[Cite as *Am. Family Ins. Co. v. Roach*, 2009-Ohio-4532.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AMERICAN FAMILY INSURANCE COMPANY

Plaintiff-Appellee

-vs-

BRIAN N. ROACH

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2008CA00181

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2006CV04491

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 31, 2009

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, J.

{¶1} Defendant-appellant Brian N. Roach appeals the August 14, 2008 Judgment Entry of the Stark County Court of Common Pleas granting summary judgment in favor of Plaintiff-appellee American Family Insurance.

STATEMENT OF THE CASE

{¶2} Appellee American Family Insurance Company (hereinafter "American Family") issued a Business Owners Policy (hereinafter the "Policy") of insurance to Brian Roach dba Innovative Future LD. The Declarations page identifies the named insured as "BRIAN ROACH DBA INNOVATIVE FUTURE LD," and further identifies the Form of Business as "INDIVIDUAL." Innovative Future is a real estate holding company.

{¶3} Section II of the Policy reads, in pertinent part:

{¶4} "A. Coverages

{¶5} "1. Business Liability

{¶6} "a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury', 'property damage' or 'personal and advertising injury', to which this insurance does not apply..."

{¶7} Section (b)(2) reads:

{¶8} "This insurance applies:

{¶9} ***

{¶10} "(2) To 'personal and advertising injury' caused by an offense arising out of your business, but only if the offense was committed in the 'coverage territory' during the policy period."

{¶11} The Policy lists as "Exclusions", in pertinent part,

{¶12} "1. Applicable to Business Liability Coverage

{¶13} "This insurance does not apply to:

{¶14} ***

{¶15} "p. Personal and Advertising Injury

{¶16} " 'Personal and advertising injury':

{¶17} "(1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury';

{¶18} "(2) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

{¶19} "***

{¶20} "(5) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;

{¶21} "(6) Arising out of a breach of contract, except an implied contract to use another's advertising idea in your 'advertisement';"

{¶22} The Policy defines "Personal and advertising injury" as

{¶23} "14. 'Personal and advertising injury' means injury, including consequential 'bodily injury', arising out of one or more of the following offenses:

{¶24} "***

{¶25} "d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;"

{¶26} Paragraph C of Section II defines an "insured" as:

{¶27} "1. If you are designated in the Declarations as:

{¶28} "a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner."

{¶29} On June 30, 2006, AultCare Corporation filed a complaint in the Stark County Court of Common Pleas, case number 2006 CV 2407, alleging Appellant "impugned and disparaged" AultCare Corporation in his comments published on the Canton Repository website in October of 2004. As a result of the statements, AultCare alleged damage to its reputation in the community and its patients and customers causing serious financial harm.

{¶30} The complaint further alleges Appellant, a former employee of AultCare, filed a lawsuit against AultCare in 1997. The case was settled, and Appellant executed a confidential written settlement agreement, prohibiting Appellant from, among other things, disparaging AultCare or promoting the filing of lawsuits against the company.

{¶31} On November 20, 2006, Appellee American Family Insurance Company filed a complaint in the Stark County Court of Common Pleas seeking a judicial determination American Family owes no duty to defend, indemnify, or otherwise provide coverage to Appellant for any and all allegations stemming from or arising out of the

underlying lawsuit. Appellant concedes the statements were not made as part of his business with Innovative Future.

{¶32} On May 10, 2007, American Family filed a motion for summary judgment as to their duty to defend Appellant in the underlying lawsuit. Via Judgment Entry of August 14, 2008, the trial court granted summary judgment in favor of American Family finding no duty to defend or indemnify Appellant in the underlying action.

{¶33} Appellant now appeals, assigning as error:

{¶34} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BECAUSE IT FAILED TO PROPERLY APPLY THE SUMMARY JUDGMENT STANDARD AND FAILED TO CONSTRUE THE EVIDENCE MOST FAVORABLY TO APPELLANT.

{¶35} "II. AMERICAN'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE THE FACTS IN THE UNDERLYING ACTION REGARDING WHETHER APPELLANT DISPARAGED AULTCARE WERE IN DISPUTE AND UNDECIDED, AND ANY DECISION ON AMERICAN'S DUTY TO DEFEND AND INDEMNIFY WAS PREMATURE.

{¶36} "III. AMERICAN'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE INSURANCE COVERAGE UNDER THE POLICY DOES NOT APPLY SOLELY TO INNOVATIVE FUTURE LTD.

{¶37} "IV. AMERICAN'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE AMERICAN CANNOT RELY ON AN EXCLUSION FOR 'CONTRACTUAL LIABILITY' TO AVOID DEFENSE AND INDEMNITY.

