[Cite as *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 2006-Ohio-713.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

Nos. 85967 and 85969

THE CINCINNATI INSURANCE CO.	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
CPS HOLDINGS, INC., ET AL.	:	
	:	
Defendants-Appellants	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 16, 2006
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. CV-519559
	:	
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellants, CPS Holdings, Inc., CPS Holding Company, Ltd., and I.Q. Solutions, L.L.C. (hereafter collectively "CPS"), along with the State of Ohio, Department of Administrative Services ("DAS"), appeal the trial court's decision in favor of appellees, Cincinnati Insurance Company ("CIC") and Gulf Underwriters Insurance Company ("Gulf"). The parties filed competing cross-motions for summary judgment/declaratory relief, and the trial court denied appellants' motion and granted appellees' motion. Upon review of the record and the arguments of the parties, we now

reverse and remand the matter to the trial court for the reasons set forth below.

{¶ 2} This appeal stems from a dispute between appellants CPS and DAS. CPS, as a third-party administrator, originally contracted with DAS to provide natural gas services to state agencies. DAS claims that during the course of this relationship, CPS mismanaged state funds and breached its contractual duties. Essentially, DAS contends that CPS failed to use the money it was paid to obtain natural gas services and instead kept and commingled those funds with its own funds. DAS claims a total loss in excess of $5,771,302.

{¶ 3} On May 30, 2003, DAS filed suit in Franklin County Common Pleas Court. The original complaint set forth claims for negligence, professional negligence, breach of implied warranty, breach of contract, breach of express warranty, conversion, and unjust enrichment. On December 8, 2003, DAS filed an amended complaint, adding parties and claims for the recovery of public funds, pursuant to R.C. 117.28, and piercing the corporate veil.

{¶ 4} CPS sought a defense of the lawsuit from its liability insurers, appellees Gulf and CIC among them, and both insurers denied any defense obligation. As previously mentioned, the underlying litigation was filed and is properly located in Franklin County. However, in an unexplained tactic, CIC filed for declaratory judgment against CPS in the Cuyahoga County Court of

Common Pleas. While it was acknowledged that the instant suit would probably best be litigated in Franklin County, the trial court accepted the filing and this matter went forward in Cuyahoga County. CPS then filed a counterclaim against CIC, Gulf, and other insurers. Both sides filed cross-motions for summary judgment and declaratory relief. On October 29, 2004, the trial court held a hearing to permit all parties to present arguments on the summary judgment and declaratory relief issues. The trial court issued its opinion and judgment entry against CPS and in favor of the insurers on January 24, 2005.

{¶ 5} Appeals were brought by both CPS (Cuy. App. No. 85967) and DAS (Cuy. App. No. 85969) solely against appellees CIC and Gulf. Those appeals have been consolidated in the interest of judicial economy. Both appellants assert essentially the same assignments of errors, which are listed in the appendix of this opinion.

Standard of Review

{¶ 6} In general, Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains 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 such evidence most strongly in favor of the party against whom the motion for summary

judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 7} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-96, 604 N.E.2d 138.

{¶ 8} This court reviews the lower court's granting of summary judgment de novo. *Brown v. County Comm'rs* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the granting of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***. The motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140. However, a determination as to the duty to defend is a legal issue to be decided by the court, not a factual issue for a jury to resolve. *Leber v. Smith* (1994), 70 Ohio St.3d 548, 639 N.E.2d 1159; *Erie Ins. Group v. Fisher* (1984), 15 Ohio St.3d 380, 474 N.E.2d 320.

Policy Analysis in General

{¶ 9} In *Hionis v. Nationwide Inc. Co.*, Cuyahoga App. No. 80516, 2003-Ohio-1333, this court held the following when construing contracts of insurance:

