

NOTE: Nunc Pro Tunc Entry and Opinion filed on 12/1/03 to amend Entry only to conform with Opinion. Typographical error: "affirmed" amended to "reversed".

NOTE: Nunc Pro Tunc Entry filed on 12/16/03 to amend Entry to conform with Opinion. Revised: "reversed" to "reversed and remanded to the trial court for proceedings consistent with this Opinion."

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CINCINNATI INSURANCE COMPANY	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Shelia G. Farmer, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 2003CA00150
CANTON FINANCIAL	:	
	:	<u>NUNC PRO TUNC</u>
Defendant-Appellant	:	<u>OPINION</u>
CHARACTER OF PROCEEDING:		Civil appeal from Stark County Court of Common Pleas, Case No. 2002CV03128
JUDGMENT:		REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:		December 16, 2003
APPEARANCES:		
For Plaintiff-Appellee		For Defendant-Appellant
THOMAS C. HOGAN		RONALD G. FIGLER
Atty. No.		Atty. No. 0002147
c/o The Cincinnati Insurance Company		c/o Lesh, Casner & Miller
76 South Main Street, Ste. 1604		4150 Belden Village St., N.W., Ste. 606
Akron, OH 44308		Canton, OH 44718
Phone; 330-376-1600		Phone: 330-493-0040

Boggins, J.

{¶1} This is an appeal from a decision of the Court of Common Pleas of Stark County, which granted summary judgment in favor of Appellee and denied Appellant's motion for partial summary judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee had issued two policies of insurance providing coverage to Appellant, a commercial general liability policy and a commercial umbrella liability policy.

{¶3} Appellant is engaged in the business of lending money to the general public and in the course of such business it obtains credit reports as to prospective borrowers.

{¶4} On August 4, 2000, Tom Cooksey made a joint loan application on behalf of he and his wife, Patricia.

{¶5} Appellant obtained a credit report as to both.

{¶6} In actuality, the Cooksey's were separated at such time.

{¶7} Patricia Cooksey filed suit in the United States District Court involving Appellant asserting a violation of the Fair Credit Reporting Act.

{¶8} Demand was made upon Appellee to defend such action and provide coverage. Appellee denied such demand.

{¶9} The Federal suit was subsequently settled with substantial legal fees in defense thereof.

{¶10} Appellee then filed the case sub judice in declaratory judgment seeking a determination of coverage under the policies with Appellant.

{¶11} Appellant filed a motion for partial summary judgment and Appellee filed its Rule 56 Motion, which was sustained with that of Appellant denied.

{¶12} Two Assignments of Error are set forth but these will be addressed simultaneously and are as follows:

ASSIGNMENTS OF ERROR

{¶13} “Assignment of Error No. 1. The Trial Court erred in granting plaintiff’s motion for summary and declaratory judgment.

{¶14} “Assignment of Error No. 2. The Trial Court erred in denying defendant’s motion for partial summary judgment.”

I., II.

{¶15} The essential issue in this case as affecting both Assignments of Error is whether Appellee was required to defend and provide coverage as to the suit commenced by Patricia Cooksey for obtaining her credit report or whether the exclusion as to coverage and defense in the endorsements to Appellee’s policies eliminated such obligation.

{¶16} The first endorsement examined states:

{¶17} “Description of Professional Services:

{¶18} “1. Financial Services Professional.”

{¶19} The second exclusion endorsement:

{¶20} “1. Financial Consultant.”

{¶21} Each endorsement states in similar language that insurance was not provided for “bodily injury”, “property damage”, “personal injury” or “advertising injury” due to the rendering or failure to render any professional service shown in the schedule.

{¶22} The question then becomes whether Appellant is a Financial Services Professional or a Financial Consultant or engaged in a professional capacity in the operation of its business.

{¶23} These exclusions, if applicable, apply to the Commercial General Liability Policy and the Commercial Umbrella Liability Policy issued by Appellee.

{¶24} In response to the Civil Rule 56 Motions, the trial court correctly stated:

{¶25} “Summary Judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ. R.56 (C). The moving party must initially inform the trial court of the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett* (1986), 466 U.S. 317, citing with approval in *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108. See, also *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

{¶26} “When a motion for summary judgment is made and supported as provided in this rule, an adverse 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 the specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.”

{¶27} The Court then concluded:

{¶28} “The Court agrees with the Plaintiff that the controlling case is *American Policyholders Ins. Co. v. Michoti* (1952) 156 Ohio St. 578. The question in the instant case is whether the act complained of i.e. ordering the credit report on the wife, arose out of the practice of the insured’s profession. The Court finds that the profession of the insured was making loans to persons or entities deemed qualified as acceptable risks by the Defendant. One of the tools used to assess the risk was to obtain a credit report. Therefore, the Court finds that the act complained of arose out of the practice of the insured’s profession and that the policy specifically excludes coverage for bodily injury, property damage, personal injury, or advertising injury due to the rendering or failure to render any professional service.”

{¶29} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

{¶30} Based upon our review of the data provided, we respectfully disagree with the conclusion relative to the holding in *American Policyholders Ins. Co. vs. Michota*, supra. Such case involved a podiatrist’s patient suffering injuries when thrown from the examining chair which was not locked in place and spun when she attempted to be seated as directed. The central issue was whether the negligence asserted arose out of professional services rendered or to be rendered. We find that this differs considerably from the case sub judice in that there was no doubt that the doctor in *Michota* was engaged in providing professional services. Here, the question to be decided is exactly whether Appellant was so engaged as a Financial Services Professional or Financial Consultant.

{¶31} We believe that the distinction between a business and a profession has been aptly considered by the Courts of Appeals of the Fourth and Second Districts.

{¶32} In construing the nature of professional services as defined in a zoning ordinance, the Court of Appeals for the Fourth District in *City of Athens v. Michael* (June 1, 1994), Athens County App. No. 1600 held:

{¶33} “The word profession may be of more help. Appellant argues that a profession is an occupation which requires a high degree of skill, training and licensure. We perceive it as far more than that. Both occupations and professions entail making a living, but in an occupation, although the person is providing a useful and valuable service to the client and the community, the basic purpose is to make money. In a profession, the making of money is subordinate to the principles of the profession. The professional is, foremost, dedicated to the principle of that profession. Doctors are professionally dedicated to the health and welfare of the patient. Lawyers profess dedication to justice, scientists to knowledge. One looking at many of today's professionals might well be convinced that doctors are only interested in fees, that lawyers will do anything to win a big verdict, and that science is an unseemly scramble for prestige and research dollars. These criticisms are, unfortunately, too often true, but there still are men and women working in these professions who exemplify dedication to principle. While the distinction between making money and following a profession has been blurred, the concept of professionalism, the standard which so many doctors and lawyers fall short of, is still valid.”

{¶34} Also, in *GRE Insurance Group v. Normandy Pointe Associates* (March 8, 2002) Montgomery County App. No. 18998, 2002 Ohio 1197, the court stated:

{¶35} “Ohio Courts have accepted more than one definition of professional services relating to insurance contracts. ‘Professional services’ has been defined as services requiring advanced knowledge in a field acquired by a prolonged course of study or specialized intellectual instruction. *Jacob v. Grant Life Choices* (June 29, 1995), Franklin Cty.App. No. 94APE10-1436, unreported. Additionally, ‘professional services’ has been defined as services performed by one in the ordinary course of his profession, on behalf of another, pursuant to an agreement, and for which compensation is reasonably expected. *Kahn v. Cincinnati Ins. Co.* (February 3, 1984), Lucas Cty.App. No. L-83-309, unreported. “The professional services exclusion is not applicable in this case because Defendant Normandy did not provide professional services to Homeowner Plaintiffs, and Woolpert and Bassett are not covered under the policy. Accordingly, the negligence claims against Defendant Normandy are not excluded under the terms of the policy, and GRE must defend Normandy against the allegations in Case Number 96-3102.” *Id.*

{¶36} The general presumption in reading an insurance contract is that which is not clearly excluded is included. *Home Indemn. Co. v. Village of Plymouth* (1945), 146 Ohio St. 96. ‘Where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that which is not clearly excluded from the operation of such contract is included in the operation thereof.’ *Id.* Furthermore, any ambiguity or contradiction in an insurance policy must be construed in favor of the insured. *Thompson v. Preferred Rick Mut. Ins. Co.* (1987), 32 Ohio St.3d 340.

{¶37} Of further assistance are the definitions contained in the Code of Federal Regulations, Title 29-Labor, Subtitle B, Chapter V., Section 541.3:

{¶38} “Professional.

{¶39} “The term employee employed in a bona fide * * * professional capacity in section 13(a)(1) of the act shall mean any employee:

{¶40} “(a) Whose primary duty consists of the performance of:

{¶41} “(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

{¶42} “(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

{¶43} “(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or

{¶44} “(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in § 541.303; and

{¶45} “(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

{¶46} “(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;”

{¶47} We, therefore, must sustain each of the Assignments of Error as the materials examined pursuant to Civil Rule 56 clearly indicate that Appellant, while engaged in the business of lending money for profit, does not fall within the category of a profession. To determine otherwise would be to conclude that all businesses are professions.

{¶48} As the definitions chosen by Appellee in the exclusion endorsements must be examined, where doubt exists, against the drawer, we conclude that the policies issued by Appellee did provide coverage in the instant case and the duty to defend the action in Federal Court.

{¶49} This cause is reversed and this cause is remanded for proceedings consistent with this Opinion.

By: Boggins, J.

Gwin, P.J. and

Farmer, J. concur