[Cite as *Konik v. Motorists Mut. Ins. Co.*, 2010-Ohio-1452.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

CHELSEY E. KONIK, A MINOR, BY AND THROUGH HER NEXT BEST FRIEND, DENISE J. KONIK, et al.,	:	**O P I N I O N**
		CASE NO. 2009-P-0019
Plaintiffs-Appellants,	:	
- vs -	:	
MOTORISTS MUTUAL INSURANCE COMPANY, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2007 CV 0441.

Judgment: Reversed and Remanded.

Nicholas A. Papa, Chagrin Executive Offices, 305 Chagrin Executive Commons, 29325 Chagrin Boulevard, Pepper Pike, OH 44122 (For Plaintiffs-Appellants).

Merle D. Evans, *III.*, Day Ketterer LTD., Millennium Centre, #300, 200 Market Avenue North, Canton, OH 44701-4213 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Chelsy E. Konik, et al. ("Koniks"), appeal from the judgment entered by the Portage County Court of Common Pleas awarding summary judgment in favor of appellee, Motorists Mutual Insurance Company ("Motorists"). At issue is whether, as a matter of law, a provision in the insurance policy issued by appellee operates to exclude coverage for injuries sustained as a result of a bite from a vicious

dog as defined by R.C. 955.11. For the reasons discussed below, we reverse and remand.

{¶2} On April 29, 2003, an 80-90 pound dog owned by Michael and Karen Kordiac ("Kordiacs") attacked and bit Jacob Sexton, an eight-year-old neighbor of the Kordiacs. The bite left two puncture wounds on the young boy's right buttock and scratches on his back. While the wounds completely healed, the bite marks left scars. Melissa Sexton, Jacob's mother, did not press charges, but insisted on filing a police report "in case of future incidents."

{¶3} Chelsy Konik ("Chelsy") who was five years-of-age in November of 2004, was friends with Heather Kordiac ("Heather"), the Kordiacs young daughter. The girls regularly spent time together at both the Konik and Kordiac homes. By late 2004, Denise Konik ("Denise"), Chelsy's mother, had known the Kordiacs for about two years. Denise was aware that the Kordiacs had a dog and testified the animal was kept unleashed, in an attached garage. Denise testified she had never observed the animal inside the house or outside in the Kordiacs yard; nor had she witnessed Chelsy or the Kordiac children pet or approach the animal. Denise maintained, however, she was never warned about the dog, let alone told that the animal had previously attacked a child.

{¶4} On November 23, 2004, Chelsy had spent the night with Heather at the Kordiacs' residence. The next morning, Denise arrived at the Kordiacs to pick Chelsy up from the sleepover. Denise testified that, even though they had a front door, the Kordiacs utilized a side access door in their garage as the main means of ingress and egress to the outside. She explained that an individual would enter the garage from the

outside through a side entrance door, proceed through the garage, walk up two steps, and finally enter the kitchen through an additional door. Denise testified she knocked on the garage's side access door and the dog began to bark. Karen Kordiac ("Karen") appeared and opened the door.[1] The dog still barked as the women proceeded through the garage, but Karen instructed the animal to "be quiet" after which it "laid back down." Karen led the way and they entered the kitchen door which, while closed, was unlocked. The dog remained in the garage.

{¶5} Once inside, Chelsy greeted her mother and gathered her belongings. As the Kondiks prepared to leave, Heather opened the kitchen door, entered the garage, and Chelsy followed. Again, the kitchen door, which led to the garage, was not locked. As the young girls ambled into the garage, the adults staggered behind. Before Denise was able to reach the door, she testified she suddenly heard a scream and:

{¶6} "*** [t]hat's when Karen said, 'Oh, my God.' I seen the dog on top of her. And *** my daughter pushed her off, Karen kicked her, grabbed her, because she was right there next to her. The blood was squirting out of her neck. We didn't know if her jugular was gone. We didn't know if her eye was gone. The blood was just dripping down. There was a big gap there. I could stick two fingers in her cheek. I could stick three fingers in her throat. I just lost it."

