

ORIGINAL

IN THE SUPREME COURT OF OHIO

STEVE GRANGER, et al.

Appellees

v.

AUTO-OWNERS INS. CO., et al.

Appellants

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Case No. 13-1527

On Appeal from the Summit  
County Court of Appeals,  
Ninth Appellate District

MERIT BRIEF OF APPELLANTS OWNERS INSURANCE COMPANY AND AUTO-OWNERS (MUTUAL) INSURANCE COMPANY

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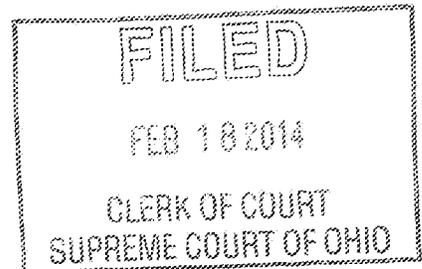
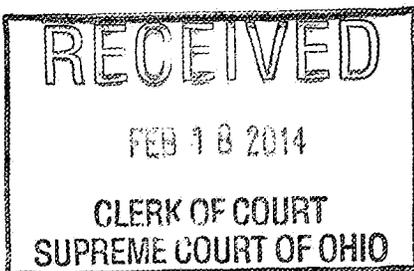
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## STATEMENT OF FACTS

In June of 2010, Appellees Steve Granger (“Granger”) and Paul Steigerwald (“Steigerwald”) placed an advertisement on “Craig’s List” for a rental property they owned on North Rose Boulevard in Akron, Ohio. In response to that listing, Valerie Kozera (“Kozera”) contacted Granger on or about June 7, 2010. Kozera advised Granger she intended to live at the property with her son who was six years old. Granger specifically told Kozera he would not rent the property to anyone with children. This was in direct violation of Ohio and Federal Fair Housing Laws.

Based on the discriminatory comments of Granger, Kozera contacted the Fair Housing Contact Service, Inc. (“FHCS”) which investigated Granger’s discriminatory conduct by conducting a series of tests where FHCS sent experienced testers to interact with Granger to inquire about the property. Granger continued on his discriminatory path and advised testers both orally and by e-mail that Granger and Steigerwald would not permit children to live at the property. Based on this investigation, in September 2010, FHCS filed a housing discrimination complaint against Granger and Steigerwald with the Ohio Civil Rights Commission. In response to those charges, Granger and Steigerwald retained their own counsel to try and resolve the claims with Kozera and FHCS. After negotiations were unsuccessful, Kozera and FHCS filed a lawsuit against Granger and Steigerwald in the United States District Court, Northern District of Ohio for their discriminatory conduct. That Complaint was filed on March 25, 2011.

During the relevant time periods, Appellants Owners Insurance Company (“Owners”) and Auto-Owners (Mutual) Insurance Company (“Auto-Owners”) had in effect various policies of insurance issued to Granger and/or Steigerwald. The dwelling policy issued by Owners Insurance Company bearing Policy No. 46-809-489-00 is not at issue in this appeal as the

Summit County Court of Common Pleas and the Ninth District Court of Appeals both properly found that the dwelling policy did not provide a duty to defend or indemnify on the claims asserted against Granger and Steigerwald for their discriminatory conduct. The policy at the heart of this appeal is an umbrella policy of insurance issued by Auto-Owners solely to Steve Granger. Steigerwald did not send a copy of the complaint to the insurance agency which procured the umbrella policy for Granger until May 18, 2011, two months after the lawsuit was filed.

On June 8, 2011, Auto-Owners denied a demand to defend and indemnify Granger and Steigerwald. Granger and Steigerwald then voluntarily settled the claims of FHCS and Kozera in July 2011 without any further communication to the carrier. Immediately thereafter, Granger and Steigerwald filed suit against Owners, Auto-Owners and the insurance agency. Following depositions of the parties, Owners and Auto-Owners filed for summary judgment as did the Co-Defendant insurance agency. The Summit County Court of Common Pleas granted the Defendants' Motions for Summary Judgment which was then appealed by Granger and Steigerwald to the Ninth District Court of Appeals.

On June 28, 2013, the Ninth District Court of Appeals issued its split decision reversing the trial court's decision in favor of Auto-Owners and of the Co-Defendant insurance agency. Plaintiffs and Co-Defendant insurance agency filed Applications for Reconsideration which were denied by the Ninth District Court of Appeals on August 14, 2013. As the Ninth District Court of Appeals erred in finding that a question of fact existed regarding the application of the intentional acts exclusion and a finding that a claim of emotional distress constitutes a claim for "humiliation", Appellants filed a Notice of Appeal with this Court on September 26, 2013, with a

Memorandum in Support of Jurisdiction. By entry of December 24, 2013, this Court accepted jurisdiction on both propositions of law submitted by Appellants.

## ARGUMENT

### Proposition of Law No. I:

**Discriminatory intent is 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.**

This court has explained when interpreting insurance policies you must “examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11, citing *Kelly v. Medical Life Ins. Co.*, 31 Ohio St. 3d 130, 509 N.E.2d 411, (1987), paragraph one of the syllabus. Moreover, “We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11 citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, (1978), paragraph two of the syllabus.

“It is axiomatic that an insurance company is under no obligation to its insured, or to others harmed by the actions of an insured, unless the conduct alleged of the insured falls within the coverage of the policy.” *Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34,36, 665 N.E.2d 1115, (1996). “Coverage is provided if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto.” *Id.* This court has also “long recognized that Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts.” *Id.* at 38, citing *State Farm Mut. Ins. Co. v. Blevins*, 49 Ohio St. 3d 165, 551 N.E.2d 955, (1990); *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St. 3d 173, 551 N.E.2d 962, (1990).

It is undisputed that the umbrella policy at issue for purposes of this appeal contains a clear and unambiguous intentional acts exclusion. It is also undisputed that Granger and Steigerwald intended to discriminate. Granger acknowledged that he told Kozera and the FHCS tester he would not rent to people with children. The policy provides as follows:

#### EXCLUSIONS

We do not cover:

\* \* \*

- (d) Personal injury or property damage expected or intended by the insured.  
We do cover assault and battery committed to protect persons or property.

FHCS and Kozera, in the underlying federal action, alleged Granger and Steigerwald violated both 42 U.S.C. 3604 and R.C.4112.02(H). The Fair Housing Act ("FHA") provides that it shall be unlawful:

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.

42 U.S.C.3604(c)

Similarly, Ohio law provides that it shall be an unlawful discriminatory practice for any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

R.C. 4112.02(H)(1) and 4112.02(H)(2)

A claim under 42 U.S.C. 3604(c) has three elements. A plaintiff must prove that: (1) defendant made a statement; (2) the statement was made with respect to the sale or rental of a dwelling; and (3) the statement indicated a preference, or limitation or discrimination on the basis of a protected class. *White v. HUD*, 475 F.3d 898 (7th Cir. 2007). There is no doubt that Granger intentionally published the discriminatory statements, and that those statements indicated an illegal preference or limitation or discrimination based on familial status. Also, it is undisputed that the rental property was available at the time Kozera inquired and remained available after she was intentionally discriminated against. As such, FHCS and Kozera plead a prima facie case of housing discrimination under both Federal and Ohio law in the underlying federal lawsuit.

Granger did not put in place a benign policy that had an unintended discriminatory effect. He singled out potential renters with children because he specifically intended to exclude that class of people from the property. He committed an intentional act under the plain and ordinary meaning of the language used in the policy and this conduct does not fall within the scope of coverage defined in the policy. In its review, the court of appeals failed to properly apply the inferred intent doctrine as to the intentional act of Granger and the applicable intentional act exclusion encompassed in the Owners' umbrella policy.

#### **A. The Evolution of the Inferred Intent Doctrine**

In applying the inferred intent doctrine a court must look to the evolution of the doctrine in its application to the issue of insurance coverage. Although not explicitly labeled as the inferred intent doctrine, the Supreme Court of Ohio first applied the principles of the doctrine in *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 507 N.E.2d 1118, (1987). In *Gill*, this Court

considered whether an insurance carrier has a duty to defend or indemnify its insured against claims of wrongful death and negligent infliction of emotional distress after the insured was convicted of aggravated murder. The applicable policy in *Gill* contained a similar intentional act exclusion that provided “coverage for personal liability of the insured does not extend to bodily injury or property damage which is expected or intended by the insured.” *Id.* at 113. The *Gill* court held that despite the complaint in the underlying tort action being grounded in negligence, the insurance company did not have a duty to defend or indemnify the wrongful death claim “since the act was indisputably intentional and outside coverage.” *Id.* at 115.

The court in *Gill* also reached the same conclusion that coverage did not apply as to the underlying negligent infliction of emotional distress claim. It reasoned, “[T]he behavior of the insured after the murder, even if he were operating under amnesia, had its origin in a clearly intentional course of conduct (i.e., the murder) and is so inextricably entwined in time and purpose with the intentional acts leading to the murder, and the murder itself, that it cannot fairly be said to be within coverage.” *Id.* at 115. The *Gill* court further reasoned that “[t]he parties to the insurance agreement cannot be imagined to have contemplated that such conduct would be subject to coverage.” *Id.*

This court was again presented with the question of whether an insurance company had a duty to defend and indemnify its insured when the harm caused was a result of an intentional act in *Physicians Ins. Co. v. Swanson*, 58 Ohio St. 3d 189, 569 N.E.2d 906, (1991). In *Swanson*, the insured’s son had intentionally fired a BB gun towards a group of teenage children from a moderate distance. The applicable policy in *Swanson* again contained an intentional act exclusion that stated “[w]e will not cover Personal Injury or Property Damage caused intentionally.” *Id.* at 191. However, in applying *Gill*, the *Swanson* court determined that the

intentional act exclusion did not apply because, “In order to avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expected or intended.” *Id.* at syllabus. This court further concluded that “it is not sufficient to show merely that the act was intentional.” *Id.* at 193.

The inferred intent doctrine was formally acknowledged by this court in *Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34,36, 665 N.E.2d 1115, (1996), paragraph one of the syllabus. *Gearing* had sought a declaratory judgment that his insurance carrier was obligated to defend him in a civil action resulting from his alleged sexual molestation of minor children, since he did not subjectively intend to hurt or harm them. *Id.* at 36. The relevant insurance policy had provided for an exclusion for bodily injury or property damage that is “expected or intended by the insured.” *Id.* at 36.

In reviewing both the majority and minority positions of competing jurisdictions, this court “accepted the premises upon which the inferred intent rule is based, and hold that intent to harm is properly inferred as a matter of law from deliberate acts of sexual molestation of a minor.” *Id.* at 37. They further held, “Incidents of intentional acts of sexual molestation of a minor do not constitute “occurrences” for purposes of determining liability insurance coverage, as intent to harm inconsistent with an insurable incident is properly inferred as a matter of law from deliberate acts of sexual molestation of a minor.” *Id.* at paragraph one of the syllabus.

