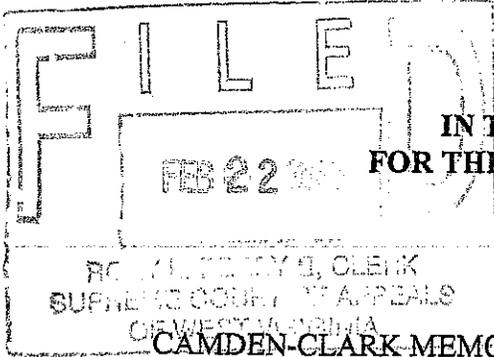
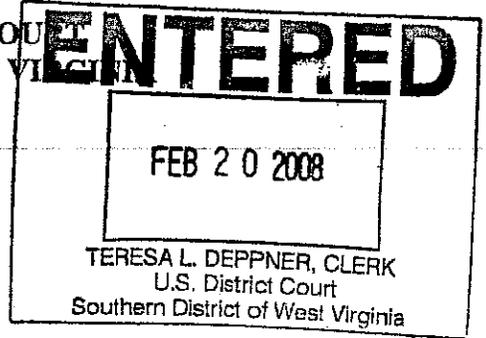


080493



IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA



PARKERSBURG DIVISION

CAMDEN-CLARK MEMORIAL  
HOSPITAL CORPORATION,  
Plaintiff,

v.

CIVIL ACTION NO. 6:06-cv-01013

ST. PAUL AND MARINE INSURANCE CO.,

DO NOT REMOVE  
FILE COPY

Defendant.

ORDER OF CERTIFICATION TO THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILE COPY

This court respectfully requests that the Supreme Court of Appeals of West Virginia exercise its certification jurisdiction pursuant to W. Va. Code §§ 51-1A-1 to 51-1A-13, and answer the questions of law set forth below. The questions are critical to the disposition of the above-captioned case pending in this court, and it appears that there is no controlling decision by the Supreme Court of Appeals of West Virginia.

**I. Facts**

This court will first set forth the facts relevant to the questions of law to be certified and which are necessary to understand "fully the nature of the controversy out of which the question arose." W. Va. Code § 51-1A-6(a)(2).

A. Background Facts

On September 28, 2001, Hilda Boggs was admitted to Camden-Clark Memorial Hospital for surgery to repair an ankle fracture. (Boggs' Compl. ¶ 7-8, Compl. Ex. A [Docket 1].) Seven days later, Hilda Boggs was dead. (Boggs Compl. ¶ 11.) On June 30, 2003, Bernard Boggs brought a

lawsuit in the Circuit Court of Wood County, West Virginia. The defendants in the state-court action were Camden-Clark Memorial Hospital Corporation (“Camden Clark”), United Anesthesia, Inc., and Dr. Manish Koyawala. (Boggs Compl. ¶ 3-5.) The state-court complaint contained several causes of action, including negligence, negligent credentialing of Dr. Koyawala, fraudulent concealment, and outrage. (Boggs Compl. ¶ 10-11, 12-13, 14-16, 19.) Boggs sought compensatory and punitive damages. (Boggs Compl. ¶ 21-25.)

Specifically, the complaint alleged that “[t]he Defendants, Manish I. Koyawala and Camden-Clark, during and following the treatment or lack thereof to Hilda Boggs at Camden-Clark, encouraged others to withhold information, make false statements, coordinate ‘stories’ and destroy, despoil, modify or fabricate relevant evidence.” (Boggs Compl. ¶ 15.) The complaint also alleged that Dr. Koyawala’s conduct “in not only causing the death of Hilda Boggs, but in directly misleading her widower regarding the circumstances of that death was outrageous and insulting, caused the Plaintiff severe emotional distress and was of such a character that no reasonable person could be expected to endure it.” (Boggs Compl. ¶ 19.) The complaint further alleged that Camden Clark was vicariously liable for the actions of Dr. Koyawala. (Boggs Compl. ¶ 18.) As for punitive damages, the complaint stated that “[t]he acts and omissions of the Defendants, as described herein, were so willful, wanton, intentional, and outrageous that the Plaintiff is entitled to recover punitive damages from the Defendants.” (Boggs Compl. ¶ 25.)

