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13-1527

IN THE SUPREME COURT OF OHIO

STEVE GRANGER, et al.	*	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
Appellees	*	
	*	Court of Appeals Case No. 26473
v.	*	
	*	
AUTO-OWNERS INS. CO., et al.	*	
	*	
Appellants	*	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS OWNERS INSURANCE COMPANY AND AUTO-OWNERS (MUTUAL) INSURANCE COMPANY

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FILED
SEP 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
SEP 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 3

STATEMENT OF THE CASE AND FACTS 6

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 8

Proposition of Law No. I: Discriminatory intent is inferred as a matter of law for purposes of an intentional act exclusion under an umbrella policy of insurance on a claim for pre-leasing housing discrimination. 8

Proposition of Law No. II: A claim for emotional distress does not constitute "humiliation" sufficient to trigger a duty to defend under an umbrella policy of insurance. The duty to defend can only be triggered by actual facts, not an inference of potential recoverable damages where no covered conduct is even alleged. 10

CONCLUSION 12

CERTIFICATE OF SERVICE 13

APPENDIX — Appx. Page

Opinion of the Summit County Court of Appeals (June 28, 2013) 1

Journal Entry of the Summit County Court of Appeals denying applications for reconsideration (August 14, 2013) 17

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

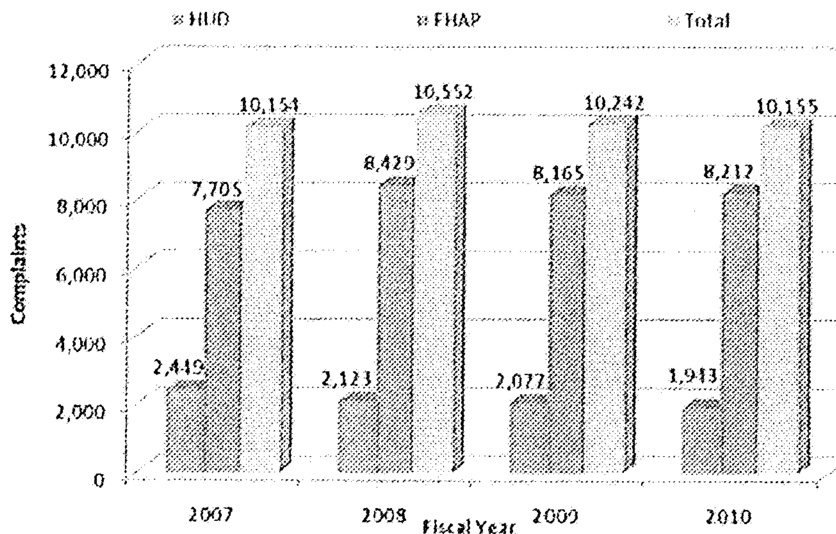
The claims in this case set upon two critical facets of Ohio's economy and their intersection with Ohio's strong public policy and laws against discrimination. By addressing the propositions of law in this matter, this Court has the opportunity to clearly advise those who discriminate in the provision of housing accommodations that they will not be defended by their insurance carriers for that discriminatory conduct.

The impact of the insurance industry on the economy in the State of Ohio is staggering. The insurance industry contributed approximately $17.4 Billion to the Ohio Gross State Product in 2010 which equates to approximately 3.7% of the State's Gross State Product. See, Insurance Information Institute Improving Public Understanding of Insurance – *What It Does And How It Works, Ohio Firm Foundation* http://www.2.iii.org/firm-foundation/state-fact-sheets-ohio-firm-foundation.html. (accessed September 25, 2013) The insurance industry provided over 100,000 jobs in Ohio in 2011 accounting for approximately $8.2 Billion in employment compensation in the State of Ohio in 2010. *Id.* In Ohio, insurance carriers paid taxes totaling $467.3 Million in 2011. *Id.* Thus, it is clear that the insurance industry has a significant presence in the State of Ohio making this case of public or great general interest.

The insurance effects of this case are not the only significant issues in this matter, however. The claims in this matter relate to claims asserted against a landlord who discriminates against a prospective tenant prior to the leasing of property. The Fair Housing Act and its ancillary state legislation prohibit discrimination based on race, color, national origin, religion, sex, disability or familial status in leased housing related transactions. Under the Fair Housing Act and its implementing regulations, the United States Department of Housing and Urban

Development has authority to investigate, conciliate and/or adjudicate claims of discrimination. The scope of discrimination is reflected in the following chart provided by the most recent available annual report on Fair Housing from the United States Department of Housing and Urban Development.

Chart 1: Complaints Filed with HUD and FHAP Agencies (FY 2007-FY 2010)



Source: TEAPOTS

In FY 2010, HUD and FHAP agencies received a total of 10,155 housing discrimination complaints. This was the 5th consecutive year that HUD and FHAP agencies received more than 10,000 complaints.

Bases of Complaints

All complaints filed must allege a basis for discrimination. The Fair Housing Act and substantially equivalent state or local fair housing laws list seven prohibited bases for discrimination: race, color, national origin, religion, sex, disability, and familial status. The Fair Housing Act and substantially equivalent state or local fair housing laws also make it unlawful to coerce, threaten, intimidate, or interfere with anyone for exercising or enjoying their fair housing rights or encouraging or aiding others in the exercise or enjoyment of their fair housing rights.