{¶38} "V. AMERICAN'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE AMERICAN OWES AT LEAST A DUTY TO DEFEND

THE UNDERLYING ACTION BECAUSE IT INCLUDES ‘PERSONAL AND ADVERTISING INJURY.’”

I

{¶39} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, an appellate court conducts a de novo review of a trial court's summary judgment. See, e.g., *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, appellate courts independently review the record to determine whether summary judgment is appropriate and need not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted summary judgment, an appellate court must review the Civ.R. 56 standard as well as the applicable law.

{¶40} Civ.R. 56(C) provides:

{¶41} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion

is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶42} Thus, a trial court may not grant summary judgment unless the evidentiary materials demonstrate that: (1) no genuine issue as to any material fact remains to be litigated; (2) after the evidence is construed most strongly in the nonmoving party's favor, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

{¶43} When a complaint alleges a claim that could potentially be covered by an insurance policy, the duty to defend arises. *Cincinnati Ins. Co. v. CPS Holdings, Inc.* (2007), 115 Ohio St.3d 306. However, an insured is not obligated to defend a claim "clearly and indisputably outside the contracted policy coverage." Id. American Family filed the within action to determine whether American Family owed a duty to defend, indemnify, or otherwise provide coverage to Appellant for any and all allegations stemming from the underlying lawsuit. An insurance policy is a contract whose interpretation is a matter of law. Id.

{¶44} Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208. However, where the intent of the parties to a contract is evident from the clear and unambiguous language used, a court must not read into the contract a meaning not contemplated or placed there by an act of the parties to the contract. *Gomolka v. State*

Auto Mut. Ins. Co. (1982), 70 Ohio St.2d 166. Additionally, exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657.

{¶45} In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219-220, 2003 Ohio 5849, the Ohio Supreme Court held,

{¶46} "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.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898, citing *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus. See, also, Section 28, Article II, Ohio Constitution. 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.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, 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.* (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146, 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.* (Tex.2000), 22 S.W.3d 417, 423."

{¶47} The June 30, 2006 complaint filed by AultCare against Appellant alleges Brian Roach, a former employee of AultCare, breached a January 12, 2000 settlement

agreement between himself and AultCare, impugning and disparaging AultCare by posting comments on the website of the Canton Repository.

{¶48} Specifically, Roach published to the website on October 21, 2004,

{¶49} Story: Insurance fee probe widens

{¶50} Name: Brian Roach

{¶51} Hometown: North Canton

{¶52} "Comment: This story has a local connection that has failed to make the Canton Repository. AultCare and the Aultman Heath Foundation have paid similar, more excessive, "conversion fees" to local brokers under a similar arrangement. I find it interesting the Repository has not picked up on the story run in a competing paper and a national healthcare publication. Could it be because the Repository has an employee on the Aultman Board? Could it be because the Foundation and its related entities spend thousands and thousands of dollars on advertising in The Rep? Or is it simply poor reporting?

{¶53} "This story, and its local link, is not going away. Civil suits have been filed locally and as the practice becomes more widely known, I am sure more civil suits will follow"

{¶54} On October 29, 2004, Roach published on the website:

{¶55} "Story: Marsh & McLennan settlement could be higher than $500M. Spitzer says

{¶56} "Name: Brian Roach

{¶57} "Hometown: North Canton

{¶58} "Comment: When is the Repository going to print the local story involving AultCare, Aultman Health Foundation and local brokers? Millions in 'kickbacks' have been paid to local brokers by Aultman Health Foundation under their 'conversion' program which is essentially the exact type of payment and conflict driving the Marsh & McLennan case."

{¶59} As stated in the Statement of the facts and case, supra, the Declarations page of the American Family policy lists "BRIAN ROACH DBA INNOVATIVE FUTURE LD" as the named insured. It is clear from the policy language the intent of the parties was to insure the business activities and operations of Brian Roach relative to Innovative Future. The evidence demonstrates the posted comments did not relate to any business of Innovative Future, a real estate holding company; rather, Brian Roach was acting in his individual personal capacity unrelated to Innovative Future.

{¶60} Accordingly, the trial court did not err in finding there is no genuine issue of material fact, and American Family is entitled to judgment as a matter of law.

II, III, IV, V

{¶61} Appellant's remaining assignments of error are overruled as moot.

{¶62} The August 14, 2008 Judgment Entry of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman ___________________
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin _______________________
HON. W. SCOTT GWIN

s/ John W. Wise________________________
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AMERICAN FAMILY INSURANCE COMPANY	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BRIAN N. ROACH	:	
Defendant-Appellant	:	Case No. 2008CA00181

For the reasons stated in our accompanying Memorandum-Opinion, the August 14, 2008 Judgment Entry of the Stark County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman ___________________
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin _______________________
HON. W. SCOTT GWIN

s/ John W. Wise________________________
HON. JOHN W. WISE