{¶7} Denise testified she immediately called 911 and went into shock.

{¶8} A review of the record indicates that Chelsy was simply attempting to exit the garage and therefore did not provoke the attack. The dog was neither caged nor tethered in any manner and did not growl or bark prior to pouncing on the child.

1. Although Denise did not attempt to open the door by herself, she testified that Karen appeared to simply open the door without disengaging a lock.

According to Denise, the animal simply lunged at her daughter without cause or warning. Fifty-six stitches were required to close the bite wounds to Chelsy's face and throat.

{¶9} On March 30, 2007, the Koniks filed a complaint against the Kordiacs sounding in negligence. In addition, the complaint sought a declaration that the damages resulting from the incident were covered under the Kordiacs' homeowner's insurance policy issued by appellee, Motorists.

{¶10} On March 10, 2008, Motorists filed a motion for summary judgment on all coverage issues; the Koniks filed their memorandum in opposition on May 12, 2008. On July 21, 2008, the trial court issued its judgment granting Motorists' motion.

{¶11} In support of its conclusion, the court observed that Motorists' policy excluded coverage for dog bites such as this where the vicious dog is on the premises of the owner and is not securely confined at all times to a locked pen "that has a top," locked fence yard, or other locked enclosure "that has a top." The court determined that, on the day Chelsy was bitten, the dog was loose in the Kordiacs' garage and, although the doors were closed, they were not locked. As a result, the dog was on the Kordiacs' premises, not securely confined to a locked enclosure. To the contrary, the court pointed out, the dog was free to roam an area which was the primary means of entry and exit to the home; an area which "Chelsy was directed into *** when leaving with her mother [when she] was attacked and severely injured ***."

{¶12} Although the Koniks claimed material issues of fact remained for trial due to ambiguities in the language of the exclusion, the court concluded the meaning of the provision was clear and not susceptible to more than one interpretation. Thus, in

conjunction with the evidence submitted during the summary judgment exercise, the court ruled Motorists was entitled to judgment as a matter of law.

{¶13} The trial court did not affix Civ.R. 54(B) language to the order. Thus, the judgment was not final and appealable until the remaining claim against the Kordiacs was resolved.

{¶14} To that end, the Koniks amended their complaint against the Kordiacs. The Kordiacs filed no answer to the amended complaint. The Koniks subsequently filed a motion for default judgment which the trial court granted after a hearing on the matter. The Koniks promptly filed a notice of appeal of the trial court's July 21, 2008 judgment. and now assign three errors for our review. As this appeal challenges the trial court's award of summary judgment, we shall first set forth our standard of review:

{¶15} We review a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336. Summary judgment is appropriate under Civ.R. 56(C) when (1) there is no genuine issue of material fact remaining 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 the evidence in favor of the nonmoving party, that conclusion favors the moving party. *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

{¶16} The moving party bears the initial burden of providing the trial court a basis for the motion and is required to identify portions of the record demonstrating the absence of genuine issues of material fact pertaining to the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The burden then shifts to the

non-moving party to set forth specific facts that would establish a genuine issue for trial. Id. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a blank assertion that the nonmoving party has no evidence to prove its case, but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C). *Dresher*, supra. Similarly, the non-moving party may not rest on conclusory allegations or denials contained in the pleadings; rather, he or she must submit evidentiary material sufficient to create a genuine dispute over material facts at issue. Civ.R. 56(E); see, also, *Dresher*, supra.

{¶17} To determine whether a genuine issue exists, a reviewing court must examine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must necessarily prevail as a matter of law. *Scott v. Lyons*, 11th Dist. No. 2008-A-0032, 2009-Ohio-1141, at ¶27. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 248.

{¶18} In light of this standard, the Koniks' first assignment of error alleges:

{¶19} "The granting of Motorists' [m]otion for [s]ummary [j]udgement [sic] was in error where the exclusionary clause relied upon was ambiguous and open to more than one interpretation."

