[Cite as *Hawthorne v. Migoni*, 2004-Ohio-378.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM L. HAWTHORNE, et al.

Plaintiffs-Appellants

-vs-

ESTATE of JOSEPH M. MIGONI, et al.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2003 AP 07 0054

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2002 CT 05 0338
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 26, 2004

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee Grange Mutual
J. KEVIN LUNDHOLM MILLER & KYLER, LPA 405 Chauncey Avenue NW Post Office Box 668 New Philadelphia, Ohio 44663	ROBERT B. DAANE 4429 Fulton Drive, NW Canton, Ohio 44718

Wise, J.

{¶1} Appellants William and Hallie Hawthorne appeal the decision of the Tuscarawas County Court of Common Pleas that granted Appellee Grange Mutual Casualty Company's ("Grange") motion for judgment on the pleadings. The following facts give rise to this appeal.

{¶2} On October 9, 2001, Appellant William Hawthorne witnessed the suicide of Joseph Migoni. The incident occurred when appellant, a mailman, was delivering mail to the Migoni residence. Just as appellant was to hand Mr. Migoni his mail, Mr. Migoni placed a gun to the side of his head and pulled the trigger. Appellant saw a flash of fire from the end of the gun, heard a loud blast and observed injuries to Mr. Migoni's head. Appellant immediately dialed 911.

{¶3} Appellant suffered emotional distress as a result of witnessing Mr. Migoni's suicide. Subsequently, on May 21, 2002, appellants filed a complaint seeking recovery for the negligent infliction of emotional distress and loss of consortium. Appellants sought coverage under a homeowners policy Grange issued to Mr. Migoni. On July 25, 2002, Grange filed a declaratory judgment action seeking a determination that there is no insurance coverage under its homeowner's policy for the claims being made in appellants' tort action. Upon motion, the trial court consolidated the two cases.

{¶4} On December 20, 2002, Grange filed a motion for judgment on the pleadings. On January 24, 2003, appellants filed a motion for summary judgment. The court filed a judgment entry, on June 12, 2003, granting Grange's motion for judgment on the pleadings. The trial court did not specifically address appellants' motion for summary judgment. However, the failure to rule on the motion will implicitly be

considered a denial.[1] Thus, appellants' complaint remains pending and the trial court found no just cause for delay concerning the issue raised in Grange's declaratory judgment action.

{¶5} Appellants timely appealed and set forth the following sole assignment of error for our consideration:

{¶6} "I. THE TRIAL COURT ERRED IN GRANTING GRANGE'S MOTION FOR JUDGMENT ON THE PLEADINGS AND ERRED IN DENYING APPELLANT'S (SIC) MOTION FOR SUMMARY JUDGMENT."

"Standard of Review"

{¶7} This court recently addressed the standard of review on a motion for judgment on the pleadings in the case of *Estate of Heath v. Grange Mut. Cas. Co*., Delaware App. No. 02CAE05023, 2002-Ohio-5494. We explained that the standard of review of the grant of a motion for judgment on the pleadings is the same as the standard of review for a Civ.R. 12(B)(6) motion. Id. at ¶ 8.

{¶8} As the reviewing court, we are required to independently review the complaint and determine if the dismissal was appropriate. Id., citing *Rich v. Erie Cty. Dept. of Human Resources* (1995), 106 Ohio App.3d 88, 91, abrogated by *Marshall v. Montgomery Cty. Children Serv. Bd.* 92 Ohio St.3d 348, 2001-Ohio-209. Judgment on the pleadings may be granted where no material factual issue exists. Id. However, it is axiomatic that a motion for judgment on the pleadings is restricted solely to the allegations contained in those pleadings. Id., citing *Flanagan v. Williams* (1993), 87

[1] See *Tripp v. Beverly Enterprises-Ohio, Inc*., Summit App. No. 21506, 2003-Ohio-6821, at ¶ 67.

Ohio App.3d 768, 771-772, abrogated by *Simmerer v. Dabbas*, 89 Ohio St.3d 586, 2000-Ohio-232.

{¶9} Further, we need not defer to the trial court's decision in such cases. Id. at ¶ 9. A motion for a judgment on the pleadings, pursuant to Civ.R. 12(C), presents only questions of law. Id., citing *Peterson v. Teodosia* (1973), 34 Ohio St.2d 161, 165-166. The determination of a motion under Civ.R. 12(C) is restricted solely to the allegations in the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in his or her favor. Id., citing *Peterson* at 165-166.

{¶10} It is based upon this standard that we review appellants' sole assignment of error.

I

{¶11} The issue raised, in appellants' sole assignment of error, is whether damages for the negligent infliction of emotional distress and loss of consortium are covered as a type of "bodily injury" under the Grange policy. We answer this question in the negative and affirm the judgment of the trial court.

{¶12} In support of their sole assignment of error, appellants make two arguments. First, appellants maintain the language Grange uses in its policy to define the term "bodily injury" is ambiguous. The Grange policy defines "bodily injury" as meaning "bodily injury, sickness or disease * * *." Appellants contend the use of the word "bodily injury" when defining the term "bodily injury" results in a circular definition and creates an ambiguity. Appellants conclude that any ambiguity should be construed

against the drafter of the policy and in favor of coverage. See *Yeager v. Pacific Mut. Life Ins. Co.* (1956), 166 Ohio St. 71, paragraph one of the syllabus.