The *Gearing* court also established that “in those cases where an intentional act is substantially certain to cause injury, determination of an insured’s subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage. Rather, an insured’s protestations that he ‘didn’t mean to hurt anyone’ are only relevant where the intentional act at issue is not substantially certain to result in an injury.” *Id.* at 39.

This court again dealt with the application of the doctrine of inferred intent in *Buckeye Union Ins. v. New Eng. Ins. Co.*, 87 Ohio St.3d 280, 720 N.E.2d 495 (1999). The Sixth Circuit Court of Appeals certified three questions to the Supreme Court of Ohio in *Buckeye Union*. The relevant question in the instant matter asked, “[W]hen an insurance company is found by Ohio courts to be guilty of ‘bad faith’ with ‘actual malice’ because it failed to settle a tort case against its insured, does such conduct constitute the type of intentional tort that is uninsurable under Ohio law?” The court answered the question in the negative.

Justice Pfeifer in his plurality opinion distinguished *Gill* and *Gearing* from the issues presented in *Buckeye Union*. In *Gill*, “the intent to injure was inferred from the defendant’s criminal conviction for aggravated murder, an essential element of which is that the perpetrator intended to cause the death.” *Id.* at 283. In *Gearing*, “the intent to injure could be inferred from the insured’s plea of guilty to charges involving the sexual molestation of minors. The court reasoned that the act and the harm are so intertwined in regard to molestation of children that to intend the act is also to intend the harm.” *Id.* at 283-284. However, he determined that failure to settle an insurance claim does not rise to the same level of murder and molestation, and “this court does not infer specific intent to injure from an act of contract interpretation.” *Id.* at 284.

Conversely, Justice Cook in her concurring opinion disagreed with Justice Pfeifer’s analysis and argued that the application of *Gearing* was the appropriate standard. Justice Cook stated that the intentional tort exclusion was expanded beyond direct intentional torts in *Gearing* and the two part analysis outlined in *Gearing* needs to be applied. *Id.* at 289. She explained the first part “requires subjective consideration of the tortfeasor’s direct intent.” *Id.* “Where direct intent does not exist, however, the analysis proceeds to the second step, which considers objectively whether the tortfeasor’s intentional act was substantially certain to cause

injury.” *Id.* However, “determination of an insured’s subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage.” *Id.* citing *Gearing* at 39. “Rather, where substantial certainty exists, intent to harm will be inferred as a matter of law.” *Id.*

Recently, this court again had the opportunity to address the doctrine of inferred intent as applied to an intentional acts exclusion in *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, 942 N.E.2d 1090. In *Campbell*, a group of teenage boys placed a Styrofoam target deer just below a crest of a hill on a curvy two lane road at night to watch the reactions of motorists as they approached the deer. *Id.* at 187-188. About five minutes after the boys placed the deer in the road; a driver drove his vehicle over the hill and lost control of his vehicle when he attempted to avoid the fake deer. *Id.* The accident caused serious harm to the driver and his passenger. *Id.* at 188. As a result of the accident, the plaintiffs brought an action against the teenage boys, their parents and their insurance carriers, the insurance carriers sought a declaration that they are under no duty to defend or indemnify their insured. *Id.*

After consolidating the declaratory judgment actions, the trial court found in favor of the insurance carriers and determined that none of the insurers had a duty to defend or indemnify this insureds in the underlying actions. “Although the court did not find that the boys directly intended to cause harm, it inferred their intent as a matter of law, based in part on finding that their conduct was substantially certain to result in harm.” *Id.* “The Tenth District Court of Appeals reversed, holding that genuine issues of material fact exist over whether the boys intended to cause harm when they placed the deer target in the road, whether harm was substantially certain to result from their actions, and whether those actions fall within the scope of their individual insurance policies.” *Allstate Ins. Co. v. Campbell*, 128 Ohio St. 3d 186, 188. 2010-Ohio-6312, 942 N.E.2d 1090, citing *Allstate Ins. Co. v. Campbell*, 10<sup>th</sup> Dist. Franklin Nos.

09AP-306, 09AP-307, 09AP-308, 09AP-309, 09AP-318, 09AP-319, 09-AP320, and 09AP-321, 2009 Ohio 6055, ¶53.

This court then granted discretionary jurisdiction over two different propositions of law set forth by the appellants. The appellants' first proposition of law stated, "[T]he doctrine of inferred intent as applied to an intentional-act exclusion in an insurance policy is not limited to cases of sexual molestation or homicide but may be applied where undisputed facts establish that harm was substantially certain to occur as a result of the insured's conduct." *Id.* at 189. Two appellants also asserted a second proposition of law which stated, "[T]heir policies' exclusionary language denotes an objective as opposed to a subjective standard of coverage, rendering an insured's subjective intent irrelevant." *Id.*

The appellants in *Campbell* urged this court to apply Justice Cook's rationale in *Gearing* and to apply the "substantially certain" test when deciding whether the intentional act exclusion applies to cases other than murder or sexual assault. *Id.* at 195-196. Although this court acknowledged that the doctrine of inferred intent is not limited to cases of sexual molestation or homicide, it did not adopt the substantially certain test as the applicable standard. *Id.* at 196. But rather held, "[T]he doctrine of inferred intent 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." *Id.* at 196-197. Based on the foregoing holding, this court remanded the matter to the trier of fact to "determine whether the boys intended or expected the harm that resulted from their intentional actions." *Id.* at 199.

#### **B. The Application of the Inferred Intent Doctrine After *Campbell***

Although the Ninth District Court of Appeals ignored this court's direction in properly applying the doctrine of inferred intent to the instant matter, other appellate courts in Ohio have

correctly applied *Campbell*. In *Sheely v. Sheely*, 3<sup>rd</sup> Dist. Auglaize No. 02-10-38, 2012-Ohio-43, ¶33, the father of a minor provided and permitted his daughter to consume alcohol which ultimately led to her death. *Id.* at ¶4. He was subsequently charged with child endangering and entered a plea of not guilty. *Id.* at ¶5. After a jury trial, he was convicted of child endangering and of furnishing alcohol to an underage person. *Id.* The mother of the minor acting as the administrator of her estate subsequently filed a wrongful death and survivorship action against her ex-husband as a result. *Id.* at ¶6. The parties ultimately entered into a consent judgment entry whereby the father admitted he was negligent as alleged in the complaint and accepted liability for his daughter's death. *Id.* at ¶7. He also consented to an award to the daughter's estate in the amount of \$300,000.00. *Id.*

As a result, the estate filed a "Supplemental Complaint by Judgment Creditor" pursuant to R.C. 3929.06 alleging the insurance carrier's policy covered the father's conduct "which caused bodily injury, including death, to another person." *Id.* at ¶9. The insurance carrier asserted that the claims were excluded by the terms of the policy and sought a declaratory judgment that there is no coverage. *Id.* at ¶10. The trial court upon the motions of the parties determined that no coverage existed as there is no "occurrence" under the policy and the intentional act exclusion applied. *Id.* at ¶14. Consequently, the estate appealed the trial court's decision to the court of appeals.

In applying *Campbell*, the court of appeals determined an issue of material fact existed as to whether the defendant's act of furnishing alcohol to a minor and her resulting death were so intrinsically tied as to infer as a matter of law that the defendant's conduct necessarily resulted in the victim's death. *Id.* at ¶33. The court explained:

Dan testified that he was unaware Ivy took the bottle of Vodka to the neighbor's house on the night she died. He was adamant in his

testimony that he would only allow Ivy and her underage friends to drink in his house while he was there; something he had allowed on several prior occasions without causing bodily injury or death. Thus, it cannot be said in this instance that Dan's act of furnishing alcohol to Ivy necessitated her death as a matter of law. For instance, even on the night in question there are numerous other possibilities that could have occurred as a result of Dan's conduct of supplying Ivy alcohol besides her death. Therefore, based upon the Supreme Court's enunciation of the doctrine of inferred intent in *Campbell*, we cannot conclude that Lightning Rod's intentional-act exclusion is applicable as a matter of law to Dan's conduct of supplying alcohol to his minor child.

*Sheely v. Sheely*, 3<sup>rd</sup> Dist. Auglaize No. 02-10-38, 2012-Ohio-43, ¶33.

It is clear from the *Sheely* court's analysis that they correctly applied *Campbell* and determined that other possibilities could have resulted from the defendant providing his minor daughter alcohol. And in fact other possibilities had occurred in the past. Again, this is where the Ninth District Court of Appeals erred in considering *Campbell* in the instant matter. There are no other possibilities that can occur when a landlord discriminates against potential tenants based on their familial status. There is no doubt that harm will result when someone intentionally discriminates against another.

The Eighth District Court of Appeals also correctly applied the inferred intent doctrine in *Lachman v. Farmers Ins. of Columbus*, 8<sup>th</sup> Dist. Cuyahoga No. 996904, 2012-Ohio-85. In *Lachman*, the insured intentionally set fire to her home in an attempt to save her marriage. She had planned to have her husband extinguish the fire and become a hero before any consequential damage occurred. *Id.* at ¶2. However, after igniting their mattress, they were unable to extinguish the fire and not only was their home totally destroyed, but a neighbor's home was damaged as well. *Id.* The insurance carrier subsequently denied the Appellants' claim pursuant to the intentional act exclusion provided in the terms of the policy. *Id.* at ¶4. As a result, the appellants initiated a declaratory judgment action seeking a determination as to whether they were entitled

to policy proceeds as a result of the loss of the home and defense coverage for property damage sustained by the neighbor's house. The trial court eventually granted the insurance carrier's motion for summary judgment and found the intentional igniting of the fire fell under the intentional act exclusion of the policy pursuant to the doctrine of inferred intent. The trial court held:

The court concludes as a matter of law that the act of [a] person setting fire to [a] comforter inside a bedroom, failing to take the proper precautions to prevent the fire from spreading is intrinsically tied with the resulting fire damage. Playing with fire is no laughing matter. Fire by its very nature is harmful, destructive, and extremely difficult to control. And one should not be rewarded for partaking in an inherently dangerous situation.

*Lachman v. Farmers Ins. of Columbus*, 8<sup>th</sup> Dist. Cuyahoga No. 996904, 2012-Ohio-85, ¶9.

Appellants appealed the trial court's ruling to the court of appeals and argued that the trial court had erred in holding that the intentional acts exclusion applies. *Id.* at ¶15. The appellate court disagreed and applied this court's holding in *Campbell*. They reasoned that there is only one conclusion which can be reached and adopted the trial court's conclusion that "the act of [a] person setting fire to [a] comforter inside a bedroom, failing to take the proper precautions to prevent the fire from spreading is intrinsically tied with resulting fire damage." *Id.* at ¶23. They further explained, "The intentional act of setting fire to a comforter can only result in harm. Whether Barbara intended the fire to spread to the remainder of the home is irrelevant; the damage caused by a fire cannot be separated from the act of intentionally setting that fire." *Id.*

However, in the instant case, rather than address the doctrine of inferred intent and the applicable standard set forth in *Campbell*, the majority opinion of the Ninth District Court of Appeals glossed over the issue by concluding, without analysis, that "in cases such as this one, where the insureds act does not necessarily result in harm, we cannot infer an intent to cause

injury as a matter of law”. *Granger v. Auto-Owners Ins. Co.*, 2013-Ohio-2792, 991 N.E.2d 1254, ¶15 (9th Dist.). This limited analysis is not sufficient under the applicable facts and standard set forth in *Campbell*.

In the instant case, Auto-Owners’ intentional act exclusion excludes coverage for personal injury or property damage “expected or intended by the insured.” There can be no doubt that Granger’s act to discriminate prospective tenants on the basis of familial status constituted an intentional act that will absolutely result in harm in **every** instance. The act of discrimination is unlike the intentional acts in *Swanson*, *Buckeye Union* and *Campbell*, where the insured’s intentional act does not necessarily result in harm. In fact, it can be argued that the intentional act of discrimination meets a similar level of injustice that Justice Pfeifer discusses in the plurality opinion of *Buckeye Union*. Justice Pfeifer in distinguishing *Gill* and *Gearing* from *Buckeye Union* states that “in both of the above cases, insureds were found to have committed wrongful acts, acts that are intentionally injurious by definition.” *Buckeye Union Ins. v. New Eng. Ins. Co.*, 87 Ohio St.3d 280, 284, 720 N.E.2d 495 (1999).

There is only one conclusion in the case currently before the court. The intentional act of pre-leasing housing discrimination can only result in harm. Whether Granger intended the harm caused by his intentional discrimination against individuals with children is irrelevant as the harm cannot be separated from the act of intentionally discriminating. Consequently, this court must reverse and remand this matter to the Ninth District Court of Appeals as discriminatory intent is 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.

**Proposition of Law No. II:**

**A claim for emotional distress does not constitute “humiliation” sufficient to trigger a duty to defend under an umbrella policy of insurance. The duty to defend can only be triggered by actual facts, not an inference of potential recoverable damages where no covered conduct is even alleged.**

Appellees and the Ninth District Court of Appeals adhered to the argument that Kozera alleged she suffered emotional distress as a result of the intentional discrimination of Granger in her federal complaint, despite the fact she did not plead a cause of action for emotional distress anywhere in her complaint. The only mention of the phrase “emotional distress” in the complaint is as follows:

**FIRST CAUSE OF ACTION**

**Federal Fair Housing Act Claims-Discrimination Based on  
Familial Status and Race**

15. Plaintiffs reassert the foregoing allegations and incorporate them by reference as if fully set forth herein.
16. Defendants made illegal statements in connection with the rental of dwellings that were discouraging to families with children.
17. Some of Defendants’ statements also indicated a preference on the basis of race.
18. FHCS expended its resources and was harmed in its mission by Defendants’ conduct as described herein.
19. Ms. Kozera experienced out of pocket costs and **emotional distress** as a result of Defendants’ conduct described herein.
20. As a direct and proximate result of Defendants’ unlawful conduct, Defendants violated 42 U.S.C.A. §3604.

*See Kozera Complaint in Fair Housing Contact Serv., Inc. v. Granger, N.D. Ohio No. CV 614.*

There is no request for compensation for emotional distress in Kozera’s prayer. It is obvious Kozera was not making a claim for emotional distress, nor was she pleading a claim for humiliation. Kozera was clearly alleging that Granger violated 42 U.S.C. §3604(b) which states it shall be unlawful “[t]o 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.” A clear reading of the statute reflects that there is no emotional distress or humiliation element to be pleaded in a housing discrimination claim. It was merely an underlying factual statement that she “experienced out of pocket costs and emotional distress as a result of Defendants’ conduct.” Nevertheless, Appellees focused on this factual statement as the umbrella policy includes limited coverage for claims of personal injury which is defined under the umbrella policy as follows:

- (a) bodily injury, sickness, disease, disability or shock;
- (b) mental anguish or mental injury;
- (c) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; and
- (d) libel, slander, defamation of character or invasion of rights of privacy;  
including resulting death, sustained by any person.

The court of appeals majority opinion’s limited their analysis of this issue to the following paragraph:

Mr. Granger and Mr. Steigerwald asserted in their response that, because Ms. Kozera claimed in her complaint that she suffered emotional distress, she arguably suffered humiliation, which is a personal injury covered under the policy. We agree. Emotional distress has been defined as “[a] highly unpleasant mental reaction (such as anguish, grief, fright, *humiliation*, or fury) that results from another person’s conduct[.]” (Emphasis added.) *Black’s Law Dictionary* 563 (8<sup>th</sup> Ed.2004). Thus, it would appear that the federal complaint alleges a personal injury as contemplated by the umbrella policy.

*Granger v. Auto-Owners Ins. Co.*, 2013-Ohio-2792, 991 N.E.2d 1254, ¶14 (9th Dist.).

As was accurately pointed out by Judge Carr in her dissent, the underlying lawsuit filed by Kozera did not assert a claim for “humiliation” or “emotional distress”. Judge Carr further rationalized in her dissent:

Mr. Granger construes Ms. Kozera's claim for damages arising out of emotional distress as one for "humiliation," and therefore "personal injury" as that term is defined in the umbrella policy. While the majority agrees with this construction, I do not. Nowhere in the complaint does any form of the word "humiliation" appear. Moreover, my review of the federal complaint indicates only two causes of action, specifically, one federal and one state claim for discrimination. I would construe the allegation of emotional distress merely as part of the prayer for damages, as it was not developed as a distinct cause of action.

*Granger v. Auto-Owners Ins. Co.*, 2013-Ohio-2792, 991 N.E.2d 1254, ¶25 (9th Dist.) (Carr, J., dissenting).

In fact, the speculation about whether or not a claim for "humiliation" or "emotional distress" was sufficiently alleged is a distinction without a difference. Under 42 U.S.C. 3613(c), the aggrieved party in a housing discrimination case can only recover the following damages:

(c) Relief which may be granted.

(1) In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

42 U.S.C. 3613(c)

This court has been clear that an insurance company is only obligated to defend an insured when the complaint brings the action within the coverage. "The test of the duty of an insurance company, under a policy of liability insurance, to defend an action against an insured, is the scope of the allegations of the complaint in the action against the insured, and 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*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973), paragraph two of the syllabus.

In *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555 (1984), the court was presented with the issue of “whether the determination of the duty to defend is limited solely to an examination of the pleadings in the action against the insured.” *Id.* at 179. This court found it necessary in *Willoughby Hills* to define the term “scope of allegations” as it was used in *Motorists*. *Id.* The court acknowledged, “Our decisions in *Motorists Mut.*, *supra*, and *Socony-Vacuum*, *supra*, clearly stand for the rule that the duty to defend may arise from the complaint alone if the allegations in the complaint unequivocally bring the action within the policy coverage.” *Id.*

The insurer in *Willoughby Hills* argued “the converse must also be true, i.e., where the pleadings do not establish a claim within the policy coverage, no duty to defend arises.” *Id.* at 179. However, the court held that “the duty to defend need not arise solely from the allegations in the complaint but may arise at a point subsequent to the filing of the complaint.” *Id.* The justification for this canon of law was the adoption of notice pleading from the federal system. *Id.* Ohio had embraced the notice pleading requirements through the adoption of the Ohio Rules of Civil Procedure and specifically Civ. R. 8(A) and (E). *Id.* Civ. R. 8(A) only required a “short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled”. *Id.* at 180.

Based on the foregoing, the *Willoughby Hills* court held, “[W]here the insurer’s duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do 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 had been pleaded, the insurer must accept the defense of the claim.” *Id.* at 180. “Thus, the “scope of the allegations” may encompass matters well outside the four corners of the pleadings.” *Id.*

The case of *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St. 3d 108, 507 N.E.2d 1118 (1987) was also fundamental in the development of Ohio law as to whether a carrier has a duty to defend its insured from allegations outside the coverage of the applicable policy of insurance. The *Gill* court distinguished its case from *Willoughby Hills* because the policy at issue in *Gill* did not contain the same broad language that promised an insured that it will “defend any suit against the insured alleging injury within coverage, even if such suit is groundless, false or fraudulent.” *Id.* at 114. Since the insurer in *Gill* “has promised only to defend claims for bodily injury or property damage “to which this coverage applies,” the true facts are determinative of the duty to defend.” *Id.* “Where the true facts are such that the insured's conduct was outside the coverage of the policy, the claim is not one “to which this coverage applies,” and the insurer has no obligation to defend the insured.” *Id.*

In its analysis of determining coverage, the *Gill* court was situated with a similar situation as this court in the instant matter. The *Gill* court reasoned:

In a case such as this one, where the conduct which prompted the underlying wrongful death 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 conduct within coverage. Such an approach would ignore patent realities for no overriding reason. To compel the insurer to defend regardless of the true facts, where, as here, the insurer has not promised to defend groundless, false or fraudulent claims, imposes an onerous burden for which the insurer did not bargain. Courts should not be expected to feign ignorance of a criminal conviction which clearly takes the conduct outside coverage. In cases such as this, this court will no longer unquestioningly elevate the allegations in the underlying tort complaint above all

consideration of the true facts as established by the insurer unless the insurer has agreed to defend regardless of the true facts.

*Preferred Risk Ins. Co. v. Gill*, 30 Ohio St. 3d 108, 113, 507 N.E.2d 1118 (1987).

The conduct of Granger of intentionally discriminating against prospective tenants on the basis of their familial status is clearly outside coverage, there should be no basis for requiring the carrier to defend or indemnify its insured because the claimant in the underlying complaint alleges emotional distress in its factual recitation. Furthermore, 42 U.S.C. 3613(c) limits relief in housing discrimination cases to (1) actual and punitive damages if the court finds that a discriminatory housing practice has occurred; (2) injunctive relief enjoining the defendant from continuing to engage in discriminatory practices; (3) and attorney fees to the prevailing party. It does not contemplate damages for “emotional distress” or “humiliation”. 42 U.S.C. 3613(c).

In *Cincinnati Ins. Co. v. Anders*, 99 Ohio St. 3d 156, 2003-Ohio-3048, 789 N.E.2d 1094, was presented with a certified conflict amongst appellate courts as to, “Whether insurance policies covering personal injuries arising out of property damage provide coverage to homeowners who are sued for their negligent failure to disclose to purchasers damage to the property that occurred during the sellers’ occupancy.” *Id.* at ¶14. The question was answered in the negative. *Id.* The holding in *Gill* was applied and the appellate court’s decision establishing the carrier did not have a duty to defend homeowners who were sued for their negligent failure to disclose to purchasers damage to the property that occurred during the sellers’ occupancy was affirmed. *Id.* at syllabus. The court of appeals in *Anders* reasoned that the claims against the homeowners were not within the scope of the policy as it relates to coverage for liability from property damage. *Id.* at ¶5.

This court in *Anders* consolidated two cases from the Greene County Court of Appeals with the same certified question and determined that in both instances the underlying claims were outside the scope of coverage. They held:

Since our holding in *Preferred Risk*, it is still the law that if the conduct alleged in a complaint is indisputably outside the scope of coverage, there is no duty to defend. The fact that the Renos' policy contains more inclusive language than what was present in the *Preferred Risk* policy does not change our preceding analysis regarding how to determine whether the underlying claims are covered by the Renos' policy. If the insurance company is to be required to provide a defense for its policy holder, the underlying claims must at least arguably fall within the coverage of the policy.

*Cincinnati Ins. Co. v. Anders*, 99 Ohio St. 3d 156, 2003-Ohio-3048, 789 N.E.2d 1094, ¶51.

In *Ohio Gov't Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, this court was once again presented with the dilemma whether an insurance carrier has a duty to defend and insured. In *Harrison*, a claimant had brought a federal action against and insured alleging that he had used a police department's computer system to display and distribute offensive and pornographic photographs and e-mails and had audio recorded female employees using the restrooms, including the claimant. *Id.* at ¶1. The insurance carrier sought a judicial determination that the allegations were outside the scope of coverage and that it did not have a duty to defend the insured. The court of appeals reversed the trial court's decision granting the insurance carrier's motion for summary judgment and determined that the carrier in fact had a duty to defend.

The applicable terms of the policy in *Harrison* are unlike the terms in the instant matter and analogous to the broad terms of policy at issue in *Willoughby Hills v. Cincinnati Ins. Co.*, *supra*. The policy contained an endorsement titled "Public Officials Wrongful Act Liability Coverage" and as outlined by the court:

[T]he Plan has the right and duty to defend any suit against the insured alleging a wrongful act covered under this form, even if any of the allegations of the suit are groundless, false or fraudulent. “Wrongful act” is defined by the contract as any actual or alleged error, misstatement or misleading statement, act or omission or neglect or breach of duty, including misfeasance, malfeasance, nonfeasance, Violation of Civil Rights, Discrimination (unless coverage thereof is prohibited by law), and Improper Service of Process by the ‘insured’ in their official capacity, individually or collectively, or any matter claimed against them solely by reason of their having served or acted in an official capacity.

*Ohio Gov't Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241, 2007-Ohio-4948, 874 N.E.2d 1155 at ¶21.

The *Harrison* court held that “the Plan agreed to defend claims against Wapakoneta and its officers that are based on wrongful acts -- including allegations that are groundless, false, or fraudulent.” *Id.* at ¶23. “The duty to defend is broader when the insurer expressly states that it will defend claims that are groundless, false, or fraudulent.” *Id.* citing *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St. 3d 108, 113, 507 N.E.2d 1118 (1987), paragraph two of the syllabus. Again, this broad policy language is not applicable in the instant matter where the terms of the policy are much narrower.

Allowing the Ninth District Court of Appeals decision in this matter to stand would ignore decades of jurisprudence guiding insurers and insureds alike in their interpretation of insurance policies. The complaint of Kozera only made claims for violation of federal and state fair housing laws. The umbrella policy provides limited coverage subject to other exclusions for “humiliation”. For the court of appeals to make the conclusory determination that a factual recitation of alleged emotional distress constitutes a claim for humiliation goes far beyond a reasonable interpretation of the pleadings and makes conclusory determinations which ignore long-standing Ohio law.

In *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), the Supreme Court of Ohio recognized a cause of action for the intentional infliction of emotional distress. The court described the nature of the serious and emotional distress required in order to recover for infliction of emotional distress in Ohio as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.* at syllabus. It is apparent from Kozera's complaint that she was not pleading an action for intentional emotional distress. She was merely including the fact that she had suffered emotional distress as an element or a factual predicate for the alleged fair housing violations. As stated above, damages for emotional distress are not even recoverable in a housing discrimination action.

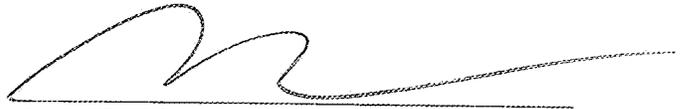
However, if Kozera was making a claim for intentional infliction of emotional distress, which she was not, the claim still does not fall within the scope of the policy. Pursuant to the terms of the policy, such a claim for emotional distress must include a specific claim for "humiliation". These are separate and distinct claims and causes of action and the Ninth District Court of Appeals erred in making such a finding in conflict with this court's rules for the interpretation of insurance policies. Such conclusory determinations unnecessarily expand the duty to defend beyond the allegations of the pleadings to hypothetical claims, causes of action, and damages. If the duty to defend is not triggered by the pleadings, it is not a court's obligation to seek out potential unpled claims to find a potential duty to defend.

#### CONCLUSION

The decision of the Ninth District Court of Appeals is fundamentally wrong in its reasoning and is contrary to long-standing Ohio law. The decision ignores this court's holding in

*Campbell*, supra, and failed to find that the intent to discriminate is inferred as a matter of law for purposes of an intentional act exclusion. It further erred in construing the federal complaint in the underlying matter in an attempt to trigger a duty to defend on behalf of the carrier. Such a ruling undermines decades of jurisprudence guiding insurers and insureds alike in their interpretation of insurance policies to determine when a duty to defend is owed. The decision below must be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail to the following on  
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13-1527

IN THE SUPREME COURT OF OHIO

STEVE GRANGER, et al.

Appellees

v.

AUTO-OWNERS INS. CO., et al.

Appellants

\* On Appeal from the Summit County Court  
 \* of Appeals, Ninth Appellate District  
 \*  
 \* Court of Appeals Case No. 26473  
 \*  
 \*  
 \*  
 \*  
 \*

NOTICE OF APPEAL OF APPELLANTS OWNERS INSURANCE COMPANY AND AUTO-OWNERS (MUTUAL) INSURANCE COMPANY

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 SEP 26 2013  
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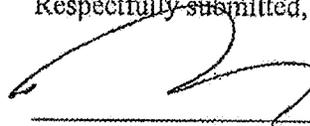
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Notice of Appeal of Appellants Owners Insurance Company  
and Auto-Owners (Mutual) Insurance Company

Appellants Owners Insurance Company and Auto-Owners (Mutual) Insurance Company hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 26473 on June 28, 2013 and which was the subject of timely applications for reconsideration filed July 2, 2013 and July 3, 2013 which were denied by the Ninth District Court of Appeals on August 14, 2013.

This case is one of public or great general interest.

Respectfully submitted,



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A copy of the foregoing has been served via regular U.S. Mail, postage prepaid, this 25<sup>th</sup> day of September, 2013 to the following:

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COURT OF APPEALS  
DANIEL A. HOFFMAN

STATE OF OHIO  
COUNTY OF SUMMIT  
STEVE GRANGER, et al.

) 2013 JUN 28 AM 9:11 THE COURT OF APPEALS  
)ss: NINTH JUDICIAL DISTRICT  
) SUMMIT COUNTY  
CLERK OF COURTS

C.A. No. 26473

Appellants

v.

AUTO OWNERS INS., et al.

Appellees

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2011 07 3997

DECISION AND JOURNAL ENTRY

Dated: June 28, 2013

BELFANCE, Judge.

{¶1} Plaintiffs-Appellants Steve Granger and Paul Steigerwald appeal the judgment of the Summit County Court of Common Pleas granting summary judgment in favor of Defendants Auto-Owners (Mutual) Insurance Company, Owners Insurance Company (Collectively "Auto-Owners"), The Church Agency, Inc., and Mike Coudriet. For the reasons set forth below, we reverse and remand the matter for proceedings consistent with this opinion.

I.

{¶2} Mr. Granger and Mr. Steigerwald established a trust to hold their assets, including a certain piece of real property in Akron, Ohio that Mr. Granger and Mr. Steigerwald have used as rental property. Both Mr. Granger and Mr. Steigerwald are trustees of the trust. Auto-Owners issued a dwelling insurance policy to Mr. Granger, Mr. Steigerwald, and the trust and an umbrella policy to Mr. Granger alone. The Church Agency and its broker Mr. Coudriet provided assistance in obtaining the policies.

{¶3} Valerie Kozera, the mother of a then-six-year old child, attempted to rent the premises, but Mr. Granger informed her that he would not rent to anyone with children. Ms. Kozera contacted Fair Housing Contact Service, Inc., ("FHCS") which investigated her claims of pre-leasing housing discrimination. In March 2011, FHCS and Ms. Kozera filed a complaint in federal court against Mr. Granger and Mr. Steigerwald alleging federal and state fair housing claims premised on discrimination based on familial status and race. The Church Agency was notified of the lawsuit, and it in turn notified Auto Owners Insurance. In a letter to Mr. Steigerwald and Mr. Granger dated June 8, 2011, Auto-Owners stated that it had received notification that Mr. Steigerwald and Mr. Granger had been accused of discrimination but that the dwelling policy definition of personal injury did not include discrimination. Thus, the dwelling policy did not cover the claim. In July 2011, Mr. Granger and Mr. Steigerwald settled the federal case for \$32,500.

{¶4} On July 21, 2011, Mr. Granger and Mr. Steigerwald filed the instant lawsuit against Auto-Owners, The Church Agency, and Mr. Coudriet for breach of contract and estoppel arising out of Auto-Owners' refusal to provide coverage and a defense in the federal suit. The complaint is unclear as to the specific claims against The Church Agency and Mr. Coudriet.

{¶5} Mr. Granger and Mr. Steigerwald filed a motion for partial summary judgment on the issue of Auto-Owners' duty to defend pursuant to the umbrella policy. Auto-Owners filed a motion for summary judgment asserting that it had no duty to provide coverage or defense under the policies for discrimination claims. Additionally, The Church Agency and Mr. Coudriet filed a separate motion for summary judgment. The trial court denied Mr. Granger's and Mr. Steigerwald's motion for partial summary judgment and granted Auto-Owners' and The Church

Agency's and Mr. Coudriet's motions for summary judgment. Mr. Granger and Mr. Steigerwald have appealed, raising one assignment of error for review.

## II.

### ASSIGNMENT OR ERROR

#### THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT[.]

{¶6} Mr. Granger and Mr. Steigerwald assert that the trial court erred in granting summary judgment to Auto-Owners, The Church Agency, and Mr. Coudriet. Notably, they do not assert that the trial court erred in denying Mr. Granger's and Mr. Steigerwald's motion for partial summary judgment.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Garner v. Robart*, 9th Dist. No. 25427, 2011-Ohio-1519, ¶ 8.

{¶8} Pursuant to Civ.R. 56(C), summary judgment is appropriate when:

(1) No genuine issue 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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

*Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must

set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 293, quoting Civ.R. 56(E).

{¶9} With respect to Mr. Granger’s and Mr. Steigerwald’s assertion the trial court erred in granting summary judgment to Auto-Owners, they maintain that the trial court erred only because Mr. Granger was owed a defense under the umbrella policy. Our analysis is thus limited to that issue.

