the “to have been determined” language which is the subject of the present conflict amongst jurisdictions. Therefore, the holdings of those cases are not responsive to the question at bar. In the only other case which did address the “to have been determined” argument, the court in *Royal Paper Stock Co. v. Meridian Ins.* (1994), 94 Ohio App.3d 327, based its decision on its assumption that it was against public policy to insure against substantial certainty employer intentional torts. However, this holding has been widely recognized as an improper application of the law set by this Court in *Harasyn, supra*. See, e.g., *Ward v. Custom Glass & Frame, Inc.* (1995), 105 Ohio App.3d 131; *Presrite Corp. v. Commercial Union Ins. Co.* (1996), 113 Ohio App.3d 38; *Karlen v. Salem Blanking Corp. v. The Cincinnati Ins. Co.* (June 24, 1998), 7th App. No. 96-CO-63. Therefore, despite the fact that other courts have addressed coverage decisions where the same exclusion was found in the insurance policy,

there is no clear mandate as to how to apply that exclusion when the argument for coverage is based on the “to have been determined” language which is the focus of the present case.

In addition, the three federal cases upon which Appellee relies focused on whether there would ultimately be a responsibility of the insurer to indemnify the insured, thereby ignoring the precedent established by this Court that the duty to defend and the duty to indemnify are separate and distinct legal duties, with the duty to defend being broader than the duty to indemnify. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948. Therefore, the findings of those cases are not dispositive of the issue herein.

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.

In the present case, the trial court and the dissent in the court of appeals found that, if a defense for substantial certainty torts was not covered by the stop gap endorsement, the coverage allegedly provided in exchange for the \$5,000 premium was illusory. Appellee herein argues that, because there is some minimal coverage provided by the endorsement, the coverage is not illusory. However, as pointed out by the dissent in the court of appeals, none of the coverage allegedly set forth in the endorsement actually applies to the business of the insured. In addition, there is no indication that the coverage for third party over suits or dual capacity suits allegedly provided in the stop gap endorsement would not be covered within the provisions of the commercial general liability policy, making such coverage under the endorsement meaningless. Accordingly,

this Court recognized in *Harasyn, supra*, that the alleged provision of coverage for dual capacity torts did not defeat the argument for illusory coverage.

Furthermore, it appears that the exclusions in the stop gap endorsement actually preclude the coverage which Appellee states is applicable. For instance, Appellee argues that the endorsement “may” provide coverage for bodily injury by disease which is not covered by the Workers Compensation system. However, the endorsement contains exclusions (d) and (l), which preclude coverage for obligations imposed by Workers Compensation law and bodily injury by disease unless the employee’s last day of last exposure is a covered bodily injury. Therefore, like the substantial certainty employee intentional tort provisions, the exclusions in the endorsement take away any coverage which the face of the endorsement appears to offer.

Appellant is not asking for a widespread policy change with respect to insurance coverage for substantial certainty employer intentional torts. Rather, Appellant is simply requesting this Court to determine that, under the express circumstances of this particular case, the coverage allegedly provided is actually illusory, considering:

1. The poorly worded and ambiguous language set forth in the stopgap endorsement written by Gulf;
2. The fact that a \$5,000 premium was charged by Gulf in exchange for the endorsement; and
3. Use of the language to have been determined, in the past tense, with respect to the exclusion for substantial certainty employer intentional torts.

Based on this combination of ambiguous language and hefty premium collected, Appellant asserts that, at the very least, the ambiguity must be construed in favor of the insured.

The cases relied upon by Appellee are distinguishable based on either the provision of a defense, or a minimal premium, or both. For example, in *Irondale*

Industrial Contractors, Inc. v. Virginia Surety Co., 2010 WL 4985757 (N.D. Ohio), part of the analysis as to whether the coverage was illusory was defined by the fact that the insured paid **nothing** for the endorsement. In *Comcorp Technologies, Inc. v. Crum & Forester Ins.*, 2002-Ohio-7140, *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, there is no information in the case about what, if anything, the insured paid for the stop gap endorsement which precluded coverage; however, in those cases, the insurer did in fact provide a defense to the tort claim.

Finally, Appellee claims that, if its coverage is in fact illusory, Appellant's only remedy is return of the \$5,000 premium. To the contrary, Appellant asserts that the proper recovery is the cost of defense that was incurred based on Gulf's failure to properly defend the underlying tort suit. In *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, this Court held that the insureds were entitled to recovery of expenses and attorney fees incurred in connection with the defense of a negligence action when the liability insurer breached its duty to defend. Specifically, this Court held:

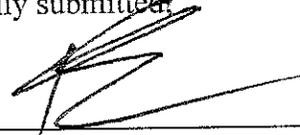
The rationale behind allowing attorney fees to date in defending the negligence action is that the insured must be put in a position as good as that which he would have occupied if the insurer had performed its duty.

Id. at 47. Cf., *Allen v. Standard Oil Co.* (1982), 2 Ohio St.3d 122. Accordingly, in the present case, Gulf should be required to reimburse Appellant for the attorney fees and expenses incurred to date in defending the underlying employer intentional tort action.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the merit brief, Appellant United Foundries Inc. respectfully request this Court to REVERSE the finding of the Fifth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

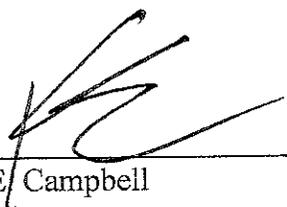
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