

IN THE SUPREME COURT OF OHIO

Steve Granger , et al.)	On Appeal from Summit County Court
)	of Appeals, Ninth Appellate District
Appellees)	
)	Case No. 2013-1527
Auto-Owners Insurance , et al.)	
)	
Appellants)	

MEMORANDUM OPPOSING JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Appellant's Brief starts with a discussion of the position of the insurance industry in Ohio's economy. Appellees are willing to stipulate that the insurance industry is quite large, that it employs many people, and that it affects the balance of the Ohio economy.

Appellants failed to discuss, however:

1. The billions in dollars in insurance premiums collected each year by the various insurers;
2. The billions in dollars in profits earned, each year, by the insurance industry;
3. How insurance claim delays deliver massive profits to the insurance industry;
4. How the insurance industry pushed tort reform to increase its profits;
5. The fact that all policy language found in an insurance policy must be approved by the State prior to sale of such policies to Ohio consumers;
6. The words and phrases contained in an insurance policy are chosen by the insurers, not by the insureds;
7. The words and phrases contained in an insurance policy are to be given their normal meaning; and
8. Where there is ambiguity, the words and phrases contained in an insurance policy are to be strictly construed in favor of coverage.

Finally, the Appellant complains that since the allegations in the underlying action contained claims for discrimination, then, consequently, there must not be coverage.

As set forth above, the insurance industry writes its own insurance policies. An insurer is

free to include any provision it wishes, so long as it obtains approval for same from the State prior to selling such policies to Ohio consumers. This very model (or similar model) exists in other states. Consequently, many insurers use similar language in their policies, and many times, contract with outside vendors to develop certain standard policy language.

Whatever the source, though, all insurers are bound by certain rules of interpretation of any policy of insurance. An insurance policy is a contract, and its interpretation is a matter of law for the court. *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St.3d 186. Coverage under an insurance policy is determined by construing 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. Contract terms are to be given their plain and ordinary meaning, *Dunson v. Home-Owners Ins. Co.*, 3d Dist. No. 5-09-37, and, "[w]hen the contract is clear and unambiguous, the court 'may look no further than the four corners of the insurance policy to find the intent of the parties.'" *Fed. Ins. Co., v. Executive Coach Luxury Travel, Inc.*, 3d Dist. Nos. 1-09-17, 1-09-18, quoting *McDaniel v. Rollins*, 3d Dist. No. 1-04-82.

However, where a portion of an insurance contract is reasonably susceptible to more than one interpretation, it will be strictly construed against the insurer and in favor of the insured. *Niemeyer v. W. Res. Mut. Cas. Co.*, 3d Dist. No. 12-09-03, citing *King*, 35 Ohio.St.3d 208, at syllabus.

Furthermore, when an insurance contract contains exceptions to coverage, there is a presumption that all coverage applies unless it is clearly excluded in the contract. *Bosserman Aviation Equip. v. U.S. Liab. Ins. Co.*, 183 Ohio.App.3d 29, citing *Andersen v. Highland House Co.*, 93 Ohio.St.3d 547, 549. "Accordingly, in order for an insurer to defeat coverage through a clause in the insurance contract, it must demonstrate that the clause in the policy is capable of the

construction it seeks to give it, and that such construction is the only one that can be fairly placed upon the language." *Id.*

Here, Appellant has conveniently omitted any discussion of:

1. the actual language found in the umbrella policy,
2. the elements of the underlying federal and state discrimination claims, and
3. the lack of any actual malice or intent on the Appellees' part.

This Court should decline the invitation to accept jurisdiction. This is not a case dealing with obvious, intentional discrimination. Steve Granger did not proclaim that he would not rent to people due to their skin color, their race, their religion, or their creed. He stated that he would not rent to Valerie Kozera because she was going to have her young son live with her in an older apartment building, containing hardwood floors and large floor heat registers. Granger did not want to disturb the other tenants with the noise that is attendant to a small child living in such a home.

Neither federal law or Ohio law includes intent as an element of a discrimination claim based on a failure to rent to someone who has children. A plaintiff in such a suit need not prove intent in order to prevail. These statutes are strict liability statutes. The only requirement to establish liability is a showing that the challenged statement or advertisement was made with respect to the rental of a dwelling unit and that it indicates discrimination on a prohibited factor (i.e., children not permitted) *Secretary, U.S. Department of Housing and Urban Development v. Godlewski* (July 6, 2007) HUDALJ No. 07-034-FH.

