

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CINCINNATI INSURANCE COMPANY,  
Plaintiff-Appellant,

UNPUBLISHED  
June 20, 2013

v

MYRON HALL, as guardian of KELLY FOSTER  
HALL, SOCIAL RESOURCES, INC., and  
MICHAEL W. DAVIS,

No. 308002  
Macomb Circuit Court  
LC No. 09-001032-CZ

Defendants-Appellees,  
and

MACOMB COUNTY COMMUNITY MENTAL  
HEALTH,

Defendant.

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Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff Cincinnati Insurance Company (Cincinnati) appeals as of right the order denying its motion for summary disposition and granting summary disposition in favor of defendant Social Resources, Inc. (SRI). We conclude that the trial court erred in finding that the policy of insurance was illusory and, therefore, reverse.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

The commercial general liability insurance policy in this case provides coverage for “those sums that the insured becomes legally obligated to pay because of “bodily injury” or “property damage.” The policy further provides that the insurance “applies to ‘bodily injury’ and ‘property damage’ only if the ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ . . .” An occurrence is defined as “an accident, including continuous or repeated exposure to substantially the same harmful conditions.” The policy provides an exclusion for “abuse or molestation.” This exclusion provides:

This insurance does not apply to “bodily injury,” “property damage” or “personal and advertising injury” arising out of:

1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any injured, or
2. The negligent:
  - a. Employment;
  - b. Investigation;
  - c. Supervision;
  - d. Reporting to the proper authorities, or failure to so report; or
  - e. Retention;of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1 above.

This case was previously before this Court in *Cincinnati Ins Co v Hall*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2011 (Docket No. 297600). The pertinent facts were set forth as follows:

The instant case arises out of an underlying action, which in turn arose out of a permanent eye injury sustained by Kelly Foster Hall (Kelly) while in SRI's care. SRI provides occupational and social training to developmentally disabled adults, its "consumers." Kelly and David Egbuche, two of SRI's customers, were in a van being operated by Michael Davis, an SRI employee, on their way to an SRI training facility. Egbuche became annoyed by Kelly rocking and making noises, and he complained to Davis, who allegedly told Egbuche to "handle it" or "take care of it." Egbuche then struck Kelly in the face, breaking Kelly's glasses and injuring his eye. Allegedly, Kelly received no treatment until he arrived home at the end of the day, when his guardian, defendant Myron Hall (Hall) took Kelly to the hospital. Kelly was rendered blind in his left eye. Davis eventually pleaded no contest to criminal charges. Two years later, Hall filed the underlying action, a personal injury suit against SRI on Kelly's behalf.

At the time of the incident, SRI was insured by Cincinnati. Representatives of Cincinnati and SRI signed a "non-waiver" agreement prior to Cincinnati undertaking SRI's defense. Cincinnati initially provided a formal coverage opinion. However, Cincinnati then filed the instant declaratory judgment action against SRI, contesting coverage under the policy. Discovery was only in early phases in the underlying action, and the parties agreed to rely on the discovery generated in the underlying claim as the factual basis for the instant action. Cincinnati filed its motion for summary disposition in this case while that discovery was still ongoing. The trial court concluded that Cincinnati was estopped from asserting any defenses under its policy because it failed to issue a written reservation of rights letter. It also held that an "abuse or molestation" exclusion in the policy was inapplicable. [*Id.* at unpub op p 1.]

In the prior appeal, this Court concluded that the trial court erred in holding that a formal reservation of rights letter was a technical prerequisite to Cincinnati raising policy defenses in a subsequent declaratory judgment action. *Id.* at unpub op pp 2-3. The matter was remanded so that the trial court could determine whether the declaratory judgment action was timely filed and whether defendants were prejudiced by the five-month delay. *Id.* at unpub op pp 3-4.

In the prior appeal, Cincinnati also argued that the trial court erred in concluding that the “abuse or molestation” exclusion in the policy was inapplicable to the case because those terms connoted sexual acts or behaviors. *Id.* at unpub op p 4. During oral argument, Cincinnati argued that the “expected or intended” injury exclusion in the policy did not apply because Egbuche was not the insured, leaving Cincinnati with the broader “abuse or molestation” exclusion. Defendants argued that the two exclusions were redundant unless “abuse or molest” were interpreted to apply only to sexual behavior.