Table 1 shows the number of complaints filed with HUD and FHAP agencies that alleged a violation on each basis. If a single complaint alleged multiple bases, it was counted under each basis alleged.

The breakdown of these types of charges of discrimination including those like the case at bar involving familial status is as follows:

Table 1: Bases of HUD and FHAP Complaints (FY 2007-FY 2010)

Basis	FY 2007		FY 2008		FY 2009		FY 2010	
	Number of Complaints	% of Total	Number of Complaints	% of Total	Number of Complaints	% of Total	Number of Complaints	% of Total
Disability	4,410	43%	4,675	44%	4,458	44%	4,839	48%
Race	3,750	37%	3,669	35%	3,203	31%	3,483	34%
Familial Status	1,441	14%	1,690	16%	2,017	20%	1,560	15%
National Origin	1,299	13%	1,364	13%	1,313	13%	1,177	12%
National Origin—Hispanic or Latino	784	8%	848	8%	837	8%	722	7%
Sex	1,008	10%	1,133	11%	1,075	10%	1,139	11%
Religion	266	3%	339	3%	302	3%	287	3%
Color	173	2%	262	2%	251	2%	219	2%
Retaliation	588	6%	575	5%	654	6%	707	7%
Number of Complaints Filed	10,154		10,552		10,242		10,155	

Percentages do not total 100 percent because complaints may contain multiple bases.
Percentages are rounded to the nearest whole number.

Source: TEAPOTS

Table 1 shows that the rank order of the most common to the least common bases of complaints has remained the same during the past 4 fiscal years. In FY 2010, disability was the most common basis of complaints filed with HUD and FHAP agencies, being cited as a basis for 4,839 complaints, or 48 percent of the overall total. This large number of complaints is due, in part, to the additional protections afforded persons with disabilities under the Fair Housing Act, i.e., reasonable accommodation, reasonable modification, and accessible design and construction. In FY 2010, race was the second most common basis of complaints, being cited as a basis for 3,483 complaints, or 34 percent of the overall total.

This data reflect a notable trend in the share of disability and race complaints. Whereas disability and race used to account for nearly the same share of complaints, the gap between these bases has grown over the years. In FY 2010, disability complaints accounted for 48 percent of complaints, while race complaints made up 34 percent of complaints, a difference of 14 percentage points. In FY 2007, this difference was much smaller. At that time, disability complaints accounted for 43 percent of complaints, while race complaints made up 37 percent of complaints, a difference of 6 percentage points.

Thus, we are dealing with thousands of complaints throughout the country and in the State of Ohio. For Fiscal Year 2011 there were a total of 531 complaints of discrimination in housing related activities. See Appendix B to Annual Report on Fair Housing Fiscal Year 2011. This is not an isolated situation of a claim or charge of discrimination being asserted against a landlord, this is something that happens repeatedly. This Court has the opportunity to provide

the necessary guidance on this issue and enunciate a clear public policy that those that discriminate do not deserve insurance coverage for their unlawful anti-social discriminatory behavior.

STATEMENT OF THE CASE AND FACTS

In June of 2010, Plaintiffs Steve Granger ("Granger") and Paul Steigerwald ("Steigerwald") placed an advertisement on "Craig's List" for a rental property they owned on North Rose Boulevard in Akron, Ohio. In response to that listing, a Valerie Kozera "(Kozera") contacted Granger on or about June 7, 2010. Kozera advised Granger she intended to live at the property with her son who was six years old. Granger specifically told Kozera he would not rent the property to anyone with children. This was in direct violation of the state and Federal Fair Housing Laws.

Based on the discriminatory comments of Granger, Kozera contacted the Fair Housing Contact Service, Inc. ("FHCS") which investigated Granger's discriminatory conduct by conducting a series of tests where FHCS sent experienced testers to interact with Granger to inquire about the property. Granger continued on his discriminatory path and advised testers both orally and by e-mail that Granger and Steigerwald would not permit children to live at the property. Based on this investigation, in September 2010, FHCS filed a housing discrimination charge against Granger and Steigerwald with the Ohio Civil Rights Commission. In response to those charges, Granger and Steigerwald retained their independent counsel to try and resolve the claims with Kozera and FHCS. After negotiations were unsuccessful, Kozera and FHCS filed a lawsuit against Granger and Steigerwald in the United States District Court, Northern District of Ohio for their discriminatory conduct. That Complaint was filed on March 25, 2011.

During the relevant time periods, Appellants Owners Insurance Company ("Owners") and Auto-Owners (Mutual) Insurance Company ("Auto-Owners") had in effect various policies of insurance issued to Granger and/or Steigerwald. The dwelling policy issued by Owners Insurance Company bearing Policy No. 46-809-489-00 is not at issue in this appeal as the Summit County Court of Common Pleas and the Ninth District Court of Appeals both found that the dwelling policy did not provide a duty to defend or indemnify on the claims asserted against Granger and Steigerwald for their discriminatory conduct. The policy at the heart of this appeal is an umbrella policy of insurance issued by Auto-Owners solely to Steve Granger. Not until two months after the Kozera lawsuit was filed in U.S. District Court did Steigerwald send a copy of the Complaint to the insurance agency which procured the umbrella policy for Granger.

