[Cite as *Imhoff v. Encompass Ins.*, 2010-Ohio-2760.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
RICHARD W. IMHOFF, EXECUTOR	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-AP-09-0048
ENCOMPASS INSURANCE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2007CV110482
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	June 15, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JAMES A. HOFELICH HOFELICH & HOFELICH, LPA 29550 Detroit Avenue Westlake, OH 44145	EDWIN J. HOLLERN HOLLERN & ASSOCIATES 77 North State Street Westerville, OH 43081

Gwin, P.J.

{¶1} Defendant-appellant Encompass Insurance appeals a summary judgment of the Court of Common Pleas of Tuscarawas County, Ohio, granted in favor of plaintiff-appellee Richard W. Imhoff, Executor of the Estate of Kenneth L. Imhoff, deceased. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT.

{¶3} "II. THE TRIAL COURT ERRED WHEN IT AWARDED ATTORNEY'S FEES FOR WORK NOT RELATED TO THE DEFENSE OF IMHOFF IN THE UNDERLYING TORT ACTION."

{¶4} It appears from the record appellee's decedent was a resident of Alterra Clare Bridge Nursing Home. Appellees decedent suffered from Alzheimer's disease, dementia, and depression with psychosis. Two other residents of the nursing home sued the decedent, alleging he physically and sexually assaulted them.

{¶5} Appellant Encompass Insurance had issued a homeowner's insurance policy for decedent. Appellee asked Encompass Insurance Company to defend and indemnify the decedent in the lawsuit. Encompass Insurance denied coverage based on an exclusion in the policy, and did not defend decedent. Appellee states he hired private counsel and incurred legal expenses in defending the underlying case.

{¶6} Civ. R. 56 states in pertinent part:

{¶7} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of

evidence, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶8} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶9} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶10} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶11} Insurance policies are contracts and their interpretation is a matter of law for the court. *City of Sharonville v. American Employers Insurance Company,* 109 Ohio St. 3d 186, 187, 2006-Ohio-2180, 846 N.E. 2d 833, at paragraph 6, citing *Alexander v. Buckeye Pipeline Company* (1978), 53 Ohio St. 2d 271, 374 N.E. 2d 146, paragraph 1 of the syllabus. Insurance coverage is determined by reasonably construing the contract in conformity with the intention of the parties, as interpreted from the ordinary and commonly understood meaning of the language employed. *King v. Nationwide Insurance Company* (1988), 35 Ohio St. 3d 208, 211, 519 N.E. 2d 1380. If a provision of a contract of insurance is susceptible to more than one interpretation, its provisions will be construed strictly against the insurer and liberally in favor of the insured. *King,* supra, syllabus. However, this rule does not apply if it results in an unreasonable interpretation of the words of the policy. *Westfield Insurance Company v. Galatis,* 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E. 2d 1256, paragraph 14, citing *Morfoot v. Stake* (1963), 174 Ohio St. 506, 2300 2d 144, 190 N.E. 2d 573.

I.

{¶12} In its first assignment of error, appellant argues the trial court erred in granting the motion for summary judgment. Appellant argues the exclusion in its insurance policy bars appellee's recovery for the alleged acts of rape and non-consensual sex, regardless of decedent's mental state.

{¶13} The clause in question states:

{¶14} "LOSSES WE DO NOT COVER is amended as follows:

{¶15} "1.h Intended by or which may reasonably be expected to result from the intentional acts or omission of one or more covered persons. This exclusion applied even if

{¶16} "(1) Such covered person lacks the metal capacity to govern his or her conduct;

{¶17} "(2) Such bodily injury or property damage is a different kind or degree than that intended or reasonably expected; or

{¶18} "(3) Such bodily injury or property damage is sustain by a different person than intended or reasonably expected."

{¶19} "The following exclusions. 1.o and1.p are added:

{¶20} "1.o arising out of sexual molestation, corporal punishment or physical or mental abuse.

{¶21} "1.p resulting from criminal acts or omissions of or at the direction of one or more covered persons. This exclusion applies even if:

{¶22} "(1) Such covered person lacks the mental capacity to govern his or her conduct;

{¶23} (2) Such covered person is not actually charged with or convicted of a crime."

{¶24} Appellee cites *Nationwide Insurance Company v. Estate of Kollstedt,* 71 Ohio St. 3d 624, 1995-Ohio-245, 646 N.E. 2d 816, as authority for the proposition the above provision of the policy was unenforceable.

{¶25} In *Kollstedt,* the Ohio Supreme Court held: "(1) A provision in a liability insurance policy which excludes coverage to an insured where the insured expected or intended to cause bodily injury or property damage does not apply under circumstances where the insured was mentally incapable of committing an intentional act." Syllabus by the court, paragraph 1.

{¶26} In *Kollstedt,* the defendant was charged with murder, but was found incompetent to stand trial because he suffered from a severely disabling psychotic illness diagnosed as primary degenerative dementia of the Alzheimer's type, senile onset, with delirium. The policy he sought to recover from excluded bodily injury or property damage "which is expected or intended by the insured." The Supreme Court did not find this clause is contrary to public policy or unenforceable, but only held if the insured cannot form the intent, then the language in the intentional act clause is not applicable.

{¶27} Appellant argued to the trial court the insurance industry modified the language in its coverage exclusions in response to the *Kollstedt* decision.

{¶28} We find *Kollstedt* is clearly distinguishable on the essential facts, namely, the language of the policy. We find the policy is not ambiguous, and giving the contract terms their plain and ordinary meaning, this exclusion specifically denies coverage for

the decedent's alleged actions. Further, in construing the contract in conformity with the intention of the parties, we find parties to the contract cannot expect coverage for intentional torts or criminal acts. In addition, in this context, as appellant asserts, the insurance policy covers negligent acts and accidents, and the alleged behavior of the deceased cannot reasonably be considered either.

{¶29} We find the trial court erred in construing the policy language to provide coverage under these circumstances. We find the trial court erred in granting appellee's motion for summary judgment and overruling appellants.

{¶30} The first assignment of error is sustained.

II.

{¶31} In its second assignment of error, appellant argues the trial court improperly computed the damages. In light of our decision in I, supra, we find this assignment of error is moot.

{¶32} The second assignment of error is overruled.

{¶33} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

_____

HON. JOHN W. WISE

WSG:clw 0604

[Cite as *Imhoff v. Encompass Ins.*, 2010-Ohio-2760.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

RICHARD W. IMHOFF, EXECUTOR	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ENCOMPASS INSURANCE	:	
Defendant-Appellant	:	CASE NO. 09-AP-0048

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to appellee.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE