> of their tenants safety: a burden which could never be completely met given the unfortunate realities of modern society.

Id. at 392-393, 485 A.2d at 746-747.

Although *Feld* concerns a relationship dissimilar to that presented in this case, the court's dictum that parties cannot be insurers against the criminal conduct of third parties is instructive. The mere happening of a criminal act indicates that security measures, however comprehensive, were ineffective. The *Feld* court stated:

> When a landlord by agreement or voluntarily offers a program to protect the premises, he must perform the task in a reasonable manner and where a harm follows a reasonable expectation of that harm, he is liable. *The duty is one of reasonable care under the circumstances. It is not the duty of an insurer* and a landlord is not liable unless his failure is the proximate cause of the harm.

Id. at 393, 485 A.2d at 747 (emphasis added).

Feld does not control the outcome of the instant case, however, because the crucial question here is not the extent of duty. As previously stated, the court will not impose a duty on Exxon or parties similarly situated.

Finally, plaintiff argues that it is not appropriate to dismiss Exxon on demurrer becuase she should be permitted to engage in extensive discovery to determine the intricate factual basis of the relationship between Exxon and the other parties to these actions. The court concludes, however, that even in light of the standards for sustaining a demurrer, the preliminary objections of Exxon must be sustained. The plaintiff has taken four years to get to this stage of the proceedings and it would be a waste of judicial resources, and time and expense to the clients, to allow such discovery only to dismiss Exxon on summary judgment, perhaps several more years down the road. It is clear to the court that the plaintiff does not state a case in negligence on the factual averments of her complaint because, as a matter of law, she cannot establish that Exxon owed a legal duty to her. Therefore, the court is sustaining Exxon's preliminary objections and as such need not discuss the issues raised in Counts II and III of plaintiff's complaint.

CONCLUSION

In accordance with *Green v. Independant Oil Company*, 414 Pa. 477, 201 A.2d 207 (1964) and *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984), the preliminary objections of defendant Exxon Corporation are sustained and defendant is dismissed form this action.

ORDER OF COURT

September 21, 1993, the preliminary objections of defendant Exxon Corporation are sustained, and defendant is dismissed from this action.

BLACK AND WIFE V. SCOTTSDALE INSURANCE COMPANY, ET AL., C.P. Fulton County Branch, No. 1 of 1992-C

Declaratory Judgment Action - Interpretation of An Insurance Contract -Rules of Construction - Alleged Ambiguities in Language - recovery of costs and legal fees incurred in declaratory judgment action necessary to compel insured to defend its insured against a third party

1. The overriding goal when interpreting an insurance contract is to ascertain the parties' intent as manifested by the language of the policy.

2. Where the terms of an insurance contract are clear and unambiguous, the Court must read the policy in its entirety, giving the words contained therein their plain and proper meaning.

3. An insurance policy should be read to avoid ambiguities, where possible.

4. A provision is deemed ambiguous where reasonably intelligent persons would honestly differ as to its meaning when considered in the context of the whole policy.

5. When the language is ambiguous, the Court must resolve the ambiguity against the insurer, as drafter of the contract, and in favor of the insured, who typically lacks bargaining leverage regarding the terms of the coverage.

6. The language in an insurance policy should not be tortured in order to create the appearance of an ambiguity .

7. Breach, without good cause, by an insurance company of its duty to defend gives rise to the right of recovery by the insured for the costs of hiring substitute counsel and other costs of defense.

8. An insured who is compelled to initiate a declaratory judgment action in order to establish his insurer's duty to defend an underlying action brought by a third party may recover counsel fees incurred in the declaratory judgment action.

George F. Douglas, Jr., Esquire, Counsel for Plaintiffs
Richard M. Rosenthal, Esquire, Counsel for Defendants, Randy Smith and Rebecca Thompson
Darryl R. Slimak, Esquire, and John W. Blasko, Esquire, Counsel for Tuscarora Wayne Mutual Insurance Co.
Dennis J. Stofko, Esquire, Counsel for Kimberly Mack, Lebanon Mutual Insurance Company, Additional Defendants
Jared L. Hock, Esquire, Counsel for Defendant, Family Care Services, Inc.
Frank J. Lavery, Jr., Esquire, Counsel for Defendant, Scottsdale Insurance Company

OPINION AND ORDER

KAYE, J., September 15, 1993:

OPINION

The declaratory judgment action presently before the Court was initiated by Mary Jane and John Black (hereinafter "plaintiffs") in order to determine which of two insurance companies, Scottsdale Insurance Company and/or Tuscarora Wayne Mutual Insurance Company, is required to provide their legal defense in a pending wrongful death and survival action. The underlying tort action involves the untimely death of a ten year old child, Christopher Lee Thompson, while he was placed in foster care with the plaintiffs on February 21, 1991. The child was allegedly mauled by three dogs which were housed in a kennel on the plaintiff's property.

Cross motions for summary judgment, filed by plaintiffs and

Scottsdale, are currently before the Court for disposition. As previously indicated, plaintiffs seek the Court's judgment as to whether Scottsdale and/or Tuscarora Wayne owes them coverage under their respective insurance policies. Scottsdale, on the other hand, requests that the Court find that the plaintiffs are not insured under its policy or, if such coverage does exist, that Tuscarora Wayne remains the plaintiff's primary insurance carrier, with Scottsdale providing only excess coverage.

We observe, preliminarily, that Tuscarora Wayne filed a combined motion for judgment on the pleadings or summary judgment on October 5, 1992. Following argument, the motion was denied by order of court entered March 4, 1993 for failure to join an indispensable party. Specifically, the party at issue was the insurance carrier for the plaintiffs' daughter, Kimberly Sue Mack. Ms. Mack is both a named party defendant in the underlying tort action and an additional defendant in the pending action for declaratory judgment. Ms. Mack's insurance carrier, Lebanon Mutual Insurance Company, has now been joined as an additional defendant to this action, rendering the matter ripe for disposition. Briefs, with appended exhibits, have been received from all parties. Argument on the cross motions for summary judgment was conducted on August 3, 1993.

A motion for summary judgment may be granted where

> "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. No. 1035.

Summary judgment may be entered only in cases which are clear and free from doubt based on an examination of the record in the light most favorable to the non-moving party. *Toth v. City of Philadephia,* 213 Pa. Super. 282, 247 A.2d 696 (1968).

Two insurance policies are at issue in this matter. The first,

issued by Tuscarora Wayne[1] to the plaintiffs, is a commercial general liability policy. The second is a commercial and professional liability insurance policy issued by Scottsdale to Family Care Services, Inc., the private agency which contracted with the plaintiffs for their services as foster parents. Based on our construction of the policies and other relevant evidence, we conclude that plaintiffs qualify for coverage under the Scottsdale policy alone.

Turning first to the Tuscarora Wayne policy, the general liability renewal certificate for the pertinent policy period beginning May 1, 1990 through May 1, 1991, describes the coverage classification category as "HEALTH CARE FACILITIES - HOME FOR THE AGED". It is undisputed that plaintiffs cared for two elderly women on the lower floor of their residence during tha same time period that they provided foster care for Christopher Thompson. Tuscarora Wayne contends that the commercial insurance policy which it issued to the plaintiffs was, in fact, limited to incidents arising in connection with their care of the elderly. In support of its position, Tuscarora Wayne cites the following endorsement to the plaintiffs' commercial general liability policy:

> LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART.
>
> SCHEDULE
>
> Premises:
>
> Project: Code 44423-Health Care Facilities-Home For The Aged
>
> (If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement).
>
> This insurance applies only to "bodily injury," "property damage," "personal injury," "advertising injury," and medical expenses arising out of:
>
> 1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary to incidental to those premises; or
>
> 2. The project shown in the Schedule.

[1]At the time of the death of their foster child, the plaintiffs had both a homeowner's insurance policy and a commercial liability insurance policy issued by Tuscarora Wayne. Plaintiffs concede, as they must, that coverage under the homeowner's policy is not at issue since it excludes liability coverage for *"bodily injury* to...persons under the age of 21 in *your* care or in the care of *your* resident relatives." (Emphasis in original.) Thus, potential liability for the death of the ten year old foster child would not be covered under the homeowner's policy.

Tuscarora Wayne contends that this endorsement unambiguously limits insurance coverage under the policy to the named "project", in this case a home for the aged. In view of the fact that the death of Christopher Thompson did not arise from plaintiff's care of the elderly residents in their home, Tuscarora Wayne argues that any liability of the plaintiffs for the death of the foster child is not subject to coverage by the insurance policy issued by Tuscarora Wayne. We agree.

Several well established rules of construction apply when interpreting an insurance contract. The overriding goal of such interpretation is to ascertain the parties' intent as manifested by the language of the policy. *Koenig v. Progressive Insurance Co.*, 410 Pa.Super 232, 599 A.2d 690 (1991), *alloc. denied*, 531 Pa. 640, 611 A.2d 712 (1992). Where the terms of an insurance contract are clear and unambiguous, the Court must read the policy in its entirety, giving the words contained therein their plain and proper meaning. *Pennsyvania National Mutual Casualty Insurance Co. v. Traveler's Insurance Co.*, 405 Pa.Super. 149, 592 A.2d 51 (1991). An insurance policy should be read to avoid ambiguities, where possible. A provision is deemed ambiguous where reasonably intelligent persons would honestly differ as to its meaning when considered in the context of the entire policy. *Curbee, Ltd. v. Rhubart*,406 Pa.Super. 505, 594 A.2d 733 (1991).

> "When the language is ambiguous... the court must resolve the ambiguity against the insurer, as drafter of the contract, and in favor of the insured, who typically lacks bargaining leverage regarding the terms of the coverage." *DiFabio v. Centaur Insurance Co.*, 366 Pa.Super 590, 593, 531 A.2d 1141, 1142 (1987).

A review of the entire commercial general liability policy issued by Tuscarora Wayne reveals that its coverage is clearly limited to the plaintiffs' operation of a home for the aged on their property. As noted previously, the renewal certificate for the applicable policy period states that coverage under the policy is classified as "Health Care Facilities - Homes for the Aged". Moreover, a straightforward reading of the previously cited endorsement, which further specifies the imitation of general liability coverage, shows that such coverage is limited to the "premises" or "project" specified in the endorsement schedule. Since no "premises" are listed therein, attention is directed to the designated "project." That "project", consistent with the renewal certificate, is listed as "Health Care Facilities - Home for the Aged." Thus, it would appear that coverage is limited to damage or injuries arising in connection with the plaintiffs' care of the elderly.

Scottsdale contends that the endorsement is ambiguous. Its analysis focuses on the absence of an entry for the category of "premises" appearing in the endorsement schedule. It then notes the endorsement's parenthetical which states that:

> "If *no* entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement." (Emphasis added.)

Scottsdale concludes from this language that, in the absence of an entry under the heading of "premises", one must be supplied by referring to the policy declarations. The only possible reference to a "premises" contained in the declarations is the listing of plaintiffs' mailing address. Scottsdale, therefore, argues that the insurance is applicable to plaintiffs' entire residence. Since the death of Christopher Thompson occurred on the plaintiffs' property, Scottsdale submits that coverage is owed by Tuscarora Wayne in this case.

We believe that Scottsdale's analysis requires unsupported leaps of logic as well as a selective and inaccurate reading of the terms contained in the policy. First, Scottsdale's interpretation of the endorsement ignores the fact that the coverage limitation is clearly written in the disjunctive as being applicable to the designated "premises" *or* "project". In order for Scottsdale's

analysis to be plausible, the endorsement must be construed to require that both a "premises" *and* a "project" be specified on the schedule. This, of course, would be contrary to the plain meaning of the term "or". " 'Or' obviously is a disjunctive particle and means one or the other of two propositions; never both." *Marnell v. Mt. Carmel Joint School System,* 380 Pa. 83, 88, 110 A.2d 357, 360-61 (1955). The endorsement's failure to specify a "premises" confirms, in our opinion, that it is the listed "project" of a home for the aged which was intended to be the subject of coverage.

The intent to limit coverage to either a "premises" or a "project" is further substantiated by the language set forth at the end of the endorsement. Once again, insurance coverage is said to be limited, in the disjunctive, to specified injuries and damage arising out of:

> 1. The ownership, maintenance or use of the premisis shown in the Schedule and operations necessary or incidental to those premises; *or*
>
> 2. The project shown in the Schedule.
>
> (Emphasis added.)

In view of the consistency of the language both within the endorsement itself, as well as with the policy in its entirety, we conclude that the clear intent of the parties was to provide coverage limited to incidents arising in connection with plaintiffs' care of the elderly. Since the death of Christopher Thompson cannot logically be regarded as arising in connection with plaintiffs' home for the aged, we must conclude that coverage under the Tuscarora Wayne commercial general liability policy does not exist in this matter.

We observe in conclusion on this issue that the language in an insurance policy should not be tortured in order to create the appearance of an ambiguity. *Curbee, Ltd., supra.* We consider Scottsdale's purported construction of the Tuscarora Wayne policy to require that the plain meaning of the words contained therein be convoluted for the purpose of creating an ambiguity. We believe that a plain reading of the policy reveals no such ambiguity and, in fact, quite lucidly evidences the parties' intent to execute a commercial liability policy directly linked to the

plaintiffs' care of the elderly on the lower floor of their home. We will, accordingly, deny plaintiffs' request for summary judgment against Tuscarora Wayne.

We will next address the issue of whether the Scottsdale commercial liability policy package issued to Family Care Services, Inc. for their business of foster care and counseling covers the potential liability of the plaintiffs for the death of Christopher Thompson. The policy package includes both commercial general liability and professional liability coverage.

Argument by counsel for the parties regarding the Scottdale policy and its coverage of plaintiffs has properly been centered on the policy's definition of who is an insured. An endorsement to the professional laibility policy[2] provides, pertinently, as follows:

> Your employees and volunteers (whether salaried or contracted) are insured while acting within the scope of their duties on your behalf.

Scottsdale contends that plaintiffs fail to qualify as "employees" of Family Care Services, Inc. and that they are, instead, independent contractors entitled to no coverage under the policy in dispute. Tuscarora Wayne and the plaintiffs initially contend that plaintiffs do qualify as employees of Family Care Services, Inc. as opposed to independent contractors, so as to clearly qualify for coverage under the policy. In the alternative, it is argued that the insurance policy's ambiguous reference to contracted "employees" and "volunteers" must be construed against the insurer so as to render the policy applicable to independent contractors and employees alike. This approach would, of course, obviate the necessity of determining whether plaintiffs were acting as traditional employees of Family Care

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[2]The commercial liability policy similarly defines an insured as including:

> Your employees and volunteers, whether salaried or contracted, Executive Officers and Trustees, but only for acts within the scope of their employment by you.

Services, Inc. in their provision of foster care.

We find ourselves in agreement with the contention that the definition of an insured contained in the Scottsdale policy is ambiguous. In particular, we believe that reasonably intelligent minds could honestly differ as to the meaning of the phrase "employees and volunteers (whether salaried or contracted)". For example, does the parenthetical modify only the term "volunteer" or does it also modify the term "employee." If the former is true, what meaning is to be ascribed to the seemingly contradictory concept of a salaried volunteer? Furthermore, given the absence of a definition of the term "employee" in the policy, could the concept of a "contracted employee" be said to apply to independent contractors as well as traditional salaried employees? As such questions indicate, we think it is evident that no single unambiguous interpretation of this phrase can be viably offered. Where a provision in an insurance policy is ambiguous, it must be construed by the Court in favor of the insured. *Pennsylvania National Mutual Casualty Insurance Co., supra.* Construing the policy in favor of the plaintiffs, we believe that they qualify for coverage as contracted employees of Family Care Services, Inc. regardless of their status as an independent contractor or an employee.

We observe that even in the absence of the ambiguity previously cited we would, nevertheless, conclude that plaintiffs qualify for coverage under the Scottsdale policy. This conclusion is based on our analysis of the evidence regarding the nature of plaintiffs' duties as foster parents which, in our opinion, demonstrates that plaintiffs are, indeed, employees of Family Care Services, Inc.

In determining whether an employer-employee relationship exists, the fundamental inquiry is whether the individual is subject to the alleged employer's control or right of control with respect to his conduct in the performance of the services for which he was retained. *Kinloch v. Tonsey,* 325 Pa.Super. 476, 473 A.2d 167 (1984). Moreover, in determining the meaning of the term "employee" in an insurance policy, the custom and practice in the industry of the insured should be examined, in this case foster care and counseling. Such an analysis is appropriate in light of the tenet that insurance coverage should be viewed with a

focus on the reasonable expectation of the insured. *State Automobile Insurance Ass'n v. Anderson, 365 Pa.Super. 85, 528 A.2d 1374 (1987), alloc. granted,* 517 Pa. 624, 538 A.2d 877 (1988).

Prior to qualifying as foster parents, plaintiffs were required to complete a detailed twelve-page application. The application requested information regarding education and work experience, church affiliation, family background and references. Prior to approval of their application, plaintiffs' home was inspected by a representative of Family Care Services, Inc. Several minor modifications were required to be made to the residence, including installation of fire extinguishers, placing safety caps on electrical outlets and adding a protective railing to the back patio to prevent a possible fall by children along an elevated section.

Subsequent to their approval as foster parents, plaintiffs executed a contract with Family Care Services, Inc. on January 21, 1991, related to the care of Christopher Thompson. The contract specifies the general parameters of the type of care to be provided to the foster child, including "opportunity to meet his/her medical, social, psychological, educational, recreational, and vocational needs." The foster parents were to be paid twenty-two ($22.00) dollares per day for "room and board, socialization, and all other ordinary expenses that could be incurred in such a living arrangement." A two-week notice was required should the foster parents decide to no longer provide care to the subject foster child.

In addition to the contract, an extensive manual regarding policies, procedures and regulations was provided to the plaintiffs to further govern their provision of care to the foster child. Included therein were policies on discipline, safety requirements, medical examinations and social activities (including school-related events, dating policies for teenagers and curfews). A supervisor from Family Care Services, Inc. was to schedule a home visit at least once every two weeks to discuss concerns of the foster parents and foster child.

We believe that the foregoing adequately demonstrates that Family Care Services, Inc. exercised considerable control over

the provision of foster care services by the plaintiffs. Bearing in mind the nature of foster care, which is designed to maximize a home-like environment for the child in placement,[3] we conclude that sufficiently close controls are placed on the foster parents to support a finding that an employer-employee relationship exists. In order for a residential setting to mirror a home environment we think it is logical to assume that more stringent controls over the details of operating the household would not be possible and, if attempted, would tend to defeat the purpose of a residential placement. We conclude that the right, if not the exercise, of control by Family Care Services, Inc. exists in this case so as to create an employer-employee relationship. We believe that a reasonable person reviewing the term "contracted employee" as it appears in the insurance policy here at issue would fairly conclude that contracted foster parents qualify as contracted employees.

We note that coverage of foster parents under the professional liability policy insured by Scottsdale would apparently meet the reasonable expectation of the insured for an additional reason not previously discussed. A review of the Scottsdale policy reveals an endorsement which specifies that the premium basis for professional liability coverage for the December 16, 1990 policy year "is decreased by 11 Foster Beds." Due to lack of clarity in the exhibited reproduction, we are unable to decipher the specific language regarding the premium basis which appears elsewhere in the policy. We think it is reasonable, however, to draw the conclusion from this endorsement that the basis for the annual professional liability premium of approximately $15,458.00 was the number of foster bed (or child) placements supervised by Family Care Services, Inc. during the policy year. Thus, it would appear that the policy was intended to provide coverage for potential liability for wrongful acts committed during the policy year by foster parents such as plaintiffs.

Based on the foregoing analysis, we hold that the Scottsdale policy provides coverage to the plaintiffs as insureds and that Scottsdale is, therefore, required to provide a legal defense for

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3The term "foster family care" is defined by Department of Public Welfare regulations as follows: "Residential care and supervision provided to a child placed with a foster family." 55 Pa.Code Sect. 3700.4.

plaintiffs in the pending wrongful death and survival action. We will, acccordingly, deny Scottsdale's motion for summary judgment and order that judgment be entered in favor of plaintiffs declaring that they qualify as insureds under the Scottsdale policy.[4]

The final issue which we must address is that presented by current counsel for plaintiffs. That issue involves the entitlement of counsel to be reimbursed by Scottsdale for his legal fees accumulated in bringing this declaratory judgment action and in his defense of plaintiffs in the underlying tort action.

Counsel's involvement, to date, has included attendance at numerous depositions. It is firmly established in Pennsylvania law that breach, without good cause, by an insurance company of its duty to defend gives rise to the right of recovery by the insured for the costs of hiring substitute counsel and other costs of defense. *Gedeon v. State Farm Mutual Acutomobile Insurance Co.*, 410 Pa. 55, 188 A.2d 320 (1963). Moreover, an insured who is compelled to initiate a decaratory judgment action in order to establish his insurer's duty to defend an underlying action bought by a third party may recover counsel fees incurred in the declaratory judgment action. *Kelmo Enterprises v. Commercial Union Insurance*, 285 Pa.Super. 13, 426 A.2d 680 (1981).[5]

4In view of our conclusion that plaintiffs are entitled to coverage under the Scottsdale policy alone, we need not address the alternative argument presented by Scottsdale regarding primary versus excess insurance coverage.

5We observe that the Superior Court's decision in *Kelmo* indicates that good faith would be a defense to a refusal to defend which would effectively bar recovery of costs and attorney's fees by an insured in a declaratory judgment action. *See also J.H. France Refractories Co. v. Allstate Insurance Co.*, 396 Pa.Super.185, 578 A.2 468 (1990), *appeal granted*, 527 pa. 634, 592 A.2d 1302 (1991). The Superior Court in *Gedeon*, 410 Pa. at 59, n.4, 188 A.2d at 322 n.4, stated that "the good faith of the insurer's belief that it had no contractual duty to defend a particular action is not a defense." Thus, we believe that the issue of good faith is not a relevant consideration in this matter. The Court, additionally, noted that good faith is to be distinquished from good cause, which could give rise to a defense for breach of the duty to defend. Good cause would exist, for example, where the insured refuses to cooperate with the insurer in preparation for litigation. No such circumstance exists in this case.

In the instant case, we believe that the record is insufficiently developed to enable the Court to render an aware of attorney's fees at this time. Plaintiff's counsel has filed an affidavit documenting his unseccessful efforts to seek representation by Scottsdale on behalf of plaintiffs. He has not however, provided an itemization of his fees and costs, nor do the pleadings indicate whether punitive damages are sought to be awarded against Scottsdale in this matter. We will, accordingly, grant leave for an evidentiary hearing to be scheduled at which time the Court will receive evidence relevant to plaintiffs' claim for attorney's fees and costs incurred in litigating the declaratory judgment action as well as the pending civil action brought by the estate of Christopher Thompson.

ORDER OF COURT

NOW, this 15th day of September, 1993, it is ordered that the motion for summary judgment filed by Scottsdale Insurance Company in DENIED. It is further ordered that the motion for summary judgment filed by the plaintiffs, Mary Jane and John Black be GRANTED as against Scottsdale Insurance company and DENIED as against Tuscarora Wayne Mutual Insurance Company, pursuant to the analysis set forth in the foregoing opinion.

It is further ordered that an evidentiary hearing be scheduled, upon motion to the Court, to determine appropriate damages to be imposed upon Scottsdale Insurance Company for breach of its duty to defend the plaintiffs.

ELHAJJ V. ELHAJJ, C.P. Franklin County Branch, No. F.R. 1986-716

Divorce - Equitable Distribution of Marital Property - Pension Evaluation - Reconsideration after Remand by Superior Court - Limitations of Ambit of Reconsideration to Appropriate Manner of Pension Distribution [Pa. R.A.P. 2591(a) cited] - "Immediate Offset" or "Deferred Distribution" Method Discussed - When counsel Fees May Be Awarded -Other subordinate or secondary issues: Interest Claim on Vacated Award - Claims for Sharing of Real Estate Taxes, Repair Expenses and Rental value of Marital Dwelling - Claim for Share of Survival Annuity and Application Thereto of Coverture Fraction