On June 8, 2011, Auto-Owners denied a demand to defend and indemnify Granger and Steigerwald. Granger and Steigerwald then voluntarily settled the claims of FHCS and Kozera in July 2011. Immediately thereafter, Granger and Steigerwald filed suit against Owners, Auto-Owners and the insurance agency. Following depositions of the parties, Owners and Auto-Owners filed for summary judgment as did the Co-Defendant insurance agency. The Summit County Court of Common Pleas granted the Defendants' Motions for Summary Judgment which was then appealed by Granger and Steigerwald to the Ninth District Court of Appeals.

On June 28, 2013, the Ninth District Court of Appeals issued its opinion reversing the grant of summary judgment in favor of Auto-Owners and of the Co-Defendant insurance agency. Plaintiffs and Co-Defendant insurance agency filed Applications for Reconsideration which were denied by the Ninth District Court of Appeals on August 14, 2013. This timely appeal follows, as the Ninth District Court of Appeals erred in finding that a question of fact existed regarding

the application of the intentional acts exclusion and a finding that a claim of emotional distress constitutes a claim for "humiliation".

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Discriminatory intent is inferred as a matter of law for purposes of an intentional act exclusion under an umbrella policy of insurance on a claim for pre-leasing housing discrimination.

It is undisputed that the umbrella policy at issue for purposes of this appeal contains a clear and unambiguous intentional acts exclusion. It is also undisputed that Granger and Steigerwald intended to discriminate. The policy provides as follows:

> EXCLUSIONS
>
> We do not cover:
>
> * * *
>
> (d) Personal injury or property damage expected or intended by the insured.
>
> We do cover assault and battery committed to protect persons or property.

Granger acknowledged that he told Kozera and the FHCS tester he would not rent to people with children. Granger did not put in place a benign policy that had an unintended discriminatory effect. He singled out potential renters with children because he specifically intended to exclude that class of people from the property.

In ***Allstate Ins. Co. v. Campbell***, 128 Ohio St.3d 186, 2010 Ohio 6312, 942 N.E.2d 1090, 2010 Ohio LEXIS 3292, this Court had the opportunity to address the doctrine of inferred intent as applied to an intentional acts exclusion and specifically stated at the syllabus as follows:

> 1. As applied to an insurance policy's intentional-act exclusion, the doctrine of inferred intent is not limited to cases of sexual molestation or homicide.

> 2. As applied to an insurance policy's intentional-act exclusion, the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm.

Rather than address the doctrine of inferred intent, the Court of Appeals in this matter glossed over the issue by similarly concluding without analysis that "in cases such as this one, where the insureds act does not necessarily result in harm, we cannot infer an intent to cause injury as a matter of law". See ***Granger v. Auto-Owners Ins. Co.***, 9th Dist. No. 26473, 2013 Ohio 2792 at ¶15. In ***Allstate***, supra, this Court recognized that the doctrine of inferred intent for purposes of an intentional acts exclusion under a policy of insurance has continued to expand for claims beyond those involving sexual molestation and murder. See ***Allstate***, supra at ¶34 citing ***Gearing v. Nationwide Ins. Co.***, 76 Ohio St.3d 34, 665 N.E.2d 1115, 1996 Ohio 113 and ***Preferred Risk Ins. Co. v. Gill***, 30 Ohio St.3d 108, 30 OBR 424, 507 N.E.2d 1118 (1987). This Court went on in ***Allstate***, supra to establish the appropriate test for the application of the inferred intent doctrine and explained its findings as follows:

> We now clarified that the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm. Because this test provides a clearer method for determining when intent to harm should be inferred as a matter of law, we hold that courts are to examine whether the act has necessarily resulted in the harm - - rather than whether the act is substantially certain to result in harm.
>
> ***Allstate***, supra at ¶56

For a claim of housing discrimination, the refusal to rent to one based upon race, gender, familial status absolutely will result in a harm. This Court now has the opportunity to make clear that unlawful discriminatory conduct is intentional in nature and excluded from insurance coverage.

Proposition of Law No. II: A claim for emotional distress does not constitute "humiliation" sufficient to trigger a duty to defend under an umbrella policy of insurance. The duty to defend can only be triggered by actual facts, not an inference of potential recoverable damages where no covered conduct is even alleged.

Appellants and the Ninth District Court of Appeals clung to the claim of Kozera that she suffered emotional distress as a result of the intentional discrimination of Granger. Appellants focused on this issue as the umbrella policy includes limited coverage for claims of personal injury which is defined under the umbrella policy as follows:

> (a) bodily injury, sickness, disease, disability or shock;
>
> (b) mental anguish or mental injury;
>
> (c) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; and
>
> (d) libel, slander, defamation of character or invasion of rights of privacy;
>
> including resulting death, sustained by any person.

The Court of Appeals analysis of this issue consists of the following paragraph:

> Mr. Granger and Mr. Steigerwald asserted in their response that, because Ms. Kozera claimed in her complaint that she suffered emotional distress, she arguably suffered humiliation, which is a personal injury covered under the policy. We agree. Emotional distress has been defined as "[a] highly unpleasant mental reaction (such as anguish, grief, fright, *humiliation*, or fury) that results from another person's conduct[.]" (Emphasis added.) *Black's Law Dictionary* 563 (8th Ed.2004). Thus, it would appear that the federal complaint alleges a personal injury as contemplated by the umbrella policy.
>
> ***Granger***, supra at ¶14.