{¶ 10} "Where the terms of an insurance policy are clear and unambiguous, those terms must be applied to the facts without engaging in any construction. *Santana v. Auto Owners Ins. Co.* (1993), 91 Ohio App.3d 490, 632 N.E.2d 1308, appeal dismissed, 69 Ohio St.3d 182, 1994-Ohio-418, 631 N.E.2d 123. When the policy terms have a plain and ordinary meaning, it is not necessary or permissible for a court to construe a different meaning. *Ambrose v. State Farm Fire & Cas.* (1990), 70 Ohio App.3d 797, 800, 592 N.E.2d 868, jurisdictional motion overruled (1991), 60 Ohio St.3d 709, 573 N.E.2d 671. In other words, 'the plain meaning of unambiguous language will be enforced as written.' *Mehl v. Motorists Mut. Ins. Co.* (1992), 79 Ohio App.3d 550, 607 N.E.2d 897. *Nationwide Mut. Ins. Co. v. Finley* (1996), 112 Ohio App.3d 712, 679 N.E.2d 1189. Further:

{¶ 11} "Insurance policies are generally interpreted by applicable rules of contract law. *Burris v. Grange Mut. Cos.* (1989), 46 Ohio St.3d 84, 545 N.E.2d 83. If the language of the insurance policy is doubtful, uncertain, or ambiguous, the language will be construed strictly against the insurer and liberally in favor of the insured. *Faruque v. Provident Life & Acc. Ins. Co.*

(1987), 31 Ohio St.3d 34, 31 Ohio B. 83, 508 N.E.2d 949. However, the general rule of liberal construction cannot be employed to create an ambiguity where there is none. *Karabin v. State Auto. Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 166-167, 10 Ohio B. 497, 462 N.E.2d 403. If the terms of a policy are clear and unambiguous, the interpretation of the contract is a matter of law. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 15 Ohio B. 448, 474 N.E.2d 271.' *Progressive Ins. Co. v. Heritage Ins. Co.* (1996), 113 Ohio App.3d 781, 784-785, 682 N.E.2d 33." Id.

The Gulf Policy

{¶ 12} There were two "claims made" policies issued to CPS by Gulf. The first policy was effective from November 13, 2001 to November 13, 2002. The parties later amended the effective dates to include December 13, 2001 through December 13, 2002. The second policy renewed the first policy with effective dates of December 13, 2002 through December 13, 2003. Both policies contained a retroactive date of November 13, 1997. After review of the facts, policy language, and applicable law, the trial court, in a very extensive opinion, entered a ruling in favor of Gulf. While this court recognizes the thoroughness of the trial court in this matter as evidenced by its opinion, we respectfully disagree with its findings.

{¶ 13} The trial court's decision focused on the chronology of events in conjunction with a "claims made" policy. With "claims made" policies, "[o]nly claims made against the insured during the policy period *** will be considered within the scope of coverage, even if the acts giving rise to liability occurred before the policy went into effect." (J.E. pg. 5, citing *LaValley v. Virginia Sur. Co.* [2000, N.D. Ohio], 85 F.Supp.2d 740, 744.)

{¶ 14} Under the Gulf policy, a "claim" is defined as: "*** a demand or assertion of a legal right seeking **Damages** made against any of **You**." (Gulf policy, pg. 14.)

{¶ 15} The Gulf policy further reads: "**We** will consider a **Claim** to be first made against **You** when a written **Claim** is first received by any of **You**." (Gulf policy, pg. 10.)

{¶ 16} CPS first became aware of the accusations forming the basis of DAS' eventual complaint through a letter it received from DAS dated November 14, 2002, which was within the first policy period. In that letter, DAS advised that CPS had failed to uphold its contractual obligations. DAS specifically claimed that CPS had not made timely payments in accordance with the contract and demanded payment of those obligations. DAS concluded the letter by demanding a cure from CPS, stating that if CPS failed to cure, CPS "[would] be liable for any additional cost that the state incurs for replacement services as well as any other damages related to the breach."

{¶ 17} The trial court found that this communication did not constitute a demand as defined by the policy; however, a review of the record leads this court to conclude that the November 14, 2002 letter was indeed a "demand or assertion of a legal right seeking damages" because the letter clearly made assertions of damages incurred due to the actions of CPS. The letter also asserted the legal liability of CPS to compensate the injured parties for those damages.

{¶ 18} The lower court held that a claim was not officially asserted by DAS until its letter to CPS dated January 8, 2003. The substance of that letter was confined to one sentence, which reads: "The purpose of this letter is to formally put you on notice of our claim for damages as a result of your breach of duty relating to the above captioned contract with the State of Ohio." This court, however, finds that the November 14, 2002 letter more fully articulated DAS' claim of damages, thus placing DAS' complaint within the appropriate time frame to trigger Gulf's duty to defend.