At all times relevant to the instant case, Camden Clark was insured by the defendant, St. Paul Fire and Marine Insurance Co. (“St. Paul”). (Def.’s Resp. 3 [Docket 25].) Camden Clark had two

policies with St. Paul, a Basic Policy and an Umbrella Policy.<sup>1</sup> The Basic Policy provides insurance coverage for four types of injury: "Medical professional injury liability," "Bodily injury and property damage liability," "Personal injury liability," and "Advertising injury liability." (Basic Policy 18-20.) Only "Medical professional injury liability" coverage is relevant to this certification order. Under medical professional liability injury, St. Paul will pay "amounts any protected person is legally required to pay as damages for covered medical professional injury that results from health care professional services provided, or which should have been provided" by a protected person. (Basic Policy 18.) The policy contains an exclusion for "bodily injury or property damage that's expected or intended by the protected person." (Basic Policy 34.) There is no exclusion in the policy for punitive damages. Furthermore, the Basic Policy gives St. Paul the right to investigate or associate in the defense of any claim or suit brought against a protected person for covered injury or damage. (Basic Policy 20.) The policy does not, however, require St. Paul to defend a policyholder. (Basic Policy 20 ("[W]e have no duty to investigate or defend any claim or suit or perform other acts or services under this agreement, even if the amount of damages or claim expenses exceeds the self-insured retention that applies."))

On December 27, 2005, Samuel McEwen, St. Paul's Director of Major Case Liability, sent a reservation of rights letter to Sherry Johnston, Camden Clark's Director of Risk Management. (McEwen Letter, Def.'s Resp. Ex. D.) In this letter, Mr. McEwen stated that St. Paul "will continue to monitor this matter [the Boggs suit] subject to the reservation of rights set forth below." (McEwen Letter 1.) St. Paul, through Mr. McEwen, reserved its right to deny indemnification "for any punitive

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<sup>1</sup> Because the Umbrella Policy provides coverage for the same types of injury, the court will focus on the Basic Policy.

damages which are awarded to the Plaintiff because of intentional acts by the named insured and/or which arise from non-covered damages such as spoliation [sic] of evidence.” (McEwen Letter 5-6.) Finally, the letter advised that St. Paul reserved its “rights to limit or deny coverage on the basis of any other grounds.” (McEwen Letter 6.)

The state-court trial began on February 28, 2006. (Journal Order & Judgment Entry, Def.’s Resp. Ex. F.) Camden Clark was the only defendant because Dr. Koyawala and United Anesthesia settled out of court prior to the trial. (Def.’s Resp. 4.) The jury rendered a verdict on March 10, 2006. (Journal Order & Judgment Entry 11.) The jury found that (1) Camden Clark “fraudulently concealed information about Hilda Boggs’ death from Ray Boggs,” (2) Camden Clark’s conduct toward Ray Boggs was so outrageous as to constitute the tort of outrage, (3) Camden Clark was negligent toward Hilda Boggs, (4) Dr. Koyawala was negligent toward Hilda Boggs and that he was the apparent agent of Camden Clark, (5) punitive damages should be awarded for Camden Clark’s conduct, and (6) Dr. Koyawala’s conduct deserved punitive damages. (Verdict Form, Def.’s Resp. Ex. E.)<sup>2</sup> The jury found that Camden Clark was not negligent in credentialing Dr. Koyawala. (Verdict Form.) As for damages, the jury awarded Ray Boggs \$100,000 as a result of the fraudulent concealment and \$375,000 on the outrage claim. (Verdict Form.) In addition, the jury found that Camden Clark’s conduct was “so outrageous, wrongful or intentional” that punitive damages in the amount of \$3,000,000 were warranted. (Verdict Form.) Likewise, the jury awarded punitive damages of \$1,500,000 against Dr. Koyawala and other medical personnel. (Verdict Form.)