As was accurately pointed out by Judge Carr in her dissent, the underlying lawsuit filed by Kozera did not assert a claim for "humiliation". This Court made clear its position regarding

the burdens of proof for establishing whether or not a claim triggers a duty to defend and/or indemnify under an insurance policy in ***Allstate,*** supra where it stated as follows:

> "It is axiomatic that an insurance company is under no obligation to its insured, or to others harmed by the actions of an insured, unless the conduct alleged of the insured falls within the coverage of the policy." ***Gearing v. Nationwide Ins. Co.*** (1996), 76 Ohio St.3d 34, 36, 1996 Ohio 113, 665 N.E.2d 1115. "Coverage is provided if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto." Id.
>
> ***Allstate***, supra at ¶8.

Allowing the Court of Appeals decision in this matter to stand would ignore decades of Ohio Supreme Court juris prudence guiding insurers and insureds alike in their interpretation of insurance policies to determine when a duty to defend is owed. The Complaint of Kozera made a claim for emotional distress. The umbrella policy provides limited coverage subject to other exclusions for "humiliation". For decades, the test of the duty of an insurance company under a liability policy to defend an action against its insured has been based on the scope of the allegations of the Complaint in the action against the insured. See ***Willoughby Hills v. Cincinnati Insurance Co.***, 9 Ohio St.3d 177, 178-179 (1984), quoting ***Motorists Mut. v. Trainor***, 33 Ohio St.2d 41 (1973), ¶2 of the syllabus. For the Court of Appeals to make the conclusory determination that a claim for damages for emotional distress constitutes humiliation goes far beyond a reasonable interpretation of the pleadings and makes conclusory determinations which ignore long-standing Ohio law.

Thus, for the claim of "emotional distress" to fall within the scope of the policy, such a claim for emotional distress must include a specific claim for "humiliation". These are separate and distinct claims and causes of action and the Ninth District Court of Appeals erred in making such a finding in conflict with this Court's rules for the interpretation of insurance policies. Such

conclusory determinations unnecessarily expand the duty to defend beyond the allegations of the pleadings to hypothetical claims, causes of action, and damages. If the duty to defend is not triggered by the pleadings, it is not a court's obligation to seek out potential unpled claims to find a potential duty to defend.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellants request this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served via regular U.S. Mail, postage prepaid, this 25th day of September, 2013 to the following:

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STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STEVE GRANGER, et al.	C.A. No. 26473
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
AUTO OWNERS INS., et al.	
Appellees	CASE No. CV 2011 07 3997

DECISION AND JOURNAL ENTRY

Dated: June 28, 2013

BELFANCE, Judge.

{¶1} Plaintiffs-Appellants Steve Granger and Paul Steigerwald appeal the judgment of the Summit County Court of Common Pleas granting summary judgment in favor of Defendants Auto-Owners (Mutual) Insurance Company, Owners Insurance Company (Collectively "Auto-Owners"), The Church Agency, Inc., and Mike Coudriet. For the reasons set forth below, we reverse and remand the matter for proceedings consistent with this opinion.

I.

{¶2} Mr. Granger and Mr. Steigerwald established a trust to hold their assets, including a certain piece of real property in Akron, Ohio that Mr. Granger and Mr. Steigerwald have used as rental property. Both Mr. Granger and Mr. Steigerwald are trustees of the trust. Auto-Owners issued a dwelling insurance policy to Mr. Granger, Mr. Steigerwald, and the trust and an umbrella policy to Mr. Granger alone. The Church Agency and its broker Mr. Coudriet provided assistance in obtaining the policies.

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{¶3} Valerie Kozera, the mother of a then-six-year old child, attempted to rent the premises, but Mr. Granger informed her that he would not rent to anyone with children. Ms. Kozera contacted Fair Housing Contact Service, Inc., ("FHCS") which investigated her claims of pre-leasing housing discrimination. In March 2011, FHCS and Ms. Kozera filed a complaint in federal court against Mr. Granger and Mr. Steigerwald alleging federal and state fair housing claims premised on discrimination based on familial status and race. The Church Agency was notified of the lawsuit, and it in turn notified Auto Owners Insurance. In a letter to Mr. Steigerwald and Mr. Granger dated June 8, 2011, Auto-Owners stated that it had received notification that Mr. Steigerwald and Mr. Granger had been accused of discrimination but that the dwelling policy definition of personal injury did not include discrimination. Thus, the dwelling policy did not cover the claim. In July 2011, Mr. Granger and Mr. Steigerwald settled the federal case for $32,500.

{¶4} On July 21, 2011, Mr. Granger and Mr. Steigerwald filed the instant lawsuit against Auto-Owners, The Church Agency, and Mr. Coudriet for breach of contract and estoppel arising out of Auto-Owners' refusal to provide coverage and a defense in the federal suit. The complaint is unclear as to the specific claims against The Church Agency and Mr. Coudriet.

{¶5} Mr. Granger and Mr. Steigerwald filed a motion for partial summary judgment on the issue of Auto-Owners' duty to defend pursuant to the umbrella policy. Auto-Owners filed a motion for summary judgment asserting that it had no duty to provide coverage or defense under the policies for discrimination claims. Additionally, The Church Agency and Mr. Coudriet filed a separate motion for summary judgment. The trial court denied Mr. Granger's and Mr. Steigerwald's motion for partial summary judgment and granted Auto-Owners' and The Church

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Agency's and Mr. Coudriet's motions for summary judgment. Mr. Granger and Mr. Steigerwald have appealed, raising one assignment of error for review.

