[Cite as *Wayne Mut. Ins. Co. v. McNabb*, 2016-Ohio-153.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

WAYNE MUTUAL INSURANCE COMPANY,	:	Case No. 15CA1
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JOSEPH R. McNABB,	:	
Defendant-Appellant.	:	RELEASED: 01/11/2016

APPEARANCES:

Scott S. Blass and James B. Stoneking, Bordas & Bordas, PLLC, Wheeling, West Virginia, for appellant.

Edward A. Dark, Wooster, Ohio, and Jeffrey M. Wakefield, Flaherty Sensabaugh Bonasso PLLC, Charleston, West Virginia, for appellee.

Hoover, P.J.

{¶1} Defendant-appellant Joseph R. McNabb ("McNabb") appeals from the judgment of the Washington County Court of Common Pleas entered in favor of plaintiff-appellee Wayne Mutual Insurance Company ("Wayne Mutual"). The trial court found that Wayne Mutual had no duty to defend or indemnify McNabb under a farmowners insurance policy in a lawsuit against McNabb and his wife in the Noble County Court of Common Pleas. Consequently, the trial court granted summary judgment in favor of Wayne Mutual. The trial court determined that although the lawsuit raised claims of negligence and unjust enrichment that were not excluded from coverage under the intentional-act exclusion of the policy, the lawsuit did not raise an actionable claim of negligence against McNabb predicated on the intentional, illegal conduct of his wife.

{¶2} On appeal, McNabb asserts that the trial court erred in concluding that Wayne Mutual had no duty to defend or indemnify him under the terms of the policy because the underlying litigation raised claims of negligence and unjust enrichment against him.

{¶3} We agree with the trial court's assessment that insofar as the underlying case raises these claims, they constitute covered occurrences that are not excluded from coverage by the intentional-act clause. In reaching this conclusion, we note that liability coverage is dependent on whether the act is intentional from the perspective of the person seeking coverage; and an unintentional act of an insured predicated on the commission of an intentional or illegal act of another person is not precluded from coverage. Neither negligence nor unjust enrichment requires intent.

{¶4} Nevertheless, the trial court did not err in denying coverage for the purported negligence claim because the underlying lawsuit did not raise an actionable claim of negligence. McNabb had no cognizable special relation to his wife that would impose a duty on him to prevent his wife from causing harm to another. The pertinent allegations of the underlying case fail to state an actionable negligence claim that is potentially or arguably within the policy coverage.

{¶5} The underlying case does, however, raise a claim of unjust enrichment. The trial court determined that this claim was not excluded from coverage under the policy, but denied coverage anyway. Wayne Mutual argues that the trial court's decision was warranted because the remedy for unjust enrichment is restitution, which is equitable relief that does not constitute damages covered by the policy. Because the plain and ordinary meaning of the term "damages" is broad enough to include restitution, however, coverage exists under the policy to defend against the unjust enrichment claim. Moreover, insofar as the term "damages" is ambiguous, it

must be construed strictly against Wayne Mutual and liberally in favor of McNabb. Finally, Wayne Mutual's Vice-President of Claims testified that McNabb was being sued for damages. Therefore, the trial court erred in determining that Wayne Mutual had no duty to defend McNabb and to indemnify him in the underlying litigation.

{¶6} Accordingly, we sustain McNabb's assignment of error and reverse the trial court's judgment granting summary judgment and declaring that Wayne Mutual had no duty to defend and indemnify him in the underlying Noble County case.

I. Facts

{¶7} Wayne Mutual issued a farmowners insurance policy to McNabb and his wife, Beverly McNabb. The policy was effective from 2004 through October 6, 2012.

{¶8} In April 2012, Braden Med Services, Inc., dba Gillespie's Drugs ("Gillespie's Drugs"), the former employer of Beverly McNabb, filed a complaint in the Noble County Court of Common Pleas against both McNabb and Beverly McNabb. In its complaint, which was entitled "COMPLAINT TO RECOVER MONEY DAMAGES FOR THEFT", Gillespie's Drugs set forth three causes of action. In its first and second causes of action, Gillespie's Drugs alleged that Beverly McNabb, in her capacity as its longtime bookkeeper, engaged in criminal acts of theft, forgery, and receiving stolen property while stealing at least $295,631.91 from the company from 2004 through 2011. Gillespie's Drugs expended almost $25,000 for administrative costs involved in investigating the alleged theft.