{¶ 19} The claims asserted in DAS' complaint also fall within the scope of Gulf's duty to defend. According to the terms of the policy, Gulf has a "right and duty to appoint an attorney and defend a covered **Claim**, even if the allegations are groundless, false or fraudulent." (Gulf policy, pg. 8.) Covered claims under the policy include "**Wrongful Acts,**" such as: "1. A negligent act, error or omission." (Gulf policy, pg. 15.)

{¶ 20} The claims asserted by DAS in its underlying complaint include claims of negligence and professional negligence. These claims are clearly covered under the wrongful acts portion of the Gulf policy. In *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, the Ohio Supreme Court held the following:

{¶ 21} "Where the pleadings unequivocally bring the action within the coverage afforded by the policy, the duty to defend will attach. However, where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim. Thus, the scope of the allegations may encompass matters well outside the four corners of the pleadings." Id., syllabus.

{¶ 22} This court finds that DAS's November 14, 2002 letter triggered Gulf's duty to defend under the terms of the policy. Any analysis of the substantive facts giving rise to DAS' complaint by the trial court is beyond the scope of consideration at a summary judgment/ declaratory judgment proceeding. Further, such proceeding is not the proper forum at which to determine Gulf's duty to indemnify since the underlying complaint is still pending. This court finds merit in appellants' assignments of error

concerning Gulf's duty to defend. The lower court's finding that Gulf has no duty to defend is therefore reversed.

The CIC Policy

{¶ 23} CIC insured CPS under a primary commercial general liability policy (No. 0723237) and an umbrella policy (No. 4477548). The primary policy provided comprehensive commercial coverage between June 1, 2000 and June 1, 2003, insuring CPS against personal injury and property damage claims. Upon review of the terms as defined by the policy, the trial court found that the claims made by DAS were not covered by this primary policy. Appellants have now conceded that determination; however, they challenge the trial court's finding that the umbrella policy "increases the coverage limits but not the scope of coverage." (J.E., pg. 2.)

{¶ 24} It is appellants' contention that if there is potential coverage for CPS under the terms of the Gulf policy, then there is potential coverage under the CIC umbrella policy. They argue that the umbrella policy requires CIC to pay any damages in excess of the underlying insurance, which the policy defines as:

{¶ 25} "*** the policies of insurance listed in the Schedule of Underlying Policies *and the insurance available to the insured under all other insurance policies applicable to the occurrence*. Underlying insurance also includes any type of self-insurance or alternative method by which the insured arranges funding for legal

liabilities that affords coverage that this policy covers." (Emphasis added.)

{¶ 26} The only policy listed in the Schedule of Underlying Policies is the CPS Primary Policy (No. 0723237). However, the underlying insurance language, "and the insurance available to the insured under all other insurance policies applicable to the occurrence," can be read as covering parallel policies such as CPS' Gulf policy. "If a court finds that the language in question in an insurance policy is reasonably susceptible of more than one meaning, the court will construe it liberally in favor of the insured and strictly as against the insurer." *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St.2d 95, 311 N.E.2d 844, syllabus.

{¶ 27} Since this court has found that the Gulf policy requires a duty to defend, that policy arguably falls within the underlying insurance language. We, therefore, agree with appellants' contention that CIC does have a duty to defend since the Gulf policy falls under CIC's umbrella policy. Thus, the lower court's finding that CIC has no duty to defend is reversed.

Conclusion

{¶ 28} We respectfully find that the lower court erred in determining that appellees' insurance policies did not create a duty to defend and/or indemnify appellants.

Judgment reversed and case remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of appellees costs herein taxed.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;

COLLEEN CONWAY COONEY, J., DISSENTS (WITH SEPARATE DISSENTING OPINION).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85967

CINCINNATI INSURANCE COMPANY	:	
	:	
Plaintiff-Appellee	:	D I S S E N T I N G
	:	
vs.	:	O P I N I O N
	:	
CPS HOLDINGS, INC., et al.	:	
	:	
Defendants-Appellants	:	

DATE: FEBRUARY 16, 2006

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶ 29} I respectfully dissent.