{¶13} An insurance policy provision is ambiguous when it is reasonably susceptible of more than on interpretation. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, syllabus. We do not find the inclusion of the words "bodily injury" in the definition of the term "bodily injury" results in the term being susceptible to more than one interpretation. None of the case law we have reviewed, on this issue, has found the term "bodily injury" ambiguous.

{¶14} Second, appellants contend emotional distress, which involves an injury to the human mind and creates physical manifestations, constitutes a "bodily injury." Case law does not support this conclusion. In *Tomlinson v. Skolnik* (1989), 44 Ohio St.3d 11, overruled on other grounds, *Schaefer v. Allstate Ins. Co.* (1996), 76 Ohio St.3d 553, superseded by statute, the Ohio Supreme Court explained that "[t]he words "bodily injury" are commonly and ordinarily used to designate any injury caused by external violence * * *." Id. at 14, quoting *Burns v. Employers Liab. Assur. Corp. Ltd.* (1938), 134 Ohio St. 222, 233.

{¶15} Various courts of appeals have followed this definition and concluded that emotional injuries are not covered as "bodily injury" under liability insurance policies. In *Bentley v. Progressive Ins. Co.*, Lawrence App. No. 02CA10, 2002-Ohio-6532, the Fourth District Court of Appeals found a plaintiff was not entitled to uninsured motorist coverage as a result of observing his common law wife die in a motorcycle accident. Id. at ¶ 27. In reaching this conclusion, the court held:

{¶16} "In the case at bar, appellant's policy defines 'bodily injury' as 'bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease.' Because the word 'bodily' modifies 'harm, sickness,' and 'disease,' appellant's non-physical sickness and disease which he claims to have suffered as a result of witnessing Monnig's tragic death are not compensable under appellant's policy." Id. at ¶ 29.

{¶17} Similarly, in *Bernard v. Cordle* (1996), 116 Ohio App.3d 116, the Tenth District Court of Appeals addressed the issue of whether a husband's emotional distress in witnessing an accident involving his wife was covered under a liability insurance policy. Id. at 118. The policy defined "bodily injury" as "physical harm, sickness, or disease." Id. at 121. The insurer filed a declaratory judgment action seeking a determination that the husband's emotional distress claim was not compensable under the policy. Id. at 118. The Tenth District Court of Appeals agreed and concluded:

{¶18} "The definition of 'damages' set forth in the policy does not include damages for infliction of emotional distress. The language of the policy is clear and unambiguous; thus, those terms must be applied without engaging in any construction. See *Santana v. Auto Owners Ins. Co.* (1993), 91 Ohio App.3d 490, 494, 632 N.E.2d 1308, 1311. This court will not amend the policy language to include damages for emotional distress. See *Ambrose v. State Farm & Cas. Co.* (1990), 70 Ohio App.3d 797, 800, 592 N.E.2d 868, 870-871. Accordingly, we find that plaintiffs' claim for infliction of emotional distress is not covered by the above definition of 'damages.' We also find that plaintiffs' claim for emotional distress does not constitute a separate 'bodily injury' as that term is defined in the insurance policy." Id. at 121.

{¶19} Finally, in *Dickens v. General. Accid. Ins.* (1997), 119 Ohio App.3d 551, the Eighth District Court of Appeals interpreted the identical language that is at issue in the case sub judice. In doing so, the court of appeals held that "[t]he provision in the policy issued by appellee to Metropolitan Cablevision where coverage is offered for bodily injuries does not cover the type of physical symptoms stemming from the emotional distress caused by a wrongful discharge." Id. at 553.

{¶20} Based on the above case law, we find no material factual issues exist and the trial court properly granted Grange's motion for judgment on the pleadings. Appellants are not entitled to recover, under Grange's policy, as the emotional distress suffered by Appellant William Hawthorne does not constitute a "bodily injury."

{¶21} Appellants' sole assignment of error is overruled.

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas, Tuscarawas County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, J., concurs.

Hoffman, P. J., dissents.

Hoffman, P.J., dissenting

{¶23} I respectfully dissent from the majority opinion.

{¶24} I find neither the *Tomlinson* nor *Schaefer* cases directly answer the issue raised herein. Appellant's "injury" is alleged to have been caused by external violence; i.e., Mr. Migoni's violent suicide.

{¶25} Furthermore, I disagree with my brethren from other appellate districts who have concluded physical manifestations emanating from an injury to the mind do not constitute "bodily harm" or "bodily injury."

{¶26} I concur in the majority's conclusion Grange's definition of "bodily injury" is not ambiguous. The fact it defines "bodily injury" by using that same phrase as part of the definition does not cause it to be ambiguous. However, its circular definition does not serve to limit the commonly accepted meaning given to the phrase.

{¶27} Webster's dictionary defines "bodily" as "of or relating to the body." "Injury" is defined as "an act that damages or hurts." Since the function of the mind relates to the body, any act that damages or hurts the functioning of the mind would, a fortiori, constitute a bodily injury. To that extent, I agree with Judge Tyack's dissent in the *Bernard* case cited by the majority in support of its conclusion.

{¶28} The case sub judice presents even a factually stronger reason to find coverage under the Grange policy. Appellant's injury to his mind produced physical manifestations, including very frequent headaches, chest pains, heart palpitations, and gastrointestinal problems. These physical manifestations constitute bodily injury.

{¶29} I would reverse the judgment of the trial court.

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JUDGE WILLIAM B. HOFFMAN