

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

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

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RECEIVED  
APR 21 2014  
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FILED  
APR 21 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## INTRODUCTION

This Honorable Court accepted jurisdiction to review the appeal in this matter on two Propositions of Law which are as follows:

**Proposition No. 1: 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 No. 2: 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.**

Appellants, Owners Insurance Company (“Owners”) and Auto-Owners (Mutual) Insurance Company (“Auto-Owners”) have presented its arguments to this Court in its Merit Brief. In response, Appellees Steve Granger (“Granger”) and Paul Steigerwald (“Steigerwald”) have now argued that Owners and Auto-Owners owed a duty to defend and/or indemnify on the underlying discrimination claims against Granger and Steigerwald because they were ignorant of the law and in spite of the fact that the underlying claimant did not allege any damages within the scope of the applicable liability coverage. Owners and Auto-Owners respond accordingly in the instant Reply Brief to the arguments raised by Appellees.

## STATEMENT OF FACTS

Although Granger and Steigerwald acknowledged the accuracy of the Statement of Facts presented by Owners and Auto-Owners, they somehow object to the “tenor” of how the facts were presented to this court. Granger and Steigerwald further argue that they were ignorant of the law and did not intend to discriminate. In spite of the clear record in this matter, wherein Granger specifically communicated to the underlying claimant Valorie Kozera (“Kozera”) that he would not rent the property to anyone with children, Appellees attempt to argue that any

allegation of late notice and delay in tendering the underlying lawsuit to Auto-Owners was the fault of the Co-Defendant-Appellees, the Church Agency and Mike Coudriet. Those are not relevant or pertinent facts for the issues in the instant appeal and any issue of late notice can be addressed at the appropriate time if necessary.

### LAW AND ARGUMENT

**Proposition of Law No. 1: 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.**

Appellees do not contest the validity of the intentional acts exclusion under the policy which states 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.

Appellees also recognize the validity of the doctrine of inferred intent as recognized repeatedly by this Court in the cases of *Preferred Risk Ins. Co. v Gill*, 30 Ohio St.3d 108, 507 N.E.2d 1118, (1987); *Physicians Ins. Co. v. Swanson*, 58 Ohio St.3d 189, 569 N.E.2d 906, (1991); *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36, 665 N.E.2d 1115, (1996); *Buckeye Union Ins. v. New Eng. Ins. Co.*, 87 Ohio St.3d 280, 720 N.E.2d 495, (1999); and *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, 942 N.E.2d 1090.

Where Appellants and Appellees differ is whether or not the inferred intent doctrine applies to the claims asserted in this matter. In support of this argument, Appellees rely on their own claimed ignorance to attempt to manufacture insurance coverage where none exists. Appellees go so far to state as follows in their brief:

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.

The problem with Appellees' position is that it is contrary to over a century of Ohio case law.

The general proposition that every one is presumed conclusively to know the law, and that ignorance or mistake of law, will not constitute a defense or excuse for an unlawful act, is recognized in civil as well as criminal jurisprudence. 1 McClain's Criminal Law, sec. 132, and cases cited.

*State of Ohio v. Bair*, 71 Ohio St. 410, 411, 73 N.E. 514, (1905)

In *Bair*, the Supreme Court of Ohio reviewed an issue addressing the alleged misconduct of two commissioners of Sandusky County in a criminal prosecution. The *Bair* court stated that ignorance is no defense, and this is still the case today.

As this Court also previously stated:

It is true that in *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228, which addressed a registration ordinance for felons that carried criminal penalties, the United States Supreme Court carved out an exception to the "ignorance of the law is no excuse" maxim, stating that "notice is required in a myriad of situations where a penalty\*\*\*might be suffered for a mere failure to act." *Id.* at 228, 78 S.Ct. 240, 2 L.Ed.2d 228. But that exception addressed a situation in which a person did take action. Also, in certain cases involving violations of tax laws, courts have concluded that the jury must find that the defendant was aware of the specific provision of the tax code the defendant was charged with violating where "highly technical statutes presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan v. United States* (1998), 524 U.S. 184, 194, 118 S.Ct. 1939, 1947, 141 L.Ed.2d 197. The TCPA is neither a criminal nor a highly technical statute and thus ignorance of the law is no defense. Although the evidence established that Ryan did not intend to violate any law, proof of such intent is not necessary.

*Charvat v. Ryan*, 116 Ohio St.3d 394, 399, 2007-Ohio-6833 at ¶¶16-17, 879 N.E.2d 765.

Likewise, the Fair Housing Statutes that Granger and Steigerwald violated are not overly complex, they simply prohibit a landlord from discriminating on the basis of familial status. Appellees' arguments clearly support Appellants' Proposition of Law No. 1 that Ohio's courts require guidance on the application of the inferred intent doctrine when the harm is inextricably intertwined with the conduct. There is no dispute that Granger intended to exclude Valerie Kozera and others with children from his rental premises in violation of law. The harm is neither remote nor contingent, it occurs immediately without regard to the claimed subjective lack of intent of Steve Granger and his claimed ignorance of the law.

**Proposition of Law No. 2: 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.**

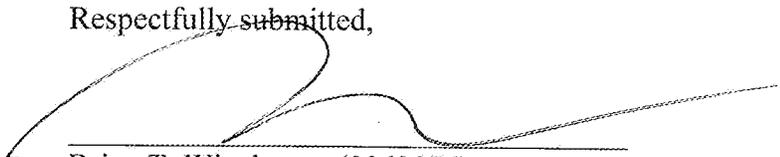
Ms. Kozera's lawsuit failed to plead a claim for humiliation or emotional distress and her prayer for relief failed to include a recovery for "humiliation" or "emotional distress". The duty to defend can only be triggered by affirmatively pleading actual facts to support a covered claim. Mere inferences to potentially recoverable damages, in the absence of pleadings to support the underlying claim, are insufficient to trigger coverage. See *Motorist Mut. Ins. Co. v. Trainor*, 33 Ohio St.2d 41, 294 N.E.2d 874, (1973), ¶2 of syllabus. The test of the duty to defend is not whether a theory of recovery within the policy coverage could be pleaded, the test is whether the theory of recovery within the policy coverage has, in fact, been pleaded. Appellees also contend that a claim for emotional distress and the corresponding damages are intertwined within a lawsuit for fair housing violations. See *HUD v. Blackwell*, 908 F.2d 864, 1990 US App. LEXIS

13550. However, in reviewing *Blackwell*, it addressed a direct action brought by the United States Department of Housing and Urban Development, not a private individual claim under 42 USC 3613. The question presented in this case is whether or not the duty to defend Granger and Steigerwald was triggered by the facts alleged in Ms. Kozera's complaint. The clear answer is No. The duty to defend can only be triggered by actual facts pled, not mere inferences to potentially recoverable damages.

### CONCLUSION

WHEREFORE, based upon the foregoing facts and authorities as well as those set forth in the Merit Brief of Appellants, Owners Insurance Company and Auto-Owners (Mutual) Insurance Company, it is respectfully request that this Honorable Court render its decision on the merits and find the defense and indemnification claims of Granger and Steigerwald barred because no covered claims were pled in Ms. Kozera's complaint. Appellants further request that his Honorable Court find that the doctrine of informed intent applies to the Appelleess' conduct in violation of the Fair Housing Act and bars Granger and Steigerwald from asserting a legally valid claim for defense or indemnification under the applicable policies of insurance.

Respectfully submitted,



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**PROOF OF SERVICE**

A copy of the foregoing has been served via regular U.S. Mail, postage prepaid, this 16<sup>th</sup>

day of April, 2014 to the following:

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