{¶ 30} In this consolidated appeal, defendants-appellants, State of Ohio, Department of Administrative Services ("DAS") and CPS Holdings, Inc., CPS Holding Company, Ltd., and IQ Solutions, L.L.C. ("CPS"), appeal the trial court's decision granting summary judgment in favor of plaintiffs-appellees, Cincinnati Insurance Company ("Cincinnati") and Gulf Underwriters Insurance Company ("Gulf"). Finding no merit to the appeal, I would affirm.

{¶ 31} Cincinnati filed a declaratory action against CPS, which counterclaimed and brought claims against DAS and Gulf. Cincinnati sought a judgment declaring that it did not owe CPS a duty to indemnify or defend.

{¶ 32} The substance of the matter is that CPS had professional insurance policies with Cincinnati and Gulf. DAS contracted with CPS to provide services to its natural gas suppliers, including making payments to those suppliers. CPS failed to make the requisite payments and converted DAS' funds for corporate use. DAS sued CPS and its insurance companies. Cincinnati and Gulf both denied coverage because the liability stemmed from an intentional breach of contract, which was excluded from both policies.

{¶ 33} The trial court granted summary judgment in favor of Cincinnati and Gulf on the declaratory action, finding that no duty to defend or indemnify CPS existed.

{¶ 34} DAS and CPS appeal this decision. DAS raises three assignments of error and CPS raises two assignments of error, which will be addressed together where appropriate.

Standard of Review

{¶ 35} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

> "Pursuant to Civ.R. 56, summary judgment is appropriate when (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 and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264."

{¶ 36} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). *Mootispaw v. Eckstein,* 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

Gulf Underwriters Insurance

{¶ 37} In the first assignments of error raised by DAS and CPS, they argue that the trial court erred in finding that Gulf did not have a duty to defend or indemnify CPS against the DAS lawsuit.

{¶ 38} "The test of the duty of an insurance company, under a policy of liability insurance, to defend an action against an insured, is the scope of the allegations of the complaint in the action against the insured, and where the complaint brings the action within the coverage of the policy the insurer is required to make defense, regardless of the ultimate outcome of the action or its liability to the insured. (*Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 144 Ohio St. 382, approved and followed.)" *Motorists Mutual Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, 294 N.E.2d 874, paragraph two of the syllabus.

{¶ 39} In the instant case, DAS is suing CPS for breach of contract, breach of express and implied warranty, conversion, unjust enrichment, negligence, professional negligence, liability under R.C. 117.28, and piercing the corporate veil. It is undisputed that Gulf's policy does not cover actions for breach of contract or warranty; thus, DAS and CPS maintain this assigned error under the negligence and professional negligence claims.

{¶ 40} Pursuant to the terms of the policy, Gulf provides an absolute duty to defend "a covered claim, even if the allegations are groundless, false or fraudulent." A covered claim under this policy is defined as a "wrongful act" which includes "a negligent act, error or omission." The policy expressly excludes intentional acts, claims arising out of ill-gotten gains or profits, and liability assumed under a contract.

{¶ 41} Following the syllabus in *Trainor*, supra, we must look at the allegations contained in the complaint to determine whether a duty to defend exists. The complaint, while alleging negligence and professional negligence, essentially stems from CPS' breach of contract with DAS and the improper recovery of profits for CPS' use. The actual substance of the complaint, not how it is categorized, determines the nature of the claims. *Ippolito v. First Energy Corp*, Cuyahoga App. No. 84267, 2004-Ohio-5876. "The term 'claim,' as used in the context of Civ. R. 54(B), refers to a set of facts which give rise to legal rights, not to the various legal theories of recovery which may be based upon those facts. *CMAX, Inc. v. Drewry Photocolor Corp.* (9th Cir. 1961), 295 F.2d 695, 697. Unless a separate and distinct recovery is possible on each claim asserted, multiple claims do not exist. *Local P-171 v. Thompson Farms Co.* (7th Cir. 1981), 642 F.2d 1065, 1070-71." *Aldrete v. Foxboro Company* (1988), 49 Ohio App.3d 81, 550 N.E.2d 208.

{¶ 42} Although DAS has alleged claims for negligence and professional negligence, the claims stem from the facts and circumstances of CPS' breach of contract. Moreover, in order to maintain a negligence action, DAS must prove that CPS owed them a duty. The only duty that arises under this cause of action is a contractual one, which takes the negligence action outside of Gulf's policy coverage. In fact, the complaint alleges under the

"negligence" and "professional negligence" claims that CPS "owed Plaintiff a duty to provide reasonable care to act in a competent manner in the course of providing cash management and billing services to Plaintiff." This duty arises under the contract between CPS and DAS because the contract was to provide cash management and billing services. Under "Schedule of Insured Services," Gulf's policy states: "Providing energy management consulting and energy management services to others, including accounting, auditing and administrative services."

{¶ 43} Therefore, because the gravamen of the complaint involves a breach of contract and conversion, Gulf's policies do not cover this action and Gulf has no duty to defend CPS.

{¶ 44} Additionally, the Ohio Supreme Court recently addressed the issue of filing a negligence action for recovery of economic losses when a contract exists, stating:

> "The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. See *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 45, 537 N.E.2d 624; *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Ass'n* (1990), 54 Ohio St.3d 1, 3, 560 N.E.2d 206. '"The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable."' *Chemtrol*, 42 Ohio St.3d at 44, 537 N.E.2d 624, quoting *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984), 345 N.W.2d 124, 126. See, also, *Floor Craft*, 54 Ohio St.3d at 3, 560 N.E.2d 206. This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that 'parties to a commercial transaction should remain free to govern their own affairs.' *Chemtrol*, 42

> Ohio St.3d at 42, 537 N.E.2d 624. See, also, *Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.* (1988), 236 Va. 419, 425, 374 S.E.2d 55, 5 Va. Law Rep. 1040. '"Tort law is not designed * * * to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts."' *Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner*, 236 Va. at 425, 374 S.E.2d 55." *Corporex Development & Construction Mgmt. v. Shook, Inc.*, 106 Ohio St.3d 412, 414, 2005-Ohio-5409, 835 N.E.2d 701 (Emphasis added).

{¶ 45} Therefore, under this theory, DAS is precluded from filing a negligence action against CPS for breach of contract.

{¶ 46} In the alternative, DAS has asked this court to adopt the reasonable-expectation doctrine concerning an insured's expectation of insurance coverage. The Ohio Supreme Court recently addressed this doctrine and declined to adopt it in *Wallace v. Balint*, 94 Ohio St.3d 182, 189, 2002-Ohio-480, 761 N.E.2d 598, stating:

> "This doctrine is explained in 2 Restatement of Law 2d, Contracts (1981), Section 211(3), which provides:
>
> 'Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.'
>
> Professor Keeton has described the reasonable-expectation doctrine: 'The objectively reasonable expectations of applicants and beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.' Keeton, Insurance Law Rights at Variance with Policy Provisions (1970), 83 Harv.L.Rev. 961.

{¶ 47} Because we have found that Gulf's policy specifically excludes coverage for liabilities arising out of contract, and CPS and DAS concede this fact, there is no basis to adopt the reasonable-expectation doctrine. Gulf does not have a duty to defend because of some obscure term that was or was not included. Rather, Gulf does not have a duty to defend because CPS breached its written contract with DAS. Lack of coverage results from CPS' actions, not the parties lack of intent or expectation. Therefore, we should find that the reasonable-expectation doctrine is inapplicable in this instance. Moreover, we should nevertheless decline to adopt this doctrine because the Ohio Supreme Court has recently decided not to adopt it. See, *Wallace*, supra.

{¶ 48} Accordingly, I would overrule the first assignments of error.

Cincinnati Insurance

{¶ 49} In the second assignments of error raised by DAS and CPS, they argue that the trial court erred in finding that Cincinnati did not potentially have a duty to defend or indemnify CPS against DAS' lawsuit.

{¶ 50} Cincinnati issued a general commercial liability policy and an umbrella policy to CPS. DAS and CPS both have abandoned any claim regarding the general liability policy. Instead, they claim that the umbrella policy covers this lawsuit and therefore triggers Cincinnati's duty to defend or indemnify.