II.

ASSIGNMENT OR ERROR

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT[.]

{¶6} Mr. Granger and Mr. Steigerwald assert that the trial court erred in granting summary judgment to Auto-Owners, The Church Agency, and Mr. Coudriet. Notably, they do not assert that the trial court erred in denying Mr. Granger's and Mr. Steigerwald's motion for partial summary judgment.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Garner v. Robart*, 9th Dist. No. 25427, 2011–Ohio–1519, ¶ 8.

{¶8} Pursuant to Civ.R. 56(C), summary judgment is appropriate when:

> (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., 50 Ohio St.2d 317, 327 (1977). To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "'must

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set forth specific facts showing that there is a genuine issue for trial.'" *Id.* at 293, quoting Civ.R. 56(E).

{¶9} With respect to Mr. Granger's and Mr. Steigerwald's assertion the trial court erred in granting summary judgment to Auto-Owners, they maintain that the trial court erred only because Mr. Granger was owed a defense under the umbrella policy. Our analysis is thus limited to that issue.

{¶10} "An insurance policy is a contract between the insurer and the insured. If we must interpret a provision in the policy, we look to the policy language and rely on the plain and ordinary meaning of the words used to ascertain the intent of the parties to the contract." (Internal citations omitted.) *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, ¶ 18. "Ambiguous provisions in an insurance policy must be construed strictly against the insurer and liberally in favor of the insured. This is particularly true when considering provisions that purport to limit or qualify coverage under the policy." (Internal citation omitted.) *Westfield Ins. Co. v. Hunter,* 128 Ohio St.3d 540, 2011-Ohio-1818, ¶ 11. "[A]n exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded." (Internal quotations and citation omitted.) *Id.*

> An umbrella policy is a policy which provides excess coverage beyond an insured's primary policies. Umbrella policies are different from standard excess insurance policies, since they provide both excess coverage ("vertical coverage") and primary coverage ("horizontal coverage"). The vertical coverage provides additional coverage above the limits of the insured's underlying primary insurance, whereas the horizontal coverage is said to "drop down" to provide primary coverage for situations where the underlying insurance provides no coverage at all.

(Internal quotations and citations omitted.) *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, ¶ 5.

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{¶11} "[T]he duty to defend is broader than and distinct from the duty to indemnify." *Ward* at ¶ 19. "The duty to defend arises when a complaint alleges a claim that could be covered by the insurance policy." *CPS Holdings, Inc.* at ¶ 6. The duty "is determined by the scope of the allegations in the complaint." *Ward* at ¶ 19. "If the allegations state a claim that potentially or arguably falls within the liability insurance coverage, then the insurer must defend the insured in the action." *Id.* "Once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage." *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, ¶ 13. "But if all the claims are clearly and indisputably outside the contracted coverage, the insurer need not defend the insured." *Ward* at ¶ 19.

{¶12} Thus, we examine the umbrella policy to determine whether there exists an issue of fact as to whether Auto-Owners breached its contract with Mr. Granger by failing to provide a defense in the federal suit. The umbrella policy names Steve Granger as an insured under the policy. There is nothing in the policy to suggest that Mr. Steigerwald is an insured under the umbrella policy, and Mr. Granger and Mr. Steigerwald do not make an argument to the contrary. The policy states:

> DEFENSE – SETTLEMENT
>
> With respect to any occurrence:
>
> (a) not covered by underlying insurance; but
>
> (b) covered by this policy except for the retained limit;
>
> we will:
>
> (a) defend any suit against the insured at our expense, using lawyers of our choice. * * *
>
> (b) investigate or settle any claim or suit as we think appropriate.

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The umbrella policy further states that Auto Owners "will pay on behalf of the insured the ultimate net loss in excess of the retained limit which the insured becomes legally obligated to pay as damages because of personal injury * * * ." Personal injury is defined as:

> (a) bodily injury, sickness, disease, disability or shock;
>
> (b) mental anguish or mental injury;
>
> (c) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; and
>
> (d) libel, slander, defamation of character or invasion of rights of privacy; including resulting death, sustained by any person.

{¶13} As is evident from the above language, Auto-Owners defined personal injury both in terms of certain claims, such as malicious prosecution, and in terms of resulting harms, such as humiliation or mental anguish. Auto-Owners asserted in its motion for summary judgment that the claims against Mr. Granger and Mr. Steigerwald for pre-leasing discrimination do not constitute personal injury under the umbrella policy and thus are not covered. Therefore, according to Auto-Owners, it had no duty to defend Mr. Granger. Auto-Owners also asserted that even if pre-leasing discrimination did constitute a personal injury under the umbrella policy, it would be excluded under the provision that indicates the policy does not cover "[p]ersonal injury * * * expected or intended by the insured[]" because Mr. Granger intended to discriminate.