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<sup>2</sup> The court notes that although Dr. Koyawala entered into a settlement prior to trial, the jury nevertheless found that he was negligent toward Hilda Boggs. The court presumes that this finding was made for the purposes of assessing the vicarious liability Camden Clark.

After judgment was entered, and Camden Clark requested indemnification under the insurance policies, St. Paul hired attorney Michael Farrell to perform an "interim coverage analysis" based on the insurance policies, the state-court complaint, the jury instructions used in the state-court case, the Verdict Form, and several other documents, many of which have not been provided to the court. (Def.'s Mem. 6.) Mr. Farrell sent his conclusions to Camden Clark's counsel in a letter dated July 18, 2006. (Farrell Letter, Def.'s Ex. G.) In the letter, Mr. Farrell concluded that while "the death of Mrs. Boggs does qualify as a *medical professional injury*" as defined in the insurance policy, "the Fraudulent Concealment verdict does not constitute a *medical professional injury, personal injury, advertising injury, bodily injury or property damage,*" and, accordingly, St. Paul did not have a duty to indemnify Camden Clark regarding that cause of action. (Farrell Letter 9.) He also opined that the verdict on the "Tort of Outrage" cause of action was not covered by the insurance policy for the same reason - that it did not fall within the scope of coverage. (Farrell Letter 9.) Finally, Mr. Farrell concluded that based on the "Jury Instructions, Jury Verdict, Journal Order and Judgment Entry and related memoranda submitted by the parties," the \$3,000,000 punitive damages award was based on Camden Clark having destroyed records, mislead Hilda Boggs's family, and covered up her the cause of her death. (Farrell Letter 11.) Because this conduct does not fall within medical professional injury, personal injury, advertising injury, or bodily injury or property damage, Mr. Farrell reasoned, it was not covered by the insurance policy and St. Paul had no duty to indemnify Camden Clark for the punitive damages. (Farrell Letter 11.)

In response to the Farrell letter, Anita Casey, counsel for Camden Clark sent a letter regarding coverage to Laura Toregas, St. Paul's new Director of Major Case Liability. (Casey Letter, Def.'s Resp. Ex. H.) Not surprisingly, Camden Clark disagreed with Mr. Farrell's analysis.

Specifically, Ms. Casey stated that while it was unclear whether damages for fraudulent concealment and outrage would be covered or excluded under the policy, "it is well-settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." (Casey Letter 4.) Ms. Casey also pointed out that "there is no exclusion in the policy for the payment of such [punitive] damages." Accordingly, the \$3,000,000 was covered under Camden Clark's policies. (Casey Letter 4.) Ms. Casey further criticized Mr. Farrell's analysis because it was allegedly "not based upon any determination by the jury or ruling by the court but appears to be based upon self-serving arguments set forth in Plaintiff's Opposition to the Hospital's Proposed Judgment Order." (Casey Letter 6.) The letter concluded with a promise that if St. Paul failed to reconsider its coverage position, Camden Clark was prepared to bring a declaratory judgment action against St. Paul and seek damages for "net economic loss caused by the delay in settlement, as well as an award for annoyance and inconvenience on the part of the hospital." (Casey Letter 6.)

#### B. Procedural History

Camden Clark lived up to its promise, and filed the instant declaratory judgment action on December 1, 2006. The complaint sought a declaration that St. Paul "owes a duty to provide coverage to and indemnify Camden-Clark under policy number 566XM2102 for all the allegations asserted and damages awarded against it in the underlying matter." (Compl. ¶ 24.) The complaint implies that in addition to the policy language, Camden Clark bases its claim for coverage on the fact that St. Paul's reservation of rights letter did not address issues St. Paul relied on to deny coverage in its subsequent letters to Camden Clark. (Compl. ¶ 21.) The complaint also alleged that "St. Paul's actions throughout the pendency of this claim and its denial of coverage constitutes bad faith under

the statutory and common law of West Virginia.” (Compl. ¶ 23.) St. Paul answered and denied liability.