{¶ 51} Construction of an insurance policy is a matter of law. *Chicago Title Ins. Co. v. Huntington National Bank* (1999), 87 Ohio St.3d 270, 273, citing *Latina v. Woodpath Developments Co.* (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262. In interpreting policies, the plain and ordinary meaning of the language used in the policy is reviewed, unless another meaning is clearly apparent. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus.

{¶ 52} DAS and CPS both contend that the umbrella policy affords broad blanket coverage, covering any available insurance to the insured, including the general liability policy and Gulf's policy. DAS and CPS both claim that Cincinnati's umbrella policy provides excess coverage to the Gulf policy, extending the limits and scope of the policy. They base this contention on what the umbrella policy specifically excludes and fails to exclude from coverage. "Although the CIC umbrella policy specifically excludes certain designated professional services provided by CPS/IQ (i.e., computer programming and consulting; computer manufacturing and software; electronic data processing services), the policy does not specifically exclude the professional services provided by IQ to the State * * *." This argument is flawed for two reasons.

{¶ 53} First, the umbrella policy covers damages only for bodily injury, property damage, personal injury or advertising injury which are not covered by underlying insurance or other insurance.

In the instant case, DAS is seeking only monetary damages, which are not property damages.

{¶ 54} Therefore, because DAS is seeking monetary damages, the umbrella policy does not cover the claims; thus, Cincinnati does not owe CPS a duty to defend.

{¶ 55} Second, merely because the policy does not specifically exclude the services listed under the Gulf policy does not mean that the policy includes these services. Giving credence to DAS' and CPS' arguments would open the door to ANY service not specifically listed. This could include legal services, landscaping services, transportation services, or psychological services. DAS' and CPS' reasoning is completely without merit. Moreover, they fail to support their argument with any case law that holds that anything specifically excluded is inherently included.

{¶ 56} Therefore, I would find that Cincinnati, under its umbrella policy, does not owe CPS a duty to defend.

{¶ 57} Accordingly, the second assignments of error are overruled.

DAS' Final Assignment of Error

{¶ 58} In DAS' final assignment of error, it argues that the trial court erred in construing its lawsuit against CPS as sounding in intentional and criminal liability only, and disregarding DAS' claims for negligence and professional negligence.

{¶ 59} As explained above, DAS' claims for negligence and professional negligence are couched under the theory of breach of contract. Therefore, it was not error for the trial court to disregard those claims.

{¶ 60} Accordingly, DAS's third assignment of error should be overruled and judgment affirmed.

APPENDIX A

Appellant CPS's Assignments of Error:

I. THE TRIAL COURT ERRED IN FINDING THAT GULF UNDERWRITERS INSURANCE COMPANY DID NOT HAVE A DUTY TO DEFEND CPS/IQ IN THE DAS LAWSUIT SINCE SOME -- ALTHOUGH ADMITTEDLY NOT ALL -- OF THE ALLEGATIONS IN DAS'S FIRST AMENDED COMPLAINT COULD ARGUABLY OR POTENTIALLY BE COVERED BY GULF'S POLICIES.

II. THE TRIAL COURT ERRED IN FINDING THAT CINCINNATI INSURANCE COMPANY DID NOT POTENTIALLY HAVE A DUTY TO DEFEND CPS/IQ IN THE DAS LAWSUIT SINCE SOME -- ALTHOUGH ADMITTEDLY NOT ALL -- OF THE ALLEGATIONS IN DAS'S FIRST AMENDED COMPLAINT COULD ARGUABLY OR POTENTIALLY BE COVERED BY CINCINNATI'S UMBRELLA POLICY.

Appellant DAS's Assignments of Error:

I. THE TRIAL COURT ERRED IN HOLDING THAT GULF OWES NO DUTY TO DEFEND OR INDEMNIFY CPS/IQ AGAINST DAS' LAWSUIT.

II. THE TRIAL COURT ERRED IN HOLDING THAT CIC OWES NO DUTY TO DEFEND OR INDEMNIFY CPS/IQ AGAINST DAS' LAWSUIT.

III. THE TRIAL COURT ERRED IN CONSTRUING DAS' LAWSUIT AGAINST CPS/IQ AS SOUNDING IN INTENTIONAL AND CRIMINAL LIABILITY ONLY, AND DISREGARDING THE DAS' CLAIMS FOR NEGLIGENCE AND PROFESSIONAL NEGLIGENCE.