{¶14} Mr. Granger and Mr. Steigerwald asserted in their response that, because Ms. Kozera claimed in her complaint that she suffered emotional distress, she arguably suffered humiliation, which is a personal injury covered under the policy. We agree. Emotional distress has been defined as "[a] highly unpleasant mental reaction (such as anguish, grief, fright, *humiliation*, or fury) that results from another person's conduct[.]" (Emphasis added.) *Black's*

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Law Dictionary 563 (8th Ed.2004). Thus, it would appear that the federal complaint alleges a personal injury as contemplated by the umbrella policy.

{¶15} Moreover, based upon the limited arguments made below, we cannot at this point determine whether the exclusion applies. The dissent maintains that, because the record is clear that Mr. Granger intended the *discrimination*, the exclusion applies and Auto-Owners had no duty to defend. However, this approach ignores the plain language of the policy. The relevant inquiry under the exclusion portion of the policy is whether the *personal injury* was expected or intended. Thus, the appropriate question to ask is whether Mr. Granger expected or intended Ms. Kozera to be humiliated by his conduct. There has not even been any argument advanced by Auto-Owners on this point, let alone the introduction of relevant evidence. *See Allstate Ins. Co. v. Campbell,* 128 Ohio St.3d 186, 2010-Ohio-6312, ¶ 59 ("An insurer's motion for summary judgment may be properly granted when intent may be inferred as a matter of law. In cases such as this one, where the insured's act does not necessarily result in harm, we cannot infer an intent to cause injury as a matter of law."). Thus, we conclude that Auto-Owners is not entitled to summary judgment on the issue of whether it breached the contract by failing to defend Mr. Granger pursuant to the umbrella policy. This portion of Mr. Granger's and Mr. Steigerwald's assignment of error is sustained.

{¶16} Mr. Granger and Mr. Steigerwald further argue that the trial court erred by granting summary judgment in favor of Auto-Owners with respect to its bad faith claim. Auto-Owners did move for summary judgment on this issue and the trial court, without qualification, granted summary judgment to Auto-Owners. Because the trial court does not discuss the bad faith claim in its judgment entry, its basis for awarding summary judgment on this issue is entirely unclear. We are unsure what role the trial court's determination that Mr. Granger and

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Mr. Steigerwald were not entitled to coverage or a defense played in determining that Auto-Owners was entitled to summary judgment on Mr. Granger's and Mr. Steigerwald's bad faith claim. Accordingly, upon remand, the trial court should consider this issue in the first instance in light of our conclusion that Auto-Owners was not entitled to summary judgment on the breach of contract claim with respect to its failure to provide a defense to Mr. Granger under the umbrella policy.

{¶17} Additionally, Mr. Granger and Mr. Steigerwald argue that the trial court erred by granting summary judgment in favor The Church Agency and Mr. Coudriet. Specifically, they argue that a genuine issue of material fact existed regarding whether The Church Agency and Mr. Coudriet breached their duties owed to their clients by failing to timely submit Mr. Granger's insurance claim to Auto-Owners. They do not appear to challenge the trial court's conclusion that The Church Agency and Mr. Coudriet were entitled to summary judgment on Mr. Granger's and Mr. Steigerwald's breach of contract claim. Nor do they challenge the trial court's determination that there was no breach of duty with respect to the submission of the claim under the dwelling policy.

{¶18} In addressing whether The Church Agency and Mr. Coudriet breached any duties with respect to the submission of the claim as to Mr. Granger under the umbrella policy, the trial court based its decision on the fact that it concluded that Auto-Owners did not owe Mr. Granger a defense, and, therefore, essentially The Church Agency and Mr. Coudriet could not be said to have caused Mr. Granger and Mr. Steigerwald any damage. Because we determined that Auto-Owners was not entitled to summary judgment on the issue of whether it breached its contract with Mr. Granger under the umbrella policy by failing to defend him in the federal suit, it is necessary for the trial court to consider the merits of The Church Agency's and Mr. Coudriet's

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motion on this point. *Neura v. Goodwill Industries*, 9th Dist. No. 11CA0052-M, 2012-Ohio-2351, ¶ 19. We sustain Mr. Granger's and Mr. Steigerwald's assignment of error.

III.

{¶19} In light of the foregoing, we reverse the judgment of the Summit County Court of Common Pleas and remand the matter for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
CONCURS.

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CARR, J.
DISSENTING.

{¶20} I respectfully dissent. Because I would conclude that Auto Owners demonstrated that Mr. Granger intended to discriminate against Ms. Kozera based on her familial status, while Mr. Granger failed to show that he did not intend any discrimination, I would affirm the trial court's award of summary judgment to the insurance company.

{¶21} It is well settled that the interpretation of an insurance policy, like any other contract, is a matter of law. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, ¶ 7. The Ohio Supreme Court directed:

> When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273 (1999), citing *Employers' Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343 (1919), syllabus. *See also* Ohio Constitution, Article II, Section 28. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract in unambiguous if it can be given a definite legal meaning. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex.2000).

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. "An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded." (Internal citations and quotations omitted) *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, ¶ 11. Moreover, "a defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it." *Continental Ins. Co. v. Louis Marx Co., Inc.*, 64 Ohio St.2d 399, 401 (1980).