{¶9} In Gillespie's Drugs' third cause of action, it reiterated its allegations against Beverly McNabb and added the following allegations in two paragraphs, which were both numbered 24, against McNabb:

> 24. Defendant Joseph Robert McNabb, husband of Beverly McNabb, may have conspired with Beverly McNabb to deprive Plaintiff of funds and/or knew or should have known the funds obtained and used by his wife were stolen and well beyond the salary paid by Plaintiff.
>
> 24. Defendants Beverly McNabb and Joseph McNabb have been unjustly enriched by the theft of monies from Plaintiff, having used said funds for their support and lifestyle, damaging Plaintiff.

{¶10} In its demand for judgment, Gillespie's Drugs sought compensatory damages of $295,631.91, administrative costs of nearly $25,000, triple liquidated damages, reasonable attorney fees, and punitive damages against Beverly McNabb, and $295,631.91 against McNabb "for the sums for which he was unjustly enriched," as well as other just and equitable relief. Beverly McNabb is currently serving a three-year prison sentence for felony theft. (www.drc.ohio.gov/offendersearch).

{¶11} Based on the insurance policy, McNabb timely requested that Wayne Mutual provide him a defense and indemnification with respect to the complaint filed against him by Gillespie's Drugs. Wayne Mutual denied his request for coverage under the policy by refusing to provide him with a defense and indemnification in the Noble County case. Wayne Mutual also denied a defense and indemnification to Beverly McNabb; however, she did not contest the denial.

{¶12} In June 2014, Wayne Mutual filed a complaint in the Washington County Court of Common Pleas. Wayne Mutual sought a judgment declaring that it was not obligated to extend liability coverage to McNabb and to provide a defense and indemnification for him in the pending Noble County case. McNabb submitted an answer claiming the insurance policy

provided coverage for both indemnity and a defense for Gillespie's Drugs' claims against him. He also raised a bad-faith claim against Wayne Mutual in a counterclaim.

{¶13} Both parties subsequently filed motions for summary judgment. Wayne Mutual claimed that it had no duty to defend McNabb or provide him with a defense of indemnity because: (1) the allegations in the first paragraph 24 in Gillespie's Drugs' complaint alleged theft or some other intentional misconduct against him and thus did not constitute a covered occurrence under the policy; (2) the allegations of the first paragraph 24 also alleged conspiracy and conversion against him and thus were excluded from coverage under the intentional-act provision of the policy; and (3) the allegations of the second paragraph 24 raised an equitable claim of restitution, which was not encompassed within the ordinary meaning of "damages" for suits it had a duty to defend.

{¶14} McNabb countered that Wayne Mutual should be required to defend and indemnify him because: (1) Gillespie's Drugs' complaint alleged covered claims of negligence and unjust enrichment against him; (2) the commonly accepted definition of damages included restitution, that insofar as that term was ambiguous, it should be construed liberally in his favor; and (3) Wayne Mutual's Vice President of Claims, David E. Tschantz, had conceded in a deposition in the case that "it was pretty clear [Joseph McNabb] was being sued for damages."

{¶15} In December 2014, the trial court granted Wayne Mutual's motion for summary judgment, denied McNabb's motion for summary judgment, declared that Wayne Mutual had no duty to defend or indemnify McNabb in the Noble County case against him, and dismissed McNabb's bad-faith counterclaim. In its decision, which was incorporated by reference into its judgment, the trial court made some arguably conflicting statements. For example, it reasoned that Gillespie's Drugs' complaint in the Noble County case raised claims of negligence and

unjust enrichment against McNabb, which were covered occurrences under the policy that were not excluded by the intentional-act provision. However, the trial court also determined that the first paragraph 24 of Gillespie's Drugs' complaint raised claims that were within the intentional-act exclusion of the policy. The trial court ultimately determined that Gillespie's Drugs raised no actionable claim for negligence against McNabb that was predicated on his wife's intentional and illegal conduct. The trial court's decision included no rationale for concluding that the unjust-enrichment claim against McNabb was not covered by the insurance policy.

{¶16} McNabb filed a timely appeal.

II. Assignment of Error

{¶17} Joseph McNabb assigns the following error for our review:

> The Trial Court Erred When It Concluded That Wayne Mutual Owed No Duty To Defend Its Insured Against Claims Made In The Underlying Litigation, Including Claims of Negligence and Unjust Enrichment, Or To Indemnify Its Insured Against Those Claims[.]