These are the issues that need to be addressed. These are the issues the Appellees will address below in more detail below.

ARGUMENT IN OPPOSITION OF PROPOSITIONS OF LAW

Proposition of Law No. I: Discriminatory intent is not inferred as a matter of law for purposes of an intentional act exclusion under an umbrella policy of insurance on a claim for pre-leasing housing discrimination.

Discriminatory intent is not inferred, and in fact, is not necessary to state and prove a discrimination claim for failure to rent to someone for their having children. The clear, plain language of the insurance policy in question mandates coverage (and defense) of the underlying claim.

“Personal injury” means:

* * *

- (c) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or *humiliation*; (italics added)

DEFENSE -SETTLEMENT

With respect to any occurrence:

- (a) not covered by underlying insurance; but
- (b) covered by this policy except for the retained limit;

we will:

- (a) defend any suit against the insured at our expense, using lawyers of our choice. We are not obligated to defend after we have paid an amount equal to the limit of our liability.

Among her claims and damages alleged, Kozera claimed to have been humiliated by Granger’s actions in refusing to rent to her and her family. Thus, according to the policy language written and chosen by Appellant, and according to the policy language contained in the policy sold to Granger and paid for by Granger, there was a duty to defend/coverage of the underlying matter.

In order to attempt to negate the language contained in its policy, Appellant seeks to expand the doctrine of inferred intent. This Court discussed such doctrine in its decision in *Allstate v. Campbell*, 128 Ohio St.3d 186, 2010 Ohio 6312, 942 N.E.2d 1090. Ultimately, this Court decided that the issue was whether the insureds intended or expected harm.

In *Campbell*, the insurance industry sought to expand the doctrine of inferred intent, claiming

that an objective standard should be applied in determining whether an insured intended injury. This Court disagreed with the insurance companies, deciding that the doctrine of inferred intent as part of the intentional act exclusion applies only in cases in which the insured's intentional act and the harm caused are "intrinsically tied so that the act has necessarily resulted in the harm." Thus, this Court reasoned, an insured's intent to cause injury or damage may be inferred only when "the action necessitates the harm."

In *Campbell*, this Court noted that some cars passed and avoided the decoy deer demonstrating further evidence that the harm was not intrinsically tied to the act. This Court went on to remand the matter to the trial court to determine whether the children (the insureds) had intended or expected harm from their actions. Such is not the case herein.

The evidence before courts below was that Granger had no idea that he had illegally discriminated. He testified that he did not know that he could not exclude Kozera and her son from the apartment. He thought that such laws did not apply to such small-time landlords as himself. And, he also believed that Kozera and her son would not be able to live in such an apartment, creating noise and disturbance for their neighbors (hard wood floors, old fashioned open heating vents). Absent evidence that Granger intended or expected harm, the intentional act exclusion has no application. The claims, at the very least, were arguably covered.

In the instant matter, the court of appeals refused to expand the doctrine, "where the insured's act does not necessarily result in harm." In such situations, the court held that intent could not be inferred.

As in *Campbell*, every act of refusing to rent to someone does not necessarily result in harm. In *Campbell*, some cars drove around the Styrofoam deer. Here, some prospective tenants might

have sought and obtained alternative housing, thus alleviating/eliminating any damage from the landlord's actions. Moreover, the evidence developed in the underlying matter demonstrated that Kozera chose to not move to the Akron, Ohio area. She presented no evidence of Granger's actions being the cause of this decision, or the cause of her having to pay increased rent (or that she had to pay such). Thus, Granger's actions would not necessarily result in any injury to Kozera.

Proposition of Law No. II: A claim for emotional distress does include humiliation sufficient to trigger a duty to defend under an umbrella policy of insurance. The duty to defend applies.

Kozera alleged that she was humiliated as a result of Granger's allegedly wrongful conduct. Such is apparent from the Complaint filed in Federal Court.

Additionally, following the filing of said Complaint, Kozera responded to interrogatories put to her. In response to Interrogatory No. 8, Kozera stated that Granger's actions caused her "emotional distress."