Utilizing dictionary definitions, the prior panel concluded that “[b]oth ‘abuse’ and ‘molestation’ have multiple possible definitions that include, but are not limited to, those which involve a sexual connotation.” *Id.* While the two words’ definitions included some reference to sexual behavior, they could also be broadly read: the verb “abuse” was “‘to use wrongly or improperly,’ ‘to treat in a harmful or injurious way,’ ‘to speak insultingly or harshly to or about,’ and ‘to commit sexual assault on;’” while “molest was “‘to bother, interfere with, or annoy,’ ‘to make indecent sexual advances to.’” *Id.* As the definitions applied to the case before it, the panel concluded: “there is no reason why ‘abuse’ or ‘molestation’ must be sexual in nature. The actions alleged in the instant case clearly fall into the definitions of ‘abuse’ and ‘molestation.’ Therefore, the policy explicitly excluded from its coverage the conduct alleged in Hall’s complaint, and the defendant had no duty to defend the plaintiff.” *Id.* at unpub op p 5.

However, the panel then went on to make the following statement:

We are nonetheless troubled by this outcome, because this plain reading of the “abuse or molestation” exclusion seems to suggest that the policy may well exclude everything. We agree with Hall’s general assertion that insurance policies must insure against something. It defies all sense to conclude that an insured would pay for an insurance policy that turns out to be an empty work of fiction, and indeed, such a policy might even be considered fraudulent. If the literal application of the plain meaning of the “abuse or molestation” exclusion operates to totally eviscerate the policy, then the policy must be ambiguous, and the trial court may then engage in interpreting it to address that ambiguity. However, that evaluation should be undertaken by the trial court. [*Id.*]

The panel remanded the case “for further proceedings not inconsistent with this opinion, as the trial court deems necessary and appropriate” and declined to retain jurisdiction. *Id.*

On remand, the trial court was clearly perturbed by this Court’s interpretation of the “abuse or molestation” exclusion. It noted that if “abuse and molest” was not limited to sexual behavior, then the terms are “the two broadest terms that we have in the dictionary” and “virtually includes everything.” The trial court concluded that the exclusion was “too broad . . . too vague.” It concluded “I’m satisfied that the term is, as written, at least ambiguous

but at the most would be illusory as a result of the – the contract would [be] illusory as a result of it, and I’m going to let you take it back to the Court of Appeals and let them give you their final analysis.” Cincinnati now appeals as of right.

## II. STANDARDS OF REVIEW

We review de novo a trial court’s decision on a motion for summary disposition. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. We must review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Barclae v Zarb*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 299986, issued April 16, 2013) slip op p 4 (internal citations and quotations omitted).]

“The interpretation and construction of insurance contracts are also questions of law, which this Court reviews de novo.” *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 72; 755 NW2d 563 (2008). Additionally, “[w]hether contract language is ambiguous is also a question of law which we review de novo. It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10).” *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

## III. ANALYSIS

Cincinnati argues that the trial court erroneously concluded on remand that the policy exclusion for abuse or molestation was ambiguous or illusory.

The prior panel was asked to determine whether the trial court erred in holding that a formal reservation of rights letter was a technical prerequisite to bringing a declaratory judgment action and whether the trial court erred in interpreting the “abuse or molestation” exclusion to apply only to sexual acts or behaviors.<sup>1</sup> After answering both questions, the panel then proceeded to raise an issue not raised by either party – whether the policy was illusory. Complicating the matter is the prior panel’s apparent conflation of two separate and distinct terms – “ambiguous” and “illusory.”

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<sup>1</sup> Only Cincinnati filed a motion for summary disposition with regard to the issue of whether Cincinnati’s declaratory judgment action below was timely. Because SRI did not address below the issue of whether it suffered actual prejudice by the timing of Cincinnati’s declaratory judgment action, and because SRI has not filed a cross-appeal regarding the trial court’s finding on remand that the declaratory judgment action was timely, we decline to address the issue further.