III. Standard of Review

{¶18} McNabb contends that the trial court erred in construing the insurance policy language. Appellate courts apply a de novo standard of review to an appeal from a summary judgment based on the interpretation of an insurance contract. *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, 948 N.E2d 931, ¶ 12; *see also Willis v. Gall*, 2015-Ohio-1696, 31 N.E.3d 678, ¶ 10 (4th Dist.) ("[t]he interpretation of a written contract, such as an insurance policy, is a matter of law that we review de novo").

{¶19} Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact; (2) the moving party is entitled to

judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 29 (4th Dist.).

{¶20} "The fundamental goal when interpreting an insurance policy is to ascertain the intent of the parties from a reading of the policy in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner designed to give the contract its intended effect." *Laboy v. Grange Indemn. Ins. Co.*, 144 Ohio St.3d 234, 2015-Ohio-3308, 41 N.E.3d 1224, ¶ 8. In the absence of an express contractual definition or resultant manifest absurdity, we will construe words and phrases contained in an insurance policy in accordance with their plain and ordinary meaning. *Id.*, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus.

{¶21} If an insurance contract is plain and unambiguous, the court does not go beyond the plain language of the policy to determine the parties' rights and obligations; instead, it gives effect to these plain and unambiguous terms. *See Scarberry v. W. Res. Group*, 4th Dist. Highland No. 14CA6, 2015-Ohio-240, ¶ 11, and cases cited therein.

{¶22} Conversely, if provisions in an insurance contract are ambiguous, i.e., reasonably susceptible of more than one interpretation, they will be construed liberally in favor of the insured. *Laboy* at ¶ 9. This rule, however, will not be applied to create an unreasonable interpretation of the policy provisions. *Id.* With these principles guiding our analysis, we now address the merits of McNabb's sole assignment of error.

IV. Law and Analysis

A. Duty to Defend-General Principles

{¶23} In his sole assignment of error, McNabb asserts that the trial court erred in concluding that Wayne Mutual had no duty under the insurance policy to defend and indemnify him against claims made by Gillespie's Drugs in the Noble County case, including claims of negligence and unjust enrichment. As the Ohio Supreme Court recently reiterated, "[t]he duty of an insurer to defend an insured is a broad duty—broader than the duty to indemnify—that is absolute when the complaint contains any allegation that could arguably be covered by the insurance policy." *Granger v. Auto-Owners Ins.*, 144 Ohio St.3d 57, 2015-Ohio-3279, 40 N.E.3d 1110, ¶ 21, citing *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 13. "An exception to the absolute duty exists when all the claims are each clearly and indisputably outside the coverage." *Id*. at ¶ 21. "Another way of stating the exception is that the insurer need not provide a defense if there is no set of facts alleged in the complaint which, if proven true, would invoke coverage for any claim." *Id.*, citing *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 605, 710 N.E.2d 677 (1999).

{¶24} McNabb contends that the pertinent allegations in Gillespie's Drugs' complaint against him raised two claims that were potentially or arguably within the policy coverage: (1) negligence; and (2) unjust enrichment.

B. Insurance Policy Provisions

{¶25} The McNabbs' farmowners insurance policy was effective at the time Gillespie's Drugs filed its complaint against the McNabbs. Under the policy, Wayne Mutual agreed to "pay those sums that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies" and imposed on it "the right and duty to defend any 'suit' seeking those damages." The insurance applied to "property damage" only if it was caused by an "occurrence" and happened during the policy period. "Occurrence"

was defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions" and "[p]roperty damage" included "[l]oss of use of tangible property that is not physically injured." The policy excluded from coverage " 'property damage' expected or intended from the standpoint of the 'insured' ".

{¶26} In *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, the Ohio Supreme Court interpreted similar provisions and held that "[w]hen a liability policy defines 'occurrence' as an 'accident,' a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, e.g., negligent hiring or negligent supervision, qualifies as an 'occurrence.' " *Id.* at paragraph one of the syllabus. The court further held that "[i]nsurance-policy exclusions that preclude coverage for injuries expected or intended by an insured, or injuries arising out of or caused by an insured's intentional or illegal acts, do not preclude coverage for the negligent actions of other insureds under the same policy that are predicated on the commission of those intentional or illegal acts, e.g., negligent hiring or negligent supervision." *Id.* at paragraph two of the syllabus.