In response to Interrogatory No. 16, Kozera claimed that she was "emotionally tax[ed]."

Later, in her Mediation Statement, Kozera claimed that she was suffering "emotional distress damages" as a result of Granger's refusal to rent to her. (Mediation Statement at page 5)

From the above, it is clear that Auto Owners had, at the very least, a duty to defend in the underlying lawsuit.

The Appellant would have this Court look to Judge Carr's dissenting opinion, in which she stated that Kozera did not assert a claim for "humiliation." Of course, Judge Carr and the Appellant do not explain what is a claim for humiliation. There is no such tort under Ohio law. As such, in accordance with their analysis, the inclusion of coverage for humiliation is the inclusion of no coverage. According to their analysis, then Appellant accepted premiums and provided elusive,

imaginary coverage. Such cannot be true.

In its briefing, below, Appellant chose to not cite this Court to any of this evidence. Instead, Appellant cited the court of appeals to the following cases:

1. *Wagner v. The Ohio Casualty Group*—dealing with claims for pre-rental housing discrimination and policy language which did not include coverage for “humiliation.”

In that case, the Court dealt with *similar* policy language, but with *two* twists: there was no coverage for “humiliation” contained within that policy. “Personal injury” did not include “humiliation” as a coverage. Such language is the basis upon which a defense was owed to Granger.

Secondly, the definition of “personal injury” in *Wagner* included the limiting phrase “in which a tenant resides.” Such language is NOT found in the Umbrella Policy.

2. *Kings Pointe Apartments v. State Farm Fire & Cas. Co.*—dealing with another policy which does not include coverage for “humiliation.” Again, Auto Owners was dodging the issue in this case. Kozera made allegations which include claims for humiliation.

3. *State Farm Fire & Cas. Co. v. Hiermer*—in dealing with an umbrella policy containing coverage for “humiliation,” the Court decided that allegations of negligent infliction of emotional distress are *included* in such a definition.

Hiermer is actually supportive of Plaintiffs’ position—that there is coverage (and a defense owed).

4. *Sterling Merchandise Co. v. Hartford Insurance Co.*—in dealing with the definition of “safe burglary,” the court decided that Ohio has not implicitly adopted the “reasonable expectations” doctrine. Such has no bearing on this matter.

5. *Monsler v. Cincinnati Cas. Co.*—Finally, Auto Owners directs this Court to a

policy which includes an “intentional acts” exclusion. In *Monsler*, the Plaintiff alleged only intentional acts on the part of the Defendants. Here, Kozera (and the other Plaintiff) did not limit their claims to those of an intentional nature. They made claims for violations of state and federal anti-discrimination in housing statutes. Such statutes do *not* mandate that one must have intentionally discriminated in order to be found liable.

Kozera and Fair Housing Contact Service, Inc. made claims for violations of the Fair Housing Act of 1988, 42 U.S.C. Section 3604 and R.C. 4112.02(H).

42 U.S.C. Section 3604 provides, in pertinent part:

“As made applicable by section 3603 of this title and except as exempted by sections 3603 (b) and 3607 of this title, it shall be unlawful—

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
- (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
- (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

Ohio’s version of the anti-discriminatory law, R.C. 4112.02(H)(4), provides that it is an unlawful discriminatory practice for any person to “[d]iscriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership,

occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowner's insurance, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located.”

A plaintiff in such a suit need not prove intent in order to prevail. These statutes are strict liability statutes. The only requirement to establish liability is a showing that the challenged statement or advertisement was made with respect to the rental of a dwelling unit and that it indicates discrimination on a prohibited factor (i.e., race, children not permitted, etc.) *Secretary, U.S. Department of Housing and Urban Development v. Godlewski* (July 6, 2007) HUDALJ No. 07-034-FH.

Since intent need not be proved in order for Kozera and Fair Housing in the underlying case to prevail, and since intent was not even alleged in the underlying suit, any claim that any intentional act exclusion applies is totally misplaced.

For the foregoing reasons, this Court should decline to accept jurisdiction of this case.

Respectfully submitted,
MAISTROS & LOEPP, LTD.



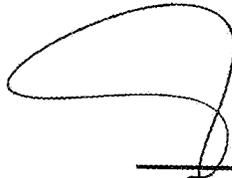
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