## A. AMBIGUITY

A contractual provision may be ambiguous if it irreconcilably conflicts with another provision or it is equally susceptible to more than one meaning. *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). However, “[t]he fact that a policy does not define a relevant term does not render the policy ambiguous. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism.” *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82-83; 730 NW2d 682 (2007). Thus, a term is not ambiguous merely because different dictionary definitions exist for the term. *Twichel v MIC General Ins Corp*, 469 Mich 524, 536 n 6; 676 NW2d 616 (2004).

In rejecting SRI’s claim that “abuse” and “molestation” must include sexual behavior, the prior panel noted:

Defendants argue that the policy exclusion does not apply because nothing of any even arguably sexual nature occurred. We disagree. The policy does not define “abuse,” “molestation,” or “abuse or molestation.” Therefore, it is appropriate for this Court to refer to a dictionary. *Holland v. Trinity Health Care Corp.*, 287 Mich.App 524, 527–528; 791 NW2d 724 (2010). Furthermore, there is no Michigan case law interpreting the phrase “abuse or molestation” in an insurance policy exclusion.

Both “abuse” and “molestation” have multiple possible definitions that include, but are not limited to, those which involve a sexual connotation. The Random House Webster’s College Dictionary defines the verb “abuse” as “to use wrongly or improperly,” “to treat in a harmful or injurious way,” “to speak insultingly or harshly to or about,” and “to commit sexual assault on.” Random House Webster’s College Dictionary (2001). This demonstrates that abuse need not be “sexual.” The same dictionary defines “molest” as “to bother, interfere with, or annoy,” “to make indecent sexual advances to,” and “to assault sexually.” *Id.* This likewise demonstrates that molestation need not be sexual. Therefore, according to dictionary definitions of the terms; Egbuche’s actions toward Hall could be considered “treatment in an injurious way,” constituting “abuse;” and “bothering, interfering with, or annoying,” constituting “molestation.” [*Hall*, at unpub op p 4.]

After looking to dictionary terms and finding that “abuse or molest” could be broadly interpreted to include more than unwanted sexual contact, the prior panel concluded that the policy explicitly excluded coverage. The prior panel did not conclude that the policy was ambiguous. In fact, it concluded the exact opposite when it held that “[t]he actions alleged in the instant case clearly fall into the definitions of ‘abuse’ and ‘molestation.’ Therefore, the policy explicitly excluded from its coverage the conduct alleged in Hall’s complaint, and the defendant had no duty to defend the plaintiff.” *Id.*

The problem is that the prior panel concluded that although “the plain meaning of ‘abuse or molestation’ is not restricted to sexual acts or behaviors . . .we remand for a determination of whether the policy is therefore rendered ambiguous.” *Id.* And that “[i]f the literal application of the plain meaning of the ‘abuse or molestation’ exclusion operates to totally eviscerate the policy, then the policy *must* be ambiguous, and the trial court may then engage in interpreting it to address that ambiguity.” *Id.* at unpub op p 5. However, having previously found no ambiguity, it is obvious that the panel meant to use the term “illusory.” A fair reading of the prior opinion would be: “abuse or molestation” is unambiguous as set forth in the insurance policy and is not limited to sexual behavior, but the result *may* be an illusory policy which would constitute an exception to the requirement that an unambiguous contract be enforced as written.

## B. ILLUSORY

An “illusory contract” is defined as an agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable. A similar, more specific concept exists in the realm of insurance. The “doctrine of illusory coverage” encompasses a rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured. Courts avoid interpreting insurance policies in such a way that an insured’s coverage is never triggered and the insurer bears no risk. [*Ile v Foremost Ins Co*, 293 Mich App 309, 315-316; 809 NW2d 617 (2011) rev’d on other grounds 493 Mich 915, 823 NW2d 426 (2012) (internal quotations and footnotes omitted).]

In *Ile*, our Court concluded that a an insurance policy’s underinsured motorist coverage (UIM), which purportedly provided UIM benefits up to minimum limit of liability coverage allowed under state law, was illusory because “a premium was paid for coverage which would not pay benefits under any reasonably expected set of circumstances.” *Id.* at 322 (internal quotations omitted). However, this Court’s decision was reversed by our Supreme Court in *Ile v Foremost Ins Co*, 493 Mich 915; 823 NW2d 426 (2012):

The Court of Appeals erroneously concluded that the underinsured motorist coverage in the insurance policy issued by the defendant to Darryl Ile was illusory because Ile could reasonably believe that his insurance premium payment included some charge for underinsurance when there are no circumstances in which Ile could recover underinsured motorist benefits given the policy limits Ile selected. We have expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract.

Moreover, when read as a whole, the clear language of the policy provides for combined uninsured and underinsured motorist coverage that, as promised, would have operated to supplement any recovery by Ile to ensure that he received a total recovery of up to \$20,000/\$40,000 (the policy limit) had the other vehicle involved in the crash been either uninsured or insured in an amount less than \$20,000/\$40,000. That such coverage would, under the terms of the policy, always be labeled “uninsured,” as opposed to “underinsured,” does not make the policy illusory.

Thus, it appears that our Supreme Court will not strike an insurance policy as illusory if there is any manner in which the policy could be interpreted to provide coverage.

On remand from the prior opinion, then, the trial court's only inquiry should have been whether the insurance policy was illusory. The prior panel concluded that the definition of "abuse" included "to use wrongly or improperly," "to treat in a harmful or injurious way," "to speak insultingly or harshly about," and "to commit sexual assault on." The trial court focused on the most general "treat in a harmful or injurious way" and believed that such a broad term could include virtually any activity, including negligent conduct. We disagree.

There is nothing in the prior panel's definitions that would remove the term "abuse" from its common meaning, which necessarily connotes intentional, purposeful conduct. Again, "reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings." *Pro-Seal Service Group, Inc.*, 477 Mich at 82-83. The prior panel consulted a dictionary to define "abuse" with the sole purpose of determining whether "assault and molestation" included behavior other than sexual behavior. It did not consult the dictionary to determine whether "abuse" encompassed passive or negligent behavior. In fact, it specifically passed on deciding the issue. Referencing the commonly used meaning of "assault", it defies logic to conclude that *any* conduct that results in injury is encompassed in the definition. See *Twichel*, 469 Mich at 534 ("Where a term is not defined in the policy, it is accorded its commonly understood meaning.") This is especially true in cases where insurers offer coverage to providers who care for vulnerable individuals.

We conclude that the policy is not rendered illusory by the "abuse or molestation" exclusion. It is still possible to recover under the policy for negligent conduct. For example, if Davis, instead of "directing Egbuche to assault Hall" (which is how Cincinnati interprets Davis's instruction to Egbuche "take care of it"), instead negligently injured Hall in attempting to get him on or off the bus through mere negligence, the insurance policy would provide coverage because such an accidental event would be the precise "occurrence" the policy was intended to cover. "Abuse or molestation" must be interpreted as implying intentional mistreatment and cannot imply mere accidental or negligent conduct. The exclusion for "abuse or molestation" does not render the entire policy illusory when there are countless examples of when the policy would provide coverage.

We are not constrained by the prior panel's definition of "abuse." The law of the case doctrine provides that "a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law *decided* by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Sinicropi v Mazurek*, 279 Mich App 455, 465; 760 NW2d 520 (2008) (emphasis added). This is true regardless of the correctness of the prior decision. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). "The doctrine of the law of the case arises where an appellate court *has passed on a legal question* and remanded the case for further proceedings. Under the doctrine, the legal questions *determined* by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The law of the case does not apply to an issue that was raised but not *decided* by an appellate court." *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 697; 513 NW2d 230 (1994) (citation omitted and emphasis added).

The prior panel took great pains *not* to decide the issue of whether the insurance policy was illusory, leaving the trial court to make such a determination. Having previously defined “abuse” and “molestation” for the very limited purpose of determining whether the terms encompassed non-sexual conduct, the prior panel specifically passed on the issue of whether the definitions applied to a determination of whether the policy was illusory. As we have twice stated, the fact that the prior panel found that abuse includes “to treat in a harmful or injurious way,” does not mean that we must abandon the commonly understood meaning of abuse, which necessarily includes intentional or deliberate conduct.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly