ORIGINAL

IN THE SUPREME COURT OF OHIO

STEVE GRANGER, et al.	)	Case No. 13-1527
	)	
Appellees	)	
	)	
vs	)	
	)	
AUTO-OWNERS INS. CO., et al.	)	
	)	
	)	
	)	
Appellants	)	
	)	

MERIT BRIEF OF APPELLANTS GRANGER AND STEIGERWALD

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STATUTES

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MISC.

Black's Law Dictionary . . . . . .

STATEMENT OF FACTS

Appellees agree with the majority of the Statement of Facts as stated by the Appellants. However, the Appellees do wish to correct the tenor of how such were presented by the Appellants.

Mr. Granger and Mr. Steigerwald never knew that it was illegal and discriminatory to not rent to persons with children. That is, Mr. Granger and Mr. Steigerwald did not intend to discriminate against Ms. Kozera, or against anyone else, for that matter.

As to the timing of turning over the underlying suit to Auto-Owners, the delay was caused by co-Appellees, The Church Agency and Mike Coudriet. Mr. Granger gave all of the information to the agency and Mr. Coudriet as to the suit; Mr. Coudriet and the agency chose when and who to contact relevant to same.

ARGUMENT

Response to Proposition of Law No. I:

"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." *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, ¶ 18. It is well settled that in Ohio, words in an insurance contract which are not defined therein are read according to their ordinary meaning unless there is an ambiguity. *Gomolka V. State Auto Mut Ins. Co.* , 70 Ohio St.2d 166 (1982); *Olmstead v Lumbermens Mut. ins. Co.,* 22 Ohio St.2d 212 (1970); *Taulbee v. The Travelers Companies,* 42 Ohio App.3d 209, 211 (1987); *Aetna Cas. & Sur Co. v. Roland,* 47 Ohio App.3d 93, 95 (1988). "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." *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." *Id.* (Emphasis added.)

> 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. (Emphasis added.)

Cincinnati Ins. Co. v. CPS Holdings, Inc., 115 Ohio St.3d 306, 2007-Ohio-4917, ¶ 5. 5

"[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." (Emphasis added.) *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." (Emphasis added.) *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.

Where words in the policy have a plain or ordinary meaning, a court may not construe the words differently. *Roland*; citing *Olmstead*. In determining the plain meaning of an insurance contract, the contract should be read as a whole and each word given its appropriate meaning, if possible. *Burdett Oxygen Co. of Cleveland Inc. v. Employers Surplus Lines Ins. Co.*, 419 F.2d 247,

248 (C.A. 6 1969), citing *Farmers' Nat'l. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309 (1911). Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer. *Faruque v. Provident Life & Acc. Ins. Co.*, 31 Ohio St.3d 34, syllabus (1987); *Hutchinson V. J C. Penney Cas. Ins. Co.*, 17 Ohio St.3d 195, paragraph one of the syllabus (1987), approving and following *Buckeye Union Ins. Co. v Price*, 39 Ohio St.2d, 95, syllabus (1974).

The pertinent policy provisions state:

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. (Emphasis added.)

The Court of Appeals correctly noted that Auto-Owners chose to define "personal injury" "both in terms of certain claims, such as malicious prosecution, and in terms of resulting harms, such as humiliation or mental anguish." *Granger v. Auto Owners Ins.*, 2013-Ohio-2792.

In the courts below, Auto-Owners claimed that the underlying claims of Ms. Kozera did not fall into its definition of "personal injury," and if it did, then its "expected or intended" exclusion would exclude all coverage for such claims, "because Mr. Granger intended to discriminate." *Id.*

Now, before this Court, Auto-Owners has abandoned its unsupportable claim that Ms. Kozera's claims for emotional distress were not, arguably, "humiliation" under the policy. The Court of Appeals found such to be clear, looking to Black's Law Dictionary to define "emotional distress."

Here, Auto-Owners now claims that the doctrine of "inferred intent" bars coverage and its defense obligations. In support of its disingenuous claim, Auto-Owners cites this Court to a litany of cases involving such acts as sexual molestation, aggravated murder, and firearms usage. Auto-Owners goes on to claim that this Court can infer intent, "based in part on finding that [such] conduct was substantially certain to result in harm." *Allstate Ins. vs. Campbell*, 128 Ohio St.3d 186, 188 (2010).

In *Campbell*, this Court limited this doctrine to situations where the "insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm." Thereafter, this Court remanded the matter back to the trial court to determine whether the boys (insureds) intended or expected the harm that resulted from their intentional actions (placing a Styrofoam deer in the roadway). *Id.* at 199.

The Ninth District Court of Appeals correctly considered this Court's decision in *Campbell*, and applied same.

> 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.")

The court of appeals found that Auto-Owners had not met its burden of showing that Mr. Granger had expected or intended Ms. Kozera to be humiliated by his conduct. That is the pertinent question; that is the applicable policy language.

Additionally, as argued in both courts below by Mr. Granger, a plaintiff in a housing discrimination lawsuit need not prove intent in order to prevail. See R.C. 4112.02(H)(4); *Secretary, U.S. Department of Housing and Urban Development v. Godlewski* (July 6, 2007) HUDALJ No. 07-034-FH. Intent was not alleged in the underlying lawsuit. Intent was not a necessary element in the underlying claims. And, there was no evidence that Mr. Granger intended to injure anyone. In fact, in his affidavit, Mr. Granger testified that he did not intend to discriminate against Ms. Kozera, or anyone else. He did not know the law. He thought that it was legal to not rent to families with children.

Consistent with this Court's remand in *Campbell*, Mr. Granger has already provided this ample evidence to the courts below demonstrating that he neither intended or expected any injury

from his misconduct (telling Ms. Kozera and others that he and Mr. Steigerwald would not rent to families with children).

Response to Proposition of Law No. II:

In its second proposition, Auto-Owners claims that there was no coverage and no defense owed since Ms. Kozera did not specifically make a claim for "emotional distress" or "humiliation." Such argument is without any merit; such argument is spurious; and, such argument flies in the face of decades of decisions from this Court and other courts of this state.

As set forth above, if there is arguably coverage under the policy, then the insurer owes a duty to defend against the claim. Additionally, as this Court held in *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, the duty to defend can arise at a later date, subsequent to the filing of the complaint. *Id.* at 179.

In its brief, Auto-Owners attempts to focus this Court on the fact that Ms. Kozera did not specifically state a claim for "humiliation" or "emotional distress." First, as this Court is well aware, there is no such tort/claim/cause of action as one for humiliation or even emotional distress (as opposed to the tort of intentional infliction of emotional distress).

Second, there is nothing in the policy itself which mandates that coverage only arises when a party plaintiff correctly and exactly states a claim/cause of action in the very same words as are found in Auto-Owners' policy. Auto-Owners drafted the insurance policy. Accordingly, Auto-Owners held the absolute power in drafting the policy to:

1. Define any words included within its policy including the word "humiliation,"
2. To include or exclude such term from its policy (many other such policies do not include the term "humiliation" in their definition of "personal injury", and

3. To exclude all claims for housing discrimination, whether the offender intends or does not intend to harm/discriminate.

All ambiguities must be construed against the drafter–Auto-Owners--and in favor of the insured--in favor of coverage. Here, Auto-Owners chose not to do any of the above. Taking Auto-Owners' argument to its most logical conclusion, then Auto-Owners has now admitted that its policy language is ambiguous.

Third, as the court of appeals correctly stated: "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." *Granger, supra.* Auto-Owners chose the language, and as such, must be assumed to have intended the language (every word in the policy) to have meaning. (In determining the plain meaning of an insurance contract, the contract should be read as a whole and each word given its appropriate meaning, if possible *Burdett Oxygen Co. of Cleveland Inc. v. Employers Surplus Lines Ins. Co.* (C.A. 6 1969), 419 F.2d 247, 248, citing *Farmers' Nat'l. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309.) Otherwise, Auto-Owners accepted premiums without any real intention to live up to its half of the bargain.

Finally, Auto-Owners claims that Ms. Kozera could not have obtained emotional distress or humiliation damages since her damages were limited to her actual damages. Of course, in so making such argument– consistent with its failure to define such terms as "humiliation" within its insurance policy– Auto-Owners neglects to inform this Court that humiliation/emotional distress damages are included in such. See *HUD v. Blackwell, Fair Housing - Fair Lending (P-H)* para. 25,001 at p. 25,005 (HUDALJ No. 04-89-0520-1, Dec. 21, 1989), aff'd, 908 F.2d 864 (11th Cir. 1990) , wherein it was held that damages under the Fair Housing Laws include damages for embarrassment,

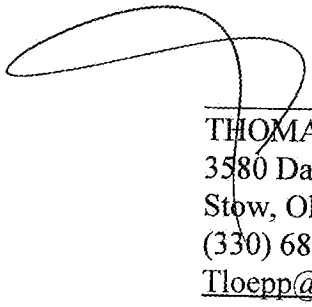
humiliation and emotional distress caused by acts of discrimination. In her complaint, Ms. Kozera claimed that Mr. Granger's acts caused her emotional distress. Likewise, in her response to interrogatories, she, again, stated such. (See response to interrogatory numbers 8 and 16, and mediation statement at page 5.)

CONCLUSION

Auto-Owners charged Mr. Granger for the coverage it sold to Mr. Granger. In exchange for Mr. Granger's premium payments, Auto-Owners promised to provide coverage and defend Mr. Granger in certain situations. There is no language in the policy which states that Auto-Owners may choose not to defend Mr. Granger should Auto-Owners decide that, although it contracted to provide certain coverage, it found such coverage and defense to be against some public or other policy not found in the insurance policy.

All insurers, including Auto-Owners, must be held to the terms contained in their policies of insurance. This is simple, clear contract law. The court of appeals recognized this Court's decision in *Campbell.*

Respectfully submitted,
MAISTROS & LOEPP, LTD.



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CERTIFICATE OF SERVICE

A copy of the foregoing documents was sent on March 31, 2014 via regular U.S. Mail upon:

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