On November 21, 2007, Camden Clark moved for partial summary judgment. In its motion, Camden Clark seeks a declaration that “St. Paul Fire and Marine Insurance Company owes a duty to indemnify Camden-Clark, under the relevant St. Paul policy, for the damages awarded against it in the underlying Boggs v. Camden Clark matter(s).” (Pl.’s Mot. Summ. J.) That being said, the motion is styled as one for “partial” summary judgment, and in Camden Clark’s memoranda in support of its motion it focuses on the tort of outrage and punitive damages.

#### C. Parties’ Arguments

With respect to the tort of outrage claim, Camden Clark argues that “[a] review of the elements that must be proven for a tort of outrage claim . . . lead[s] to the inescapable conclusion that the tort of outrage has both intentional and negligence elements.” (Pl.’s Mem. 13.) Camden Clark notes that the Verdict Form submitted to the jury asked the jury to decide only whether “Camden-Clark Memorial Hospital’s conduct toward Ray Boggs was so outrageous that a reasonable person could not have been expected to endure it.” (Pl.’s Mem. 14 (citing Verdict Form).) The jury was “never asked to determine whether the emotional distress was intentionally inflicted or negligently inflicted.” (Pl.’s Mem. 14.) Camden Clark concludes that because there is no indication whether the jury’s finding of outrage was based on intentional conduct or negligent conduct, “it is inconceivable as to how St. Paul denied coverage for the tort of outrage utilizing the intentional act exclusion.” (Pl.’s Mem. 14.) Likewise, Camden Clark asserts that because “there was no finding made by the jury that the punitive damages awarded against Camden-Clark were specifically attributable to any alleged intentional tort claim against Camden-Clark as opposed to the negligent

conduct alleged against Camden-Clark,” St. Paul’s denial of coverage based on any intentional act exclusion is “based on mere conjecture, speculation, and leaps of logic.” (Pl.’s Mem. 16.) Camden Clark further points out that “St. Paul took absolutely no action during the trial in the underlying action to protect or pursue its denial of coverage for punitive damages based upon the intentional acts exclusion in its policy.” (Pl.’s Resp. 15.)

In response, the St. Paul argues that Camden Clark, as the plaintiff and the insured, has the burden of showing that the tort of outrage and punitive damages fall within one of the four types of coverage afforded by the Basic and Umbrella policies. (Def.’s Resp. 9-10.) Thus, St. Paul contends, it is not necessary to discuss the policy exclusions because Camden Clark has not made out a prima facie case of coverage. Further, St. Paul asserts that it is clear from the complaint and the facts as argued to the jury at trial that the conduct giving rise to the tort of outrage has nothing to do medical professional injury or any of the other three bases for coverage set forth in the Basic Policy. (Def.’s Resp. 13.) St. Paul also maintains that the “facts of this case clearly show that the punitive damages claims are directly the result of the improper conduct with respect to the handling, destruction, and falsification of the documents in this case,” and consequently, the punitive damages are not covered. (Def.’s Resp. 19.)

Finally, Camden Clark replies by noting that under West Virginia law, “the burden shifts to an insurer who seeks to rely upon exclusionary language in an insurance policy to defeat coverage.” (Def.’s Reply 4.) The plaintiff asserts that the defendant “simply fails to demonstrate that the tort of outrage does not fall within the insuring agreement.” (Pl.’s Reply 4.) Further, the plaintiff maintains that “under the express terms of the insuring agreement, the tort of outrage claim ‘results from’ health care professional services.” (Pl.’s Reply 7.) The plaintiff also notes that the “only means by

which St. Paul could have refuted this position was by sending special interrogatories to the jury at the time of the jury deliberations in the underlying action.” (Pl.’s Reply 9.)

## II. Questions of Law

There are some rules of law relevant to this case that are well-settled in West Virginia. First, the insured bears the burden to “establish[] a prima facie case of coverage.” *Payne v. Weston*, 466 S.E.2d 161, 165 (W. Va. 1995); *Jarvis v. Penn. Cas. Co.*, 40 