{¶27} For purposes of the insurance coverage at issue here, the policy specified that it applied "[s]eparately to each 'insured' against whom claim is made or 'suit' is brought." Therefore, the fact that his wife may have been excluded from coverage in the Noble County case did not automatically preclude McNabb from coverage.

C. Negligence

{¶28} McNabb contends that the trial court erred in declaring that he was not entitled to coverage under the insurance policy. McNabb asserts that because Gillespie's Drugs' complaint arguably raised a claim of negligence against him, McNabb would have been covered under the policy even if it had been predicated upon his wife's intentional and illegal embezzlement of

funds from her employer. We believe that McNabb is correct that if Gillespie's Drugs' complaint raised an arguable claim of negligence against him, it would constitute a covered occurrence that was not excluded from coverage by the intentional-act provision of the policy. *See Safeco* at paragraphs one and two of the syllabus.

{¶29} In its somewhat confusing decision, the trial court concluded at one point that Gillespie's Drugs raised a negligence claim, which was a covered occurrence that was not within the intentional-act exclusion. The pertinent part of Gillespie's Drugs' complaint is the first Paragraph 24, which states: "Defendant *Joseph Robert McNabb*, husband of Beverly McNabb, may have conspired with Beverly McNabb to deprive Plaintiff of funds and/or knew or *should have known the funds obtained and used by his wife were stolen and well beyond the salary paid by Plaintiff*." (Emphasis added.)

{¶30} After scrutinizing Gillespie's Drugs' complaint, it is evident that the sole cause of action it raised against McNabb was for unjust enrichment. Any allegations that he "knew or should have known the funds obtained and used by his wife were stolen and well beyond the salary paid by" Gillespie's Drugs to her were to support the unjust enrichment claim rather than to raise any actionable negligence claim. The addition of the words "should have known" to the allegations did not transform the claim to a viable claim of negligence. *See Chiquita Brands Internatl., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 2013-Ohio-759, 988 N.E.2d 897, ¶ 17 (1st Dist.), quoting *Snowden v. Hastings Mut. Ins. Co.*, 177 Ohio App.3d 209, 2008-Ohio-1540, 894 N.E.2d 336, ¶ 13 (7th Dist.) (" '[t]he mere insinuation of negligence in a civil suit complaint cannot transform what are essentially intentional torts into something 'accidental' that might be covered by insurance' ").

{¶31} Therefore, the trial court correctly held that the insurance policy did not provide coverage for any negligence claim against McNabb. Gillespie's Drugs did not plead an arguably viable negligence claim in its complaint.

D. Unjust Enrichment

{¶32} McNabb next asserts that the trial court erred in declaring that he was not entitled to coverage under the insurance policy because Gillespie's Drugs' complaint raised a claim of unjust enrichment against him. McNabb asserts that the unjust enrichment claim would have been covered under the policy even if it had been predicated upon his wife's intentional and illegal embezzlement of funds from her employer when she worked as a bookkeeper.

{¶33} In its decision, the trial court determined that Gillespie's Drugs raised an unjust enrichment claim and that it was not subject to the intentional-act exclusion; however, without any specific rationale, the trial court determined that it was not subject to coverage under the insurance policy. "Unjust enrichment of a person occurs when he or she 'has and retains money or benefits which in justice and equity belong to another.' " *Univ. Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 2002-Ohio-3748, 772 N.E.2d 105, ¶ 60, quoting *Hummel v. Hummel*, 133 Ohio St. 520, 528, 14 N.E.2d 923 (1938). "[R]estitution is the 'common-law remedy designed to prevent one from retaining property to which he is not justly entitled.' " *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 20, quoting *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 256, 141 N.E.2d 465 (1957). "To establish a claim for restitution, therefore, a party must demonstrate '(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ("unjust enrichment").' " *Johnson* at ¶ 20, quoting *Hambleton v. R.G. Barry*

Corp., 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984); *see also Hamilton v. Ball*, 2014-Ohio-1118, 7 N.E.3d 1241, ¶ 26 (4th Dist.).