{¶10} “An insurance policy is a contract between the insurer and the insured. If we must interpret a provision in the policy, we look to the policy language and rely on the plain and ordinary meaning of the words used to ascertain the intent of the parties to the contract.” (Internal citations omitted.) *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, ¶ 18. “Ambiguous provisions in an insurance policy must be construed strictly against the insurer and liberally in favor of the insured. This is particularly true when considering provisions that purport to limit or qualify coverage under the policy.” (Internal citation omitted.) *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, ¶ 11. “[A]n exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded.” (Internal quotations and citation omitted.) *Id.*

An umbrella policy is a policy which provides excess coverage beyond an insured’s primary policies. Umbrella policies are different from standard excess insurance policies, since they provide both excess coverage (“vertical coverage”) and primary coverage (“horizontal coverage”). The vertical coverage provides additional coverage above the limits of the insured’s underlying primary insurance, whereas the horizontal coverage is said to “drop down” to provide primary coverage for situations where the underlying insurance provides no coverage at all.

(Internal quotations and citations omitted.) *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, ¶ 5.

{¶11} “[T]he duty to defend is broader than and distinct from the duty to indemnify.” *Ward* at ¶ 19. “The duty to defend arises when a complaint alleges a claim that could be covered by the insurance policy.” *CPS Holdings, Inc.* at ¶ 6. The duty “is determined by the scope of the allegations in the complaint.” *Ward* at ¶ 19. “If the allegations state a claim that potentially or arguably falls within the liability insurance coverage, then the insurer must defend the insured in the action.” *Id.* “Once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage.” *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, ¶ 13. “But if all the claims are clearly and indisputably outside the contracted coverage, the insurer need not defend the insured.” *Ward* at ¶ 19.

{¶12} Thus, we examine the umbrella policy to determine whether there exists an issue of fact as to whether Auto-Owners breached its contract with Mr. Granger by failing to provide a defense in the federal suit. The umbrella policy names Steve Granger as an insured under the policy. There is nothing in the policy to suggest that Mr. Steigerwald is an insured under the umbrella policy, and Mr. Granger and Mr. Steigerwald do not make an argument to the contrary. The policy states:

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. \* \* \*
- (b) investigate or settle any claim or suit as we think appropriate.

The umbrella policy further states that Auto Owners "will pay on behalf of the insured the ultimate net loss in excess of the retained limit which the insured becomes legally obligated to pay as damages because of personal injury \* \* \* ." Personal injury is defined as:

- (a) bodily injury, sickness, disease, disability or shock;
- (b) mental anguish or mental injury;
- (c) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; and
- (d) libel, slander, defamation of character or invasion of rights of privacy; including resulting death, sustained by any person.

{¶13} As is evident from the above language, Auto-Owners defined personal injury both in terms of certain claims, such as malicious prosecution, and in terms of resulting harms, such as humiliation or mental anguish. Auto-Owners asserted in its motion for summary judgment that the claims against Mr. Granger and Mr. Steigerwald for pre-leasing discrimination do not constitute personal injury under the umbrella policy and thus are not covered. Therefore, according to Auto-Owners, it had no duty to defend Mr. Granger. Auto-Owners also asserted that even if pre-leasing discrimination did constitute a personal injury under the umbrella policy, it would be excluded under the provision that indicates the policy does not cover "[p]ersonal injury \* \* \* expected or intended by the insured[]" because Mr. Granger intended to discriminate.

{¶14} Mr. Granger and Mr. Steigerwald asserted in their response that, because Ms. Kozera claimed in her complaint that she suffered emotional distress, she arguably suffered humiliation, which is a personal injury covered under the policy. We agree. Emotional distress has been defined as "[a] highly unpleasant mental reaction (such as anguish, grief, fright, *humiliation*, or fury) that results from another person's conduct[.]" (Emphasis added.) *Black's*

*Law Dictionary* 563 (8th Ed.2004). Thus, it would appear that the federal complaint alleges a personal injury as contemplated by the umbrella policy.

{¶15} Moreover, based upon the limited arguments made below, we cannot at this point determine whether the exclusion applies. The dissent maintains that, because the record is clear that Mr. Granger intended the *discrimination*, the exclusion applies and Auto-Owners had no duty to defend. However, this approach ignores the plain language of the policy. The relevant inquiry under the exclusion portion of the policy is whether the *personal injury* was expected or intended. Thus, the appropriate question to ask is whether Mr. Granger expected or intended Ms. Kozera to be humiliated by his conduct. There has not even been any argument advanced by Auto-Owners on this point, let alone the introduction of relevant evidence. *See Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, ¶ 59 (“An insurer’s motion for summary judgment may be properly granted when intent may be inferred as a matter of law. In cases such as this one, where the insured’s act does not necessarily result in harm, we cannot infer an intent to cause injury as a matter of law.”). Thus, we conclude that Auto-Owners is not entitled to summary judgment on the issue of whether it breached the contract by failing to defend Mr. Granger pursuant to the umbrella policy. This portion of Mr. Granger’s and Mr. Steigerwald’s assignment of error is sustained.

{¶16} Mr. Granger and Mr. Steigerwald further argue that the trial court erred by granting summary judgment in favor of Auto-Owners with respect to its bad faith claim. Auto-Owners did move for summary judgment on this issue and the trial court, without qualification, granted summary judgment to Auto-Owners. Because the trial court does not discuss the bad faith claim in its judgment entry, its basis for awarding summary judgment on this issue is entirely unclear. We are unsure what role the trial court’s determination that Mr. Granger and

Mr. Steigerwald were not entitled to coverage or a defense played in determining that Auto-Owners was entitled to summary judgment on Mr. Granger's and Mr. Steigerwald's bad faith claim. Accordingly, upon remand, the trial court should consider this issue in the first instance in light of our conclusion that Auto-Owners was not entitled to summary judgment on the breach of contract claim with respect to its failure to provide a defense to Mr. Granger under the umbrella policy.

{¶17} Additionally, Mr. Granger and Mr. Steigerwald argue that the trial court erred by granting summary judgment in favor The Church Agency and Mr. Coudriet. Specifically, they argue that a genuine issue of material fact existed regarding whether The Church Agency and Mr. Coudriet breached their duties owed to their clients by failing to timely submit Mr. Granger's insurance claim to Auto-Owners. They do not appear to challenge the trial court's conclusion that The Church Agency and Mr. Coudriet were entitled to summary judgment on Mr. Granger's and Mr. Steigerwald's breach of contract claim. Nor do they challenge the trial court's determination that there was no breach of duty with respect to the submission of the claim under the dwelling policy.

{¶18} In addressing whether The Church Agency and Mr. Coudriet breached any duties with respect to the submission of the claim as to Mr. Granger under the umbrella policy, the trial court based its decision on the fact that it concluded that Auto-Owners did not owe Mr. Granger a defense, and, therefore, essentially The Church Agency and Mr. Coudriet could not be said to have caused Mr. Granger and Mr. Steigerwald any damage. Because we determined that Auto-Owners was not entitled to summary judgment on the issue of whether it breached its contract with Mr. Granger under the umbrella policy by failing to defend him in the federal suit, it is necessary for the trial court to consider the merits of The Church Agency's and Mr. Coudriet's

motion on this point. *Neura v. Goodwill Industries*, 9th Dist. No. 11CA0052-M, 2012-Ohio-2351, ¶ 19. We sustain Mr. Granger's and Mr. Steigerwald's assignment of error.

## III.

{¶19} In light of the foregoing, we reverse the judgment of the Summit County Court of Common Pleas and remand the matter for proceedings consistent with this opinion.

Judgment reversed,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.



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EVE V. BELFANCE  
FOR THE COURT

MOORE, P. J.  
CONCURS.

CARR, J.  
DISSENTING.

{¶20} I respectfully dissent. Because I would conclude that Auto Owners demonstrated that Mr. Granger intended to discriminate against Ms. Kozera based on her familial status, while Mr. Granger failed to show that he did not intend any discrimination, I would affirm the trial court's award of summary judgment to the insurance company.

{¶21} It is well settled that the interpretation of an insurance policy, like any other contract, is a matter of law. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, ¶ 7. The Ohio Supreme Court directed:

When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273 (1999), citing *Employers' Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343 (1919), syllabus. See also Ohio Constitution, Article II, Section 28. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex.2000).

*Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. "An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded." (Internal citations and quotations omitted) *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, ¶ 11. Moreover, "a defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it." *Continental Ins. Co. v. Louis Marx Co., Inc.*, 64 Ohio St.2d 399, 401 (1980).

{¶22} The majority and Mr. Granger are correct that the duty to defend is broader than and distinct from the insurer's duty to provide coverage. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, ¶ 19. "The test of the duty of an insurance company, under a policy of liability insurance, to defend an action against an insured, is the scope of the allegations of the complaint in the action against the insured, and where the complaint brings the action within the coverage of the policy the insurer is required to make a defense, regardless of the ultimate outcome of the action or its liability to the insured." *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 178-179 (1984), quoting *Motorists Mut. v. Trainor*, 33 Ohio St.2d 41 (1973), paragraph two of the syllabus. Therefore, the insurance company has a duty to defend its insured whenever the allegations in the complaint state a claim that "arguably" falls within the coverage. *Harrison* at ¶ 19. However, the insurer has no duty to defend against any claim that is "clearly and indisputably outside the contracted policy language." *CPS Holdings* at ¶ 6, citing *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 113 (1987); see also *Harrison* at ¶ 19; *Maxum Indemn. Co. v. Selective Ins. Co. of South Carolina*, 9th Dist. No. 11CA0015, 2012-Ohio-2115, ¶ 17 (holding that "once the insurer is able to establish that there is no set of facts that would bring the allegations of the complaint within coverage of its policy, its duty to defend is extinguished.").

{¶23} The relevant policy provisions regarding the duty to defend are as follows:

DEFENSE – SETTLEMENT

With respect to any occurrence:

not covered by underlying insurance; but

covered by this policy except for the retained limit;

we will:

defend any suit against the insured at our expense, using lawyers of our choice. \*

\* \*

investigate or settle any claim or suit as we think appropriate.

The policy further contains the following relevant exclusion:

#### EXCLUSIONS

We do not cover:

\* \*

Personal injury or property damage expected or intended by the insured.

The policy defines "personal injury" to mean:

bodily injury, sickness, disease, disability or shock;

mental anguish or mental injury;

false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; and

libel, slander, defamation of character or invasion of rights of privacy;

including resulting death, sustained by any person.

{¶24} I disagree with the majority's construction of the complaint underlying Auto Owners' alleged duty to defend. In their complaint filed in federal court, FHCS and Ms. Kozera alleged the following. After Ms. Kozera inquired about an apartment that Mr. Granger had advertised for rent, he asked her who would be living in the apartment with her. After Ms. Kozera told Mr. Granger that her six-year old son would be living with her, Mr. Granger told her that he would not rent the apartment anyone with children. Ms. Kozera contacted FHCS. The agency conducted an investigation, sending trained testers to inquire about renting the premises. Mr. Granger, both verbally and in writing, informed testers who stated that they had children that he would not rent to people with children. Mr. Granger further provided one of the testers with a copy of the lease which emphatically stated that "No \* \* \* children are permitted -- period. No

exceptions!” FHCS and Ms. Kozera alleged both a federal and state claim for discrimination. Ms. Kozera further alleged that she suffered damages for “emotional distress” as a result of Mr. Granger’s discrimination.

{¶25} Mr. Granger construes Ms. Kozera’s claim for damages arising out of emotional distress as one for “humiliation,” and therefore “personal injury” as that term is defined in the umbrella policy. While the majority agrees with this construction, I do not. Nowhere in the complaint does any form of the word “humiliation” appear. Moreover, my review of the federal complaint indicates only two causes of action, specifically, one federal and one state claim for discrimination. I would construe the allegation of emotional distress merely as part of the prayer for damages, as it was not developed as a distinct cause of action. Assuming *arguendo*, however, that Ms. Kozera’s claims arguably present a claim for personal injury as that term is defined in the policy, I would conclude that Auto Owners’ duty to defend was abrogated by application of the plain language of the policy’s exclusion for expected or intended injury.

{¶26} Mr. Granger argues that, because violations of 42 U.S.C. 3604 (Fair Housing Act) and R.C. 4112.02(H) (prohibiting discrimination relating to the rental of housing accommodations) constitute strict liability offenses, his conduct was not intentional. The violation of a law prohibiting discrimination and the act of engaging in conduct intended or expected to cause personal injury are not dependent events. The umbrella policy does not limit its exclusion for intended or expected harm to only situations in which the insured has been convicted or found liable for an offense requiring proof of intent. Moreover, the commission of a strict liability offense does not preclude the ability of the actor to have acted with intent (or any other culpable mental state). The question in this case was whether Mr. Granger intended to

discriminate against Ms. Kozera. I believe that the trial court properly concluded that no genuine issue of material fact existed in that regard.

{¶27} Auto Owners deposed Mr. Granger who testified and admitted that he told Ms. Kozera and others that he would not rent to people with children. He testified that he wished to maintain a quiet environment for his tenants. Mr. Granger further admitted during his deposition that he sent an email to "Lauren Green" about the rental property, informing her that he is "selective" in his choice of tenants and that pets and children are not allowed. "Lauren Green" was one of the testers sent to the property by FHCS to investigate Ms. Kozera's allegation of discrimination. A copy of the lease Mr. Granger provided to prospective tenants, attached to the federal lawsuit which is appended to Mr. Granger's complaint, clearly states that no children are permitted on the premises under the lease. In addition, Mr. Granger admitted in his deposition that he violated the discrimination laws. Based on this evidence, I would conclude that Auto Owners met its initial burden under *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996), to show that Mr. Granger intended to discriminate against Ms. Kozera based on her familial status.

{¶28} I would conclude that Mr. Granger, however, failed to meet his reciprocal burden under *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996), to show that he did not intend to discriminate against Ms. Kozera when he declined to rent to her based on her familial status. In response to the defendants' motions for summary judgment, Mr. Granger submitted his affidavit in which he averred that he did not intend to discriminate against Ms. Kozera or others. I would conclude that his sworn statement made subsequent to his deposition did not serve to create a genuine issue of material fact. This Court has recognized that "an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to

defeat a motion for summary judgment.” *First Energy Solutions v. Gene B. Glick Co.*, 9th Dist. No. 23646, 2007-Ohio-7044, ¶ 12, quoting *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 28. In this case, Mr. Granger offered no explanation for the disparity between his deposition testimony and the subsequent sworn statement in his deposition. Accordingly, he failed to present evidence to contradict Auto Owners’ evidence that he intended to discriminate against Ms. Kozera by refusing to rent to her on the basis of her familial status.

{¶29} I would conclude that there was no genuine issue of material fact regarding Mr. Granger’s intent to discriminate against Ms. Kozera. The umbrella policy by its plain language excluded from coverage claims based on intentional conduct by the insured. The policy further unambiguously stated that the insurer would only defend the insured against claims “covered by this policy \* \* \*.” Because Ms. Kozera’s discrimination claims were not arguably covered by the policy, and were in fact clearly and indisputably outside the contracted policy language, Auto Owners owed no duty to defend Mr. Granger. Moreover, because the insurance company owed no duty to defend, its refusal to defend did not constitute bad faith. Accordingly, I would conclude that the trial court did not err by finding that no genuine issue of material fact existed and that Auto Owners was entitled to judgment as a matter of law.

{¶30} Mr. Granger further argues that the trial court erred by granting summary judgment in favor of The Church Agency and Mr. Coudriet. Specifically, he argues that a genuine issue of material fact existed regarding whether The Church Agency and Mr. Coudriet breached their duties owed to their client by failing to timely submit Mr. Granger’s insurance claim to Auto Owners. Assuming that Mr. Granger’s complaint alleges a cause of action against the insurance agent and the company that helped him procure insurance policies from Auto Owners, my resolution of the issue relating to Auto Owners’ motion for summary judgment

would render this argument moot. Because Auto Owners' duty to defend and provide coverage was obviated by an applicable exclusion in the policy, the agency's delay, if any, in forwarding the claim to Auto Owners does not create a genuine issue of material fact as to any claim against The Church Agency and Mr. Coudriet which might be gleaned from the complaint. Accordingly, I would conclude that the trial court did not err in granting summary judgment in favor of The Church Agency and Mr. Coudriet. Accordingly, I would overrule Messrs. Granger's and Steigerwald's assignment of error.

APPEARANCES:

THOMAS C. LOEPP, Attorney at Law, for Appellants.

BRIAN T. WINCHESTER and DAWN E. SNYDER, Attorneys at Law, for Appellees.

STEPHAN KREMER and HOLLY MARIE WILSON, Attorneys at Law, for Appellees.

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BTW

COURT OF APPEALS  
DANIEL M. NEWBORN

AUG 16 2013  
MASON, OHIO, U.S. DEPT. OF JUSTICE

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STATE OF OHIO  
COUNTY OF SUMMIT

SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STEVE GRANGER, et al.

C.A. No. 26473

Appellants

v.

AUTO-OWNERS INSURANCE, et al.

Appellees

JOURNAL ENTRY

Appellants have moved this Court to reconsider its June 28, 2013 decision, which reversed the judgment of the trial court granting summary judgment to Appellees. Appellees The Church Agency and Mike Coudriet have also moved for reconsideration. Appellees Auto-Owners Insurance Company and Owners Insurance Company (collectively "Auto-Owners") have responded in opposition to the application for reconsideration by Appellants.

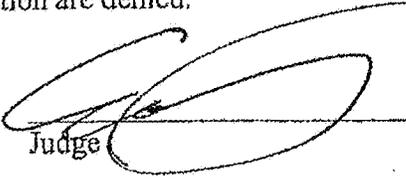
In determining whether to grant an application for reconsideration, a court of appeals must review the application to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117 (10th Dist.1992). Appellants argue that this Court should reconsider its decision because this Court failed to consider arguments

*[Signature]*  
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that Appellants made. Specifically, Appellants assert that, on appeal, they argued that the trial court erred in denying their motion for partial summary judgment and that the trial court erred in granting summary judgment to Auto-Owners for its failure to indemnify Mr. Granger. The Church Agency and Mike Coudriet assert that this Court erred in reversing and remanding the grant of summary judgment in their favor as the issue we are remanding for consideration was already decided by the trial court.

This Court finds that the applications for reconsideration in this case neither call attention to an obvious error nor raise issues that we did not consider properly. Appellants' assignment of error was limited to asserting that the trial court erred in granting summary judgment. Accordingly, our analysis was properly limited to that issue. *See State v. Michel*, 9th Dist. Summit No. 25184, 2011-Ohio-2015, ¶ 24. With respect to Appellants' contention that they also argued on appeal that the trial court erred in granting summary judgment on the issue of indemnity, we do not agree. While that topic is mentioned in the brief, Appellants did not develop any argument on that issue, leading this Court to conclude that the issue was not being raised on appeal. *See App.R. 16(A)(7)*. With respect to The Church Agency's and Mike Coudriet's assertion, we note that, with respect to the breach of contract claim, we did not overturn the trial court's grant of summary judgment, concluding that that portion of the trial court's decision was not being challenged on appeal. With respect to The Church Agency's and Mike Coudriet's contention that the trial court already considered the issue we are remanding for consideration, we do not agree. While the trial court's entry is somewhat ambiguous, it appears that the trial court based, at least in part, its grant of summary judgment to The Church Agency and Mike Coudriet on its faulty interpretation of the insurance contract. Given the foregoing, we conclude it is still appropriate for the trial court to consider the issue in the first instance.

The applications for reconsideration are denied.

  
\_\_\_\_\_  
Judge

Concur:  
Moore, P. J.

Dissent:  
Carr, J.

DANIEL M. HOFFIGAN

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SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

STEVE GRANGER, *et al.*,

Plaintiffs,

VS.

AUTO OWNERS INS., *et al.*,

Defendants.

CASE NO. CV 2011 07 3997

JUDGE TAMMY O'BRIEN

JUDGMENT ENTRY

(Final and Appealable)

This matter comes before the Court on the Motion for Partial Summary Judgment filed by Plaintiffs Steven Granger and Paul Steigerwald ("Plaintiffs"), the Motion for Summary Judgment filed by Defendants Owners Insurance Company and Auto-Owners (Mutual) Insurance Company (collectively "Auto-Owners"), and the Motion for Summary Judgment filed by Defendants The Church Agency and Mike Coudriet (collectively "Defendants Church"). At issue in the parties' motions is whether a duty to defend and indemnify existed under the parties' Dwelling or Umbrella Policies.

The Court has considered the parties' Motions, the responses thereto, the facts of this matter, Civ.R. 56(C), and applicable law. Upon due consideration, the Court:

1. DENIES Plaintiffs' Motion for Partial Summary Judgment;
2. GRANTS Auto-Owners' Motion for Summary Judgment; and
3. GRANTS Defendants Church's Motion for Summary Judgment.

ANALYSIS

I. Factual Background.

Plaintiffs are the owners of the premises located at 65 N. Rose Boulevard, Akron, Ohio ("the Premises"). At all pertinent times, Plaintiffs have utilized the Premises as a rental property.

Plaintiffs obtained insurance on the Premises through Defendants Church. The Church Defendants are the agency, brokers and agents who issued Auto-Owners' insurance policies on the Premises.

Two Auto-Owners insurance policies were issued to insure the Premises. At issue is Auto-Owners Policy No. 46-809-00 that was issued to Plaintiff Steve Granger, Plaintiff Paul Steigerwald, and The Steigerwald & Granger Revocable Living Trust (hereinafter the "Dwelling

Policy"). The Dwelling Policy had an applicable policy term of June 3, 2010 to June 3, 2011. Auto-Owners Policy No. 46-979-785-01 was also issued to Plaintiff Steven Granger (hereinafter the "Umbrella Policy"). The Umbrella Policy had an applicable policy term of October 15, 2009 to October 15, 2010. The Dwelling Policy and Umbrella Policy will collectively be referred to as the "Auto-Owners Policies."

On or about March 25, 2011, Plaintiffs were sued in the Northern District of Ohio by Fair Housing Contact Service, Inc. ("FHCS") and Valerie Kozera (the "Underlying Lawsuit"). See Kozera Complaint, attached to Plaintiffs' Complaint as Exhibit C. FHCS and Kozera alleged in the Underlying Lawsuit that Kozera, who is African-American, responded to an advertisement on Craigslist and inquired about renting the Premises. *Id.* at ¶¶4, 7. Kozera tried to rent the Premises for herself and her then six-year old son. *Id.* at ¶4. Kozera asserted that she called the telephone number provided on Craigslist and spoke to Steven Granger. *Id.* at ¶¶7-8. Granger allegedly told Kozera that he would not rent the Premises to anyone with children. *Id.* at ¶8. Kozera contacted FHCS and, in response, FHCS initiated its own investigation. *Id.* at ¶9. FHCS's investigation substantiated Kozera's claims that Granger did not permit children to live at the Premises. *Id.* at ¶10. FHCS alleged that it also discovered that Granger discriminated on the basis of race. *Id.* at ¶¶11-12. FHCS and Kozera filed suit against Granger and Paul J. Granger aka Paul J. Steigerwald and asserted claims for discrimination based on familial status and race (first cause of action) and for "pendant state fair housing claims" (second cause of action). See Kozera Complaint.

Plaintiffs were aware of FHCS and Kozera's claims and investigation well before the filing of the Underlying Lawsuit. In September 2010, FHCS filed a Housing Discrimination Charge against Plaintiffs with the Ohio Civil Rights Commission. See S. Granger Depo. at Exhibit E. Defendant Michael Coudriet became aware of the Fair Housing claim in early 2011 when Plaintiff Paul Steigerwald first talked to Roslynn Penix about it at the Church Agency. See M. Coudriet Depo. at 19. See also R. Penix Depo. at 16. Ms. Penix talked to Mr. Steigerwald on January 14, 2011 and Steigerwald allegedly informed her that there was an issue of a fair housing discrimination claim against Plaintiffs. M. Coudriet Depo. at 22-23; R. Penix Depo. at 21-22. At that time, Steigerwald allegedly did not want to turn in a claim because he felt that the matter would more than likely go away. M. Coudriet Depo. at 20; R. Penix Depo. at 21.

On February 21, 2011, Plaintiffs signed a retainer agreement with their current counsel to defend them against the Kozera claim, which was then in pre-suit investigation and settlement negotiations. See S. Granger Depo. at 43 and Exhibit G; see also P. Steigerwald Depo. at 42. On May 18, 2011, nearly two months after the Underlying Lawsuit was filed, Mr. Steigerwald forwarded the underlying complaint to Lynn Penix at the Church Agency to put the agency on "notice to serve as advised by counsel that a potential lawsuit of \$150,000 plus attorney fees may be filed. Court is scheduled for Friday, May 20, 2011 . . ." See S. Granger and P. Steigerwald Depos. at Exhibit F. Plaintiffs represented at that time that "this lawsuit therefore opens the file utilizing the personal liability insurance of Steven G. Granger." *Id.*

On June 8, 2011, Auto-Owners notified Plaintiffs that the allegations of the Underlying Lawsuit fell outside the scope of coverage of the Auto-Owners Policies, and therefore denied

coverage. See Complaint at Exhibit D. Plaintiffs voluntarily settled the Underlying Lawsuit in July 2011 for \$32,500.00. See S. Granger Depo. at 32; see also Complaint at Exhibit E. Plaintiffs now allege that Defendants wrongfully refused to defend and provide coverage for the claims asserted in the Underlying Lawsuit.

## 2. Procedural Posture.

Plaintiffs commenced the instant action on July 22, 2011 when they filed their Complaint for Breach of Contract, Bad Faith and Estoppel with the Court. Plaintiffs allege that, with respect to the claims asserted in the Underlying Lawsuit, insurance coverage was available under both the Dwelling and Umbrella Policies and Auto-Owners had a duty to defend. See Complaint at ¶10. It is asserted that, “[b]y refusing to cover the Plaintiffs’ losses and by refusing to defend the Underlying Lawsuit, Auto-Owners breached the policies.” *Id.* Plaintiffs argue that “the actions of the Auto-Owners were done in bad faith” and that “[t]he actions of Auto-Owners were malicious, without justification, were done with actual malice, fraud and insult.” *Id.* at ¶¶15-16.

With respect to Defendants Church, Plaintiffs assert that said Defendants “informed the Plaintiffs that Auto-Owners owed a duty to defend and to cover the Plaintiffs in the Underlying Lawsuit.” *Id.* at ¶12. It is further asserted that “Church, by and through its agents and employees, informed the Plaintiffs that the Auto-Owners Policies were all-encompassing.” *Id.* at ¶13.

Plaintiffs “demand judgment against Defendants for compensatory damages in excess of the amount of \$32,500.00 plus attorney fees and costs of the Underlying Lawsuit, punitive damages in excess of \$65,000.00, together with attorney fees, expenses, interest and costs incurred and any other relief that this court may deem proper and appropriate.” *Id.* at 3.

The Church Defendants filed separate Answers on August 19, 2011. In their Answers, the Church Defendants admit that Auto-Owners issued policies of insurance to Plaintiffs to insure the Premises. See Church Defendants Answers at ¶¶2. The Church Defendants deny the material allegations of the Complaint and, in addition to other affirmative defenses, assert that “Plaintiffs’ injuries were caused by their own contributory/comparative negligence and/or assumption of the risk” and that “Plaintiffs’ injuries were caused by the acts or omissions of third parties.” *Id.* at ¶¶20-21

Auto-Owners filed an Answer on September 15, 2011. Auto-Owners admits that the Dwelling and Umbrella Policies were issued to Plaintiffs. See Answer at ¶2. Auto-Owners denies the material allegations of the Complaint and, in addition to other affirmative defenses, asserts that “[t]he underlying claims against Plaintiffs fail to constitute an occurrence sufficient to trigger any duty to defend or indemnify.” *Id.* at ¶18.

Plaintiffs argue in their April 4, 2012 Motion for Partial Summary Judgment that a defense was owed in the Underlying Lawsuit. It is asserted that, at a minimum, a defense was owed under the Umbrella Policy which provides a defense for “humiliation” claims. The Plaintiffs reason that Kozera was humiliated as a result of the alleged wrongful conduct at issue

in the Underlying Lawsuit and that, because coverage and defense obligations must be construed in favor of the insured, a duty to defend existed.

Auto-Owners filed a Motion for Summary Judgment on April 10, 2012. Auto-Owners maintains that, with respect to the claims asserted in the Underlying Lawsuit, there is no duty to defend or indemnify. It is asserted that pre-leasing discrimination is not covered under the policy; that Plaintiffs are not entitled to a defense under the policies; that Paul Steigerwald is not an insured under the Umbrella Policy; that the retained limit has not been triggered under the Umbrella Policy; and that Plaintiffs cannot demonstrate any bad faith by Defendants.

Defendants Church filed a Motion for Summary Judgment on April 13, 2012. Defendants Church argue that an insurance agent is not liable for an insurance carrier's denial of coverage to an insured. It is asserted that "[n]either Defendant The Church Agency, Inc. nor Defendant Mike Coudriet, as insurance agents, have any control over, and cannot be held liable for, the actions of Co-Defendant Auto-Owners in rejecting Plaintiffs' Insurance claims." See Defendants Church's Motion for Summary Judgment at 6.

### 3. Standard of Review on Summary Judgment.

In reviewing a motion for summary judgment, the Court must consider the following: (1) whether there is no genuine issue of material fact to be litigated; (2) whether in viewing the evidence in a light most favorable to the non-moving party it appears that reasonable minds could come to but one conclusion; and (3) whether the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996); *Wing v. Anchor Media, L.T.D.*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). If the Court finds that the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986).

Civ.R. 56(C) states the following, in part, in regards to summary judgment motions:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of the 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.

Where a party seeks summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. *Dresher*, 75 Ohio St.3d at 293. The *Dresher* court continued,

the moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to

prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

*Banks v. Ross Incineration*, 9th Dist. No.98CA007132 (Dec. 15, 1999).

4. Standard to Apply when Interpreting and Construing an Insurance Contract.

In addressing the parties' arguments and motions, the Court is being asked to interpret and construe two Auto-Owners insurance policies. With respect to the interpretation of insurance contracts, the Supreme Court of Ohio has provided that the Court is to "examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy." *Westfield Ins. Co. v. Galatis, et al.*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶11. The Court is to "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Id.* "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Id.* See also *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, ¶17. Whether Auto-Owners breached the terms of the Dwelling or Umbrella Policies is a question of law for the Court. See *Luntz v. Stern*, 135 Ohio St. 225, 20 N.E.2d 241 (1939), paragraph five of the syllabus. See also *Morris v. Investment Life Ins. Co.*, 27 Ohio St.2d 26, 272 N.E.2d 105 (1971).

The Court will separately address below, and not necessarily in the order in which they were filed, the parties' motions for summary judgment.

5. Auto-Owners' Motion for Summary Judgment.

Auto-Owners argues that it did not have a duty to defend or indemnify under either the Dwelling or Umbrella Policy. The policies will be separately analyzed.

a. Whether Auto-Owners had a duty to defend or indemnify under the Dwelling Policy.

In support of its position that it did not have a duty to defend under the Dwelling Policy, Auto-Owners refers to the Dwelling Policy's Landlord Liability provision which provides:

## COVERAGE F – LANDLORD LIABILITY

1. We will pay all sums any insured becomes legally obligated to pay as damages because of or arising out of **bodily injury or property damage**:
  - a. arising out of the ownership, maintenance or use of the described premises as a rental dwelling; and
  - b. caused by an **occurrence** to which this coverage applies:
2. We will pay all sums any insured becomes legally obligated to pay as damages because of or arising out of **personal injury**:
  - a. arising out of the ownership, maintenance or use of the described premises as a rental dwelling; and
  - b. caused by an **incident** to which this coverage applies.

See Dwelling Policy, Landlord Liability at 1, *attached to* Plaintiffs' Complaint as Exhibit A. "Personal injury" is defined on page 1 of the Landlord Liability provision as:

- c. **Personal injury** means:
  - (1) libel, slander or defamation of character;
  - (2) false arrest, detention or imprisonment, or malicious prosecution;
  - (3) invasion of privacy; or
  - (4) wrongful eviction or wrongful entry.

*Id.* "Bodily injury" is defined in the Insuring Agreement as "physical injury, sickness or disease sustained by a person including resulting death of that person." *Id.*, Insuring Agreement at 1. "Occurrence" is defined in the Dwelling policy as "an accident". *Id.* at 2.

Auto-Owners argues that "[p]re-leasing discrimination does not constitute a personal injury" under the policy. See Auto-Owners' Motion for Summary Judgment at 10. Auto-Owners alternatively asserts that, "even if housing discrimination constituted personal injury \* \* \* it would be excluded because Plaintiff Granger intended or expected it." *Id.* While Plaintiffs argue that the discrimination was not intentional, they do not address the Dwelling Policy in either their Motion for Partial Summary Judgment or their Response to Motions for Summary Judgment of Defendants and Reply Brief. Plaintiffs' focus on the Umbrella Policy and the argument that coverage exists under that policy.

Upon due consideration, the Court finds that Auto-Owners did not have a duty to defend or indemnify under the Dwelling Policy because the discrimination was intentional and not a covered "incident." Hence, even if Kozera suffered humiliation and/or personal injury, there was no duty to defend or indemnify under the Dwelling policy because the humiliation and/or personal injury was not caused by an "incident."

The Dwelling Policy defines an "incident" as an accident. The alleged discrimination clearly was not an accident. Plaintiff Granger testified that he intended to exclude children from the Premises. See Granger Depo. at 25, 76-77. Granger did not want to rent to people with children because he intended to keep the noise level down in the Premise's apartment units. *Id.* at 25. It is clear that Granger did not accidentally exclude applicants with children. Accordingly, there is no coverage under the Dwelling Policy.

In finding that Granger's discrimination does not constitute an "incident" for insurance coverage purposes, the Court finds that the decisions rendered in *Motorists Mut. Ins. Co. v. Merrick*, Eleventh Dist. Nos. 98-T-0188, 98-T-0189, (Nov. 5, 1999) and *Fabbro v. Nat. Fraternal Order of Eagles, et al.*, Fifth Dist. No. 00-CA-0003, (Sept. 10, 1999) warrant consideration.

As in the instant matter, the Motorist Mutual policy in *Merrick* provided insurance coverage for personal injuries arising out of incidents or accidents. While the trial court in *Merrick* denied the insurer's motion for summary judgment on the basis that the underlying harassment claims could arise out of negligence, the court of appeals disagreed. The *Merrick* court held that the insured's alleged harassing "words and actions were not accidental" and could not "be considered unexpected events." *Id.* at \*8. The court further provided that the mere insinuation of negligence in the underlying complaint did not bring the claims within possible insurance coverage. *Id.* The court acknowledged that "the public policy of the state of Ohio is to preclude insurance coverage for injuries resulting from intentional acts." *Id.*, citing *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 665 N.E.2d 1115 (1996), paragraph two of the syllabus. In holding that Motorists did not have a duty to defend its insured in a harassment lawsuit, the court held that "any and all injuries suffered" as a result of the alleged harassment "were the result of intentional acts" and that, also, any "claim for negligent infliction of emotional distress is not covered" because the policy limits "coverage to injuries caused by accident." *Id.* at \*9.

Like the Auto-Owners policy, the Western Reserve policy at issue in *Fabbro* provided coverage for bodily injury or property damage caused by an "occurrence." *Fabbro*, \*8. "Occurrence," like incident, was defined as "an accident and includes repeated exposure to similar conditions." *Id.* The court held that the alleged discrimination and retaliation did not constitute an "occurrence" for insurance coverage purposes and that, accordingly, summary judgment was properly granted in favor of the insurer. See also *Wagner v. The Ohio Casualty Group*, Twelfth Dist. No. CA99-03-058, (Oct. 18, 1999 (court held that discrimination claims did not fall within the scope of insurance coverage); *Kings Pointe Apartments v. State Farm Fire and Cas. Co.*, 6th Cir. No.97-1140, (May 20, 1998) (summary judgment in favor of State Farm affirmed on appeal; court found that no insurance coverage available for pre-leasing housing discrimination claims).

WHEREFORE, for the reasons set forth above, the Court GRANTS Auto-Owners Motion for Summary Judgment as it pertains to the Dwelling Policy. The Court finds that Auto-Owners had no duty to defend or indemnify in the Underlying Lawsuit under the Dwelling Policy.

**b. Whether Auto-Owners had a duty to defend or indemnify under the Umbrella Policy.**

Auto-Owners also relies on the personal liability provision of the Umbrella Policy which provides:

We will pay on behalf of the insured the ultimate net loss in excess of the retained limit which the insured becomes legally obligated to pay as damages because of personal injury or property damage which occurs anywhere in the world.

See Umbrella Policy, Coverages at 3, attached to Plaintiffs' Complaint as Exhibit B. The Umbrella Policy defines "Personal Injury" as:

- (a) bodily injury, sickness, disease, disability or shock;
  - (b) mental anguish or mental injury;
  - (c) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; and
  - (d) libel, slander, defamation of character or invasion of rights of privacy;
- including resulting death, sustained by any person.

*Id.*, Definitions at 2.

Auto-Owners also refers to the "Exclusions" provision of the Umbrella Policy. The "Exclusions" provision provides:

We do not cover:

\* \* \*

- (d) Personal injury or property damage expected or intended by the insured.

\* \* \*

*Id.*, Exclusions at 4.

Upon due consideration, and for the same reasons as set forth above when addressing the Dwelling Policy, the Court finds that there is no available coverage under the Umbrella Policy considering that intentional acts and injuries are excluded under the policy and the alleged discrimination was intentional. *Id. Merrick, Fabbro, Wagner, and Kings Pointe Apartments. See also, McGuffin v. Zaremba Contr.*, 166 Ohio App.3d 142, 2006-Ohio-1734, 849 N.E.2d 315 (8th Dist.) (court held that there was no duty to defend or indemnify where underlying claims were based on intentional conduct and the umbrella policy excluded coverage for those personal injuries that were expected or intended); *Gillette v. St. Paul Guardian Ins. Co.*, 113 Ohio App.3d 564, 681 N.E.2d 944 (11th Dist.1996) (court held that intentional acts were excluded from coverage under the umbrella endorsement). Summary judgment in favor of Auto-Owners, as it pertains to the Umbrella Policy, is appropriate.

In finding that Auto-Owners is also entitled to summary judgment with respect to the Umbrella Policy, the Court notes that Plaintiff Paul Steigerwald is not an insured under said Policy. In fact, Steigerwald acknowledged at his deposition that he is not insured under the Umbrella Policy. *See Steigerwald Depo.* at 16. Because Steigerwald is not an insured under the Umbrella Policy, he would not be entitled to coverage under this Policy.

WHEREFORE, for the reasons set forth above, the Court GRANTS Auto-Owners Motion for Summary Judgment as it pertains to the Umbrella Policy.

In light of the aforementioned findings, Auto-Owners Motion for Summary Judgment is GRANTED and, accordingly, Plaintiffs' Motion for Partial Summary Judgment is DENIED.

**6. Defendants Church's Motion for Summary Judgment.**

Defendants Church assert that "[i]t is unclear what Plaintiff's claim is against Defendants Church based on paragraphs 2, 12, 13 and 14. Presumably, it is a breach of contract claim." *See Defendants Church's Motion for Summary Judgment* at 4. Defendants Church argue that, if a breach of contract claim is asserted, summary judgment is appropriate considering that "the contract of insurance in this case exists between Plaintiffs and Co-Defendant Auto-Owners." *Id.* It is asserted that "insurance agents are not liable for an insurance carrier's denial of coverage" and that, specifically, "[n]either Defendant The Church Agency, Inc. nor Defendant Mike Coudriet, as insurance *agents*, have any control over, and cannot be held liable for, the actions of Co-Defendant Auto-Owners in rejecting Plaintiffs' insurance claim." *Id.* at 5-6.

Plaintiffs assert that summary judgment in favor of Defendants Church would be inappropriate. The Plaintiffs explain that "IF Auto Owners prevails on any of its claims, and IF same is due to any actions or inactions of The Church Agency and Coudriet (i.e., their decision to NOT immediately submit the claim to Auto Owners, their decision to not immediately submit the claim to Auto Owners under the Umbrella Policy), then there would clearly be liability on The Church Agency and Coudriet for the same." *See Plaintiffs' Response to Motions for Summary Judgment of Defendants and Reply Brief* at 8-9.

As set forth above, the Court finds that Auto-Owners did not owe a duty to defend or indemnify under the terms of the Dwelling and Umbrella Policies. This finding is based upon the contractual language of the insurance policies and is not premised upon any action or inaction of Defendants Church. Accordingly, the Court finds that Defendants Church are also entitled to summary judgment.

To the extent that Plaintiffs' claims against Defendants Church are based upon a breach of contract, the Court further finds that summary judgment is appropriate considering that the contracts existed between Plaintiffs and Auto-Owners, not Plaintiffs and Defendants Church. Insurance agents are not liable for a breach of contract where the agent enters into the contract on behalf of the principal, especially where the principal is disclosed. See *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. No. 07CA009186, 2008-Ohio-1463, ¶12, citing *Castillo v. Associated Pathologist, Inc.*, 6th Dist. No. L-06-1076, 2006-Ohio-6459, ¶22 ("It is settled law in Ohio that where an agent enters into a contract on behalf of a disclosed principal, the agent is not personally liable for that contract so long as he is acting within the scope of his authority and acting in the name of the principal.") See also *Newsome v. Putnam, et al.*, Tenth Dist. Nos. 87AP-1226, 88AP-04, \*9, (June 28, 1988) (court found that summary judgment in favor of insurance agent was appropriate, even though agent had "clearly erred," because an agent cannot be held liable for breach of the insurance agreement when acting on behalf of the insurance carrier); *Roseberry v. GRE*, 10th Dist. No. 92AP-1544, \*13, (June 22, 1993) (in granting summary judgment in favor of the defendant insurance agents, the court held that the agents could not be liable for the insurer's denial of coverage "[s]ince [the agents] did not insure plaintiffs, any damages for failure to perform the insurance contract are recoverable against [the insurer], not [the agents].")

ACCORDINGLY, for the reasons set forth above, the Court GRANTS Defendants Church's Motion for Summary Judgment.

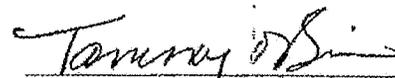
#### CONCLUSION

Upon due consideration of the parties' briefs, the facts of this matter, Civ.R. 56(C), and applicable law, the Court;

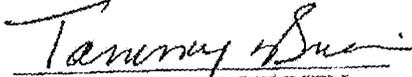
1. DENIES Plaintiffs' Motion for Partial Summary Judgment;
2. GRANTS Auto-Owners' Motion for Summary Judgment; and
3. GRANTS Defendants Church's Motion for Summary Judgment.

All claims in this litigation have been addressed and ruled upon. Accordingly, this is a final appealable order and there is no just cause for delay.

IT IS SO ORDERED.

  
JUDGE TAMMY O'BRIEN

Pursuant to Ohio Civ.R. 58(B), the Clerk of Courts shall serve upon all parties notice of this judgment and its date of entry on the Journal.

  
JUDGE TAMMY O'BRIEN

Attorney Thomas C. Loepf  
Attorneys Brian T. Winchester/Dawn E. Snyder  
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