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{¶22} The majority and Mr. Granger are correct that the duty to defend is broader than and distinct from the insurer's duty to provide coverage. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, ¶ 19. "'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 a defense, regardless of the ultimate outcome of the action or its liability to the insured.'" *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 178-179 (1984), quoting *Motorists Mut. v. Trainor*, 33 Ohio St.2d 41 (1973), paragraph two of the syllabus. Therefore, the insurance company has a duty to defend its insured whenever the allegations in the complaint state a claim that "arguably" falls within the coverage. *Harrison* at ¶ 19. However, the insurer has no duty to defend against any claim that is "clearly and indisputably outside the contracted policy language." *CPS Holdings* at ¶ 6, citing *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 113 (1987); *see also Harrison* at ¶ 19; *Maxum Indemn. Co. v. Selective Ins. Co. of South Carolina*, 9th Dist. No. 11CA0015, 2012-Ohio-2115, ¶ 17 (holding that "once the insurer is able to establish that there is no set of facts that would bring the allegations of the complaint within coverage of its policy, its duty to defend is extinguished.").

{¶23} The relevant policy provisions regarding the duty to defend are as follows:

DEFENSE – SETTLEMENT

With respect to any occurrence:

not covered by underlying insurance; but

covered by this policy except for the retained limit;

we will:

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defend any suit against the insured at our expense, using lawyers of our choice. * * *

investigate or settle any claim or suit as we think appropriate.

The policy further contains the following relevant exclusion:

EXCLUSIONS

We do not cover:

* *

Personal injury or property damage expected or intended by the insured.

The policy defines "personal injury" to mean:

bodily injury, sickness, disease, disability or shock;

mental anguish or mental injury;

false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; and

libel, slander, defamation of character or invasion of rights of privacy;

including resulting death, sustained by any person.

{¶24} I disagree with the majority's construction of the complaint underlying Auto Owners' alleged duty to defend. In their complaint filed in federal court, FHCS and Ms. Kozera alleged the following. After Ms. Kozera inquired about an apartment that Mr. Granger had advertised for rent, he asked her who would be living in the apartment with her. After Ms. Kozera told Mr. Granger that her six-year old son would be living with her, Mr. Granger told her that he would not rent the apartment anyone with children. Ms. Kozera contacted FHCS. The agency conducted an investigation, sending trained testers to inquire about renting the premises. Mr. Granger, both verbally and in writing, informed testers who stated that they had children that he would not rent to people with children. Mr. Granger further provided one of the testers with a copy of the lease which emphatically stated that "No * * * children are permitted – period. No

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exceptions!" FHCS and Ms. Kozera alleged both a federal and state claim for discrimination. Ms. Kozera further alleged that she suffered damages for "emotional distress" as a result of Mr. Granger's discrimination.

{¶25} Mr. Granger construes Ms. Kozera's claim for damages arising out of emotional distress as one for "humiliation," and therefore "personal injury" as that term is defined in the umbrella policy. While the majority agrees with this construction, I do not. Nowhere in the complaint does any form of the word "humiliation" appear. Moreover, my review of the federal complaint indicates only two causes of action, specifically, one federal and one state claim for discrimination. I would construe the allegation of emotional distress merely as part of the prayer for damages, as it was not developed as a distinct cause of action. Assuming arguendo, however, that Ms. Kozera's claims arguably present a claim for personal injury as that term is defined in the policy, I would conclude that Auto Owners' duty to defend was abrogated by application of the plain language of the policy's exclusion for expected or intended injury.

{¶26} Mr. Granger argues that, because violations of 42 U.S.C. 3604 (Fair Housing Act) and R.C. 4112.02(H) (prohibiting discrimination relating to the rental of housing accommodations) constitute strict liability offenses, his conduct was not intentional. The violation of a law prohibiting discrimination and the act of engaging in conduct intended or expected to cause personal injury are not dependent events. The umbrella policy does not limit its exclusion for intended or expected harm to only situations in which the insured has been convicted or found liable for an offense requiring proof of intent. Moreover, the commission of a strict liability offense does not preclude the ability of the actor to have acted with intent (or any other culpable mental state). The question in this case was whether Mr. Granger intended to

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discriminate against Ms. Kozera. I believe that the trial court properly concluded that no genuine issue of material fact existed in that regard.

{¶27} Auto Owners deposed Mr. Granger who testified and admitted that he told Ms. Kozera and others that he would not rent to people with children. He testified that he wished to maintain a quiet environment for his tenants. Mr. Granger further admitted during his deposition that he sent an email to "Lauren Green" about the rental property, informing her that he is "selective" in his choice of tenants and that pets and children are not allowed. "Lauren Green" was one of the testers sent to the property by FHCS to investigate Ms. Kozera's allegation of discrimination. A copy of the lease Mr. Granger provided to prospective tenants, attached to the federal lawsuit which is appended to Mr. Granger's complaint, clearly states that no children are permitted on the premises under the lease. In addition, Mr. Granger admitted in his deposition that he violated the discrimination laws. Based on this evidence, I would conclude that Auto Owners met its initial burden under *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996), to show that Mr. Granger intended to discriminate against Ms. Kozera based on her familial status.