{¶34} The parties appear to agree that Gillespie's Drugs' complaint raised an unjust enrichment claim, that the claim constitutes an occurrence under the policy, and that it does not fall within the intentional-act exclusion of the policy. As the Ohio Supreme Court held in *Safeco*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, at ¶ 24, "liability coverage hinges on whether the act is intentional from the perspective of the person seeking coverage." *See also World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 13AP-290, 2013-Ohio-5707, ¶ 34. An unjust enrichment claim is not dependent upon the intention of the parties, but equitable considerations that require the imposition of a constructive trust because the person holding the property would be unjustly enriched if permitted to keep the property. *Univ. Hosps.* at ¶ 60, citing Restatement of the Law, Restitution, Section 160, Comment *b*; *Sacksteder v. Gisslen*, 197 Ohio App.3d 484, 2011-Ohio-6319, 968 N.E.2d 11, ¶ 27 (2d Dist.). Therefore, from the insured McNabb's perspective, the act supporting the claim of unjust enrichment was not intentional, and therefore constituted an occurrence that was not excluded from coverage as an intentional act.

{¶35} Wayne Mutual instead argues that the insurance policy did not cover Gillespie's Drugs' request for restitution for the unjust enrichment claim. Wayne Mutual asserts that because equitable relief does not constitute damages, the unjust enrichment claim did not constitute a suit under the policy. The policy provided that Wayne Mutual had the "duty to defend any 'suit' seeking * * * damages." The policy defines "[s]uit" as "a civil proceeding in which damages because of * * * 'property damage' * * * to which this insurance applies are alleged." (*Id.* at 17). The parties agree that the insurance policy did not include a definition of "damages."

{¶36} In the absence of manifest absurdity or a specific definition in the policy, the word "damages" must be accorded its plain and ordinary meaning. *Laboy, supra*, at ¶ 8. "Damages" has been defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Black's Law Dictionary* 416 (8th Ed.2004); *see also Webster's New Universal Unabridged Dictionary* 504 (2003) (defining "damages" as "the estimated money equivalent for detriment or injury sustained"). This plain and ordinary meaning of "damages" is necessarily broad enough to include restitution of money because "restitution damages" are defined as "[d]amages awarded to a plaintiff when the defendant has been unjustly enriched at the plaintiff's expense." *Black's Law Dictionary* 419 (8th Ed.2004).

{¶37} This definition is not manifestly absurd. In fact, in a non-insurance context, the Eighth District Court of Appeals concluded that "[r]estitution and compensatory damages are synonymous." *Jackson v. Ohio Civ. Rights Comm.*, 50 Ohio App.3d 13, 16, 552 N.E.2d 237 (8th Dist.1989). Therefore, the plain and unambiguous meaning of the term "damages" in the parties' insurance policy manifestly covers the underlying claim by Gillespie's Drugs against McNabb seeking restitution of $295,631.91 for the amount he was unjustly enriched by his wife stealing and keeping the money from her employer.

{¶38} Moreover, insofar as the word "damages" is reasonably susceptible of different interpretations, we must liberally construe it in favor of the insured. *Laboy* at ¶ 9. Consequently, if Wayne Mutual's contentions are sufficient to raise an ambiguity about whether damages includes the equitable restitution of money, these contentions are only sufficient to raise an alternative reasonable interpretation, which is insufficient to deny coverage to McNabb under the insurance policy.

{¶39} Further, the federal district court cases cited by Wayne Mutual—*Detrex Chem. Industries, Inc. v. Emps. Ins. of Wausau*, 681 F.Supp. 438 (N.D.Ohio 1988) and *Amerisure Ins. Co. v. Acusport Corp.*, S.D.Ohio No. 2:01-cv-683, 2004 U.S. Dist. LEXIS 6901 (Jan. 30, 2004)—in support of its argument are distinguishable. The suit for equitable relief held to be outside the duty to defend in the insurance policy in *Detrex* involved an equitable request for injunctive relief and civil penalties rather than a request for restitution of money. In addition, the court in *Amerisure*, while recognizing what it referred to as a general rule that suits requesting equitable relief have been found to be outside the duty to defend set forth in general liability insurance policies, determined that that purported rule was subject to significant exceptions, one of which it applied to hold in favor of coverage in that case.