{¶20} The construction of written contracts is a matter of law requiring de novo review on appeal. *QualChoice, Inc. v. Nationwide Ins. Co.,* 11th Dist. No. 2007-L-172, 2008-Ohio-6979, ¶37. In construing a contract, common words and phrases are

accorded their ordinary meanings unless absurdity results, or a different meaning is clearly evidenced from the face or overall contents of the contract. *Nationwide Mut. Ins. Co. v. Godwin*, 11th Dist. No. 2005-L-183, 2006-Ohio-4167, at ¶27. When a word is undefined, we examine the common meaning of the word and Ohio case law involving the language at issue. *Shear v. West Am. Ins. Co.* (1984), 11 Ohio St.3d 162, 165.

{¶21} Where the provisions of an insurance contract are clear and unambiguous, courts shall not expand their meaning in order to embrace an object distinct from that contemplated by the parties. *Stickel v. Excess Ins. Co.* (1939), 136 Ohio St. 49, paragraph one of the syllabus. In other words, courts may neither read into the contract a meaning not placed there by an act of the parties, nor make a new contract where the parties' unequivocal actions show an intention to the contrary. See *Motorists Ins. Co. v. Tomanski* (1970), 27 Ohio St.2d 222, 226; see, also, *Gomolka v. State Auto Mutl. Ins. Co.* (1982), 70 Ohio St.2d 166, 168. Where, however, the language of a policy is reasonably open to different interpretations, courts must construe the policy most favorably for the insured and strictly against the insurer. *Gomolka,* supra, at 168; see, also *Butche v. Ohio Cas. Ins. Co.* (1962), 174 Ohio St. 144, 146.

{¶22} Pursuant to their first assignment of error, the Koniks allege the exclusion in the subject policy exhibits certain ambiguities which preclude summary judgment.

{¶23} The homeowners' policy issued by Motorists specifically excludes coverage for the actions of vicious dogs, as defined by R.C. 955.11, and the insured's failure to keep:

{¶24} "*** The vicious dog while on the premises of the owner, keeper or harborer, securely confined at all times in a locked pen that has a top, a locked fenced yard or other locked enclosure that has a top;

{¶25} "***"

{¶26} R.C. 955.11(4)(a) defines a vicious dog as:

{¶27} "[A] dog that, without provocation *** meets any of the following:

{¶28} "(i) Has killed or caused serious injury to any person;

{¶29} "(ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog.

{¶30} "(iii) Belongs to a breed that is commonly known as a pit bull dog. The ownership, keeping, or harboring of such a breed of dog shall be prima-facie evidence of the ownership, keeping, or harboring of a vicious dog."

{¶31} Here, it is undisputed that the dog in question had previously caused injury to another person. Accordingly, it meets the statutory definition of a vicious dog under R.C. 955.11(4)(a)(ii).[2]

{¶32} With these points in mind, the Koniks argue the phrase "on the premises of the owner" contained in the exclusionary clause is ambiguous. In their own words, the Koniks contend "[t]he ambiguity resides with whether this phrase only applies to when the dog is outside of the dwelling house or does it apply equally to when the dog is inside the dwelling house." The Koniks maintain the phrase "on the premises of the owner" suggests that the exclusion is limited to and thus will be triggered only if the

2. The exclusion also covers the actions of "dangerous dogs." However, R.C. 955.11 defines a dangerous dog as one "that, without provocation *** has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person***."

vicious dog is outside the home. In support, they point out that the requirements that the vicious dog be kept in a "locked pen that has a top, a locked fenced yard or other locked enclosure that has a top," taken together, would lead an average insured to conclude that the exclusion only applies when an owner keeps his or her vicious dog outside.

{¶33} Alternatively, Motorists argues that, while "premises" is not defined, the phrase "residence premises" has a definition. According to the policy, "residence premises" is "[t]he one family dwelling, other structures, and grounds." Motorists urges "residence premises" and "premises" should be applied interchangeably in the contract. In the event this court declines to accept this proposal, Motorists asserts the court is bound to apply the common, ordinary meaning of the term. In either situation, Motorists maintains "premises" would include the home and/or attached garage.

{¶34} Notwithstanding Motorists' insistence, we find the Koniks' position persuasive. Although the policy defines "residence premises," it does not follow that the term "premises" should be assigned the same definition as that phrase. Without the use of the modifier "residence," one could reasonably conclude that the exclusion applies only to those vicious dogs that are *not* in the residence.

{¶35} Moreover, as discussed above, where words are not specifically defined in a policy, an appellate court is required to analyze those terms in a manner consistent with cases which have previously construed the terms at issue. See *Shear*, supra. Here, the policy exclusion tracks the language of R.C. 955.22(D), the statute criminalizing the failure to confine a vicious dog. Because the policy incorporates this

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Because the dog in this case has previously bit another person, it is, by statute, a vicious rather than merely a dangerous dog.

statutory language, we must examine whether the language of R.C. 955.22(D), particularly the term "premises," has been previously delineated by any case authority in Ohio.

{¶36} R.C. 955.22 (D) provides, in relevant part:

{¶37} "(D) Except when a dangerous or vicious dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the owner, keeper, harborer, or handler of the dog, no owner, keeper, or harborer of a dangerous or vicious dog shall fail to do either of the following:

{¶38} "(1) While that dog is on the premises of the owner, keeper, or harborer, securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained;"

{¶39} In *State v. Rife* (June 13, 2000), 10th Dist. No. 99AP-981, 2000 Ohio App. LEXIS 2500, the Tenth Appellate District was asked to determine whether R.C. 955.22(D) defined a strict liability crime. The court concluded "*** the language of R.C. 955.22(D), and its statutory and policy considerations, lead us to conclude that the Ohio legislature intended to impose strict criminal liability on owners who fail to restrain or confine their vicious or dangerous dogs as specified in the section." *Rife*, supra, at *9. With respect to policy, the court determined the statute was enacted to "protect the public from the potential harm caused by *roaming dogs*, specifically *** vicious and dangerous dogs." (Emphasis added.) Id.

{¶40} From these observations, if follows that a vicious dog under the statute, must be restrained or confined in a manner specified in the statute so as to prevent the

animal from roaming. Given this interpretation, although the Kordiacs were arguably negligent for ushering their visitors through the garage in which the beast was confined, they, at the least, prevented it from roaming so as not to pose a risk to the public at large. Accepting the points outlined in *Rife* regarding the General Assembly's purpose in codifying R.C. 955.22(D), the term "premises" excludes an owner's residence or any other building in which a vicious dog can be confined to prevent it from roaming and endangering the public.

{¶41} The construction elicited from the *Rife* analysis illustrates an ambiguity in the language of the exclusion. Under Motorists' interpretation, coverage would be precluded because "premises" (defined in the policy as "residence premises") includes the owner's residence as well as the existing structures situated on that property. However, the Koniks' position, amplified by the discussion set forth in *Rife*, permits coverage because "premises" would include only that area where the dog could roam and cause potential harm to the public. Under the Koniks' interpretation, confinement in a structure on one's property, such as an adjoining garage, would be excluded from the definition of premises, thereby affording coverage for the injuries sustained by Chelsy as a result of the attack.

{¶42} The language of the exclusion is susceptible to more than one reasonable interpretation. As a result, we must liberally construe the policy in the Koniks' favor. *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537, 542. For this reason, there is a genuine issue of material fact regarding what the term "premises" includes or excludes. Thus, there is a triable issue regarding whether the Koniks are entitled to coverage under the insurance contract issued by Motorists.

{¶43} The Koniks' first assignment of error is sustained.

{¶44} The Koniks' second and third assignments of error make separate challenges to the trial court's award of summary judgment. However, these arguments are rendered moot due to our resolution of their first assignment of error. Thus, any analysis of these issues would be purely academic and unnecessary.

{¶45} Because the Koniks' first assignment of error is sustained, it is the judgment of this court that the Portage County Court of Common Pleas is hereby reversed and remanded for proceedings not inconsistent with this opinion.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.