{¶28} I would conclude that Mr. Granger, however, failed to meet his reciprocal burden under *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996), to show that he did not intend to discriminate against Ms. Kozera when he declined to rent to her based on her familial status. In response to the defendants' motions for summary judgment, Mr. Granger submitted his affidavit in which he averred that he did not intend to discriminate against Ms. Kozera or others. I would conclude that his sworn statement made subsequent to his deposition did not serve to create a genuine issue of material fact. This Court has recognized that "'an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to

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defeat a motion for summary judgment.'" *First Energy Solutions v. Gene B. Glick Co.*, 9th Dist. No. 23646, 2007-Ohio-7044, ¶ 12, quoting *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 28. In this case, Mr. Granger offered no explanation for the disparity between his deposition testimony and the subsequent sworn statement in his deposition. Accordingly, he failed to present evidence to contradict Auto Owners' evidence that he intended to discriminate against Ms. Kozera by refusing to rent to her on the basis of her familial status.

{¶29} I would conclude that there was no genuine issue of material fact regarding Mr. Granger's intent to discriminate against Ms. Kozera. The umbrella policy by its plain language excluded from coverage claims based on intentional conduct by the insured. The policy further unambiguously stated that the insurer would only defend the insured against claims "covered by this policy * * *." Because Ms. Kozera's discrimination claims were not arguably covered by the policy, and were in fact clearly and indisputably outside the contracted policy language, Auto Owners owed no duty to defend Mr. Granger. Moreover, because the insurance company owed no duty to defend, its refusal to defend did not constitute bad faith. Accordingly, I would conclude that the trial court did not err by finding that no genuine issue of material fact existed and that Auto Owners was entitled to judgment as a matter of law.

{¶30} Mr. Granger further argues that the trial court erred by granting summary judgment in favor of The Church Agency and Mr. Coudriet. Specifically, he argues that a genuine issue of material fact existed regarding whether The Church Agency and Mr. Coudriet breached their duties owed to their client by failing to timely submit Mr. Granger's insurance claim to Auto Owners. Assuming that Mr. Granger's complaint alleges a cause of action against the insurance agent and the company that helped him procure insurance policies from Auto Owners, my resolution of the issue relating to Auto Owners' motion for summary judgment

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would render this argument moot. Because Auto Owners' duty to defend and provide coverage was obviated by an applicable exclusion in the policy, the agency's delay, if any, in forwarding the claim to Auto Owners does not create a genuine issue of material fact as to any claim against The Church Agency and Mr. Coudriet which might be gleaned from the complaint. Accordingly, I would conclude that the trial court did not err in granting summary judgment in favor of The Church Agency and Mr. Coudriet. Accordingly, I would overrule Messrs. Granger's and Steigerwald's assignment of error.

APPEARANCES:

THOMAS C. LOEPP, Attorney at Law, for Appellants.

BRIAN T. WINCHESTER and DAWN E. SNYDER, Attorneys at Law, for Appellees.

STEPHAN KREMER and HOLLY MARIE WILSON, Attorneys at Law, for Appellees.

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COURT OF APPEALS
DANIEL M. HORRIGAN
2013 AUG 14 PM 1:53
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STEVE GRANGER, et al.

Appellants

v.

AUTO-OWNERS INSURANCE, et al.

Appellees

C.A. No. 26473

JOURNAL ENTRY

Appellants have moved this Court to reconsider its June 28, 2013 decision, which reversed the judgment of the trial court granting summary judgment to Appellees. Appellees The Church Agency and Mike Coudriet have also moved for reconsideration. Appellees Auto-Owners Insurance Company and Owners Insurance Company (collectively "Auto-Owners") have responded in opposition to the application for reconsideration by Appellants.

In determining whether to grant an application for reconsideration, a court of appeals must review the application to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117 (10th Dist.1992). Appellants argue that this Court should reconsider its decision because this Court failed to consider arguments

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that Appellants made. Specifically, Appellants assert that, on appeal, they argued that the trial court erred in denying their motion for partial summary judgment and that the trial court erred in granting summary judgment to Auto-Owners for its failure to indemnify Mr. Granger. The Church Agency and Mike Coudriet assert that this Court erred in reversing and remanding the grant of summary judgment in their favor as the issue we are remanding for consideration was already decided by the trial court.

This Court finds that the applications for reconsideration in this case neither call attention to an obvious error nor raise issues that we did not consider properly. Appellants' assignment of error was limited to asserting that the trial court erred in granting summary judgment. Accordingly, our analysis was properly limited to that issue. *See State v. Michel*, 9th Dist. Summit No. 25184, 2011-Ohio-2015, ¶ 24. With respect to Appellants' contention that they also argued on appeal that the trial court erred in granting summary judgment on the issue of indemnity, we do not agree. While that topic is mentioned in the brief, Appellants did not develop any argument on that issue, leading this Court to conclude that the issue was not being raised on appeal. *See* App.R. 16(A)(7). With respect to The Church Agency's and Mike Coudriet's assertion, we note that, with respect to the breach of contract claim, we did not overturn the trial court's grant of summary judgment, concluding that that portion of the trial court's decision was not being challenged on appeal. With respect to The Church Agency's and Mike Coudriet's contention that the trial court already considered the issue we are remanding for consideration, we do not agree. While the trial court's entry is somewhat ambiguous, it appears that the trial court based, at least in part, its grant of summary judgment to The Church Agency and Mike Coudriet on its faulty interpretation of the insurance contract. Given the foregoing, we conclude it is still appropriate for the trial court to consider the issue in the first instance.

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The applications for reconsideration are denied.

Judge

Concur:
Moore, P. J.

Dissent:
Carr, J.