{¶40} Even if we considered the dicta in these cases to constitute holdings, this line of authority has been criticized because, inter alia, at best, the word "damages" is ambiguous. It is "not reasonable to expect that laypersons, corporations, attorneys and insurers who confront the term 'damages' in a myriad of contexts would all attach a common, single meaning to that term," so the insured's interpretation to permit coverage should be accepted as long as it is semantically permissible. Miller, *Whether Governmentally Compelled Cleanup Costs Constitute "Damages" Under CGL Policies: the Nationwide Environmental Liability Dilemma and a California Model for its Resolution*, 16 Colum. J. Envtl. L. 73, 103-104 (1991); *see also Am. Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, D.N.J. No. 88-1994, 1988 WL 112142, *3 (Oct. 14, 1988) ("[t]he average person would not engage in a complex comparison of legal and equitable remedies in order to define 'as damages,' but would conclude based on the plain meaning of the words that the cleanup costs imposed on Levelor under CERCLA would constitute an obligation to pay damages"); *Avondale Industries, Inc. v. Travelers Indemn. Co.*, 697 F.Supp. 1314, 1319

(S.D.N.Y. 1988) ("[t]he average businessman does not differentiate between 'damages' and 'restitution;' in either case, money goes from his pocket and goes to third parties"). Insurers can easily avoid this problem by drafting policies that expressly exclude coverage for lawsuits seeking the equitable remedy of restitution. *See, e.g., Weisberger v. Home Ins. Cos.*, 76 Ohio App.3d 391, 395, 601 N.E.2d 660 (8th Dist.1991) (insurance policy defined "damages" to exclude "restitution of legal fees, costs, and expenses").

{¶41} Finally, if "damages" is considered ambiguous, Wayne Mutual's own Vice President of Claims testified in a deposition that "it was pretty clear [Joseph McNabb] was being sued for damages,"[1] thereby supporting McNabb's interpretation of the insurance policy.

{¶42} Therefore, because Wayne Mutual had a duty to defend Joseph McNabb in the underlying Noble County litigation because Gillespie's Drugs' complaint contained allegations of unjust enrichment that could arguably be covered by the insurance policy, the trial court erred in granting summary judgment in favor of Wayne Mutual, denying summary judgment in favor of McNabb, and declaring that Wayne Mutual did not have any duty to defend and indemnify McNabb in the Noble County case. We sustain McNabb's assignment of error.

V. Conclusion

{¶43} Having sustained McNabb's sole assignment of error, we reverse the judgment of the trial court, and remand the cause for the entry of summary judgment in favor of McNabb declaring that Wayne Mutual had the duty to defend and indemnify him in the Noble County litigation.

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[1] The deposition was evidently not filed in the underlying case, but after McNabb cited it in his memorandum in support of his motion for summary judgment, Wayne Mutual did not object to it on the basis that it constituted improper Civ.R. 56(C) evidence. *See Carr v. State*, 4th Dist. Vinton No. 14CA697, 2015-Ohio-3895, ¶ 31 (court may consider evidence other than the evidence specified in Civ.R. 56(C) where no objection has been raised). Wayne Mutual did object to the evidence on the basis that it was irrelevant because the parties' insurance policy was unambiguous. But if "damages" is ambiguous, its Vice President of Claims's deposition testimony was relevant.

JUDGMENT REVERSED AND CAUSE REMANDED.

Harsha, J., Concurring:

{¶44} I concur in that part of the opinion denying coverage because Gillespie's Drugs' complaint does not state a viable cause of action for negligence. See ¶ 30, *supra*. To the extent there is a contention that the parties stipulated to the existence of a negligence claim, such a stipulation is not controlling, even if it occurred. Although the parties may stipulate to what the facts are, they cannot stipulate what the law is. That duty lies solely with the courts. *Jeffers v. Bd. of Athens Co. Commrs.*, 4th Dist. No. 06CA39, 2007-Ohio-2458, ¶ 15. Therefore, I agree that the two paragraphs 24 of the Gillespie's Drugs' complaint do not raise a viable allegation of negligence that could arguably be covered by the policy.

{¶45} I also join in reversing and finding a duty on appellee Wayne Mutual to defend and indemnify Joseph McNabb on Gillespie's Drugs' action for unjust enrichment. Nonetheless, I confess that it's hard to believe that in 2004 upon the issuance of the policy, either the McNabbs or Wayne Mutual envisioned the farm policy providing the coverage we find to exist here today. However, it is indisputable that Wayne Mutual was put on notice in 2009 that similar, if not identical, language would create coverage where a third party was guilty of intentional misconduct. See, *Safeco*, *supra*. Because Wayne Mutual apparently took no steps after *Safeco* to change their potential exposure, they reissued a policy that creates coverage for claims like the unjust enrichment action filed by Mrs. McNabb's employer.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds that reasonable grounds for this appeal exist.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs with Concurring Opinion.
Abele, J.: Dissents.

For the Court

BY: _____
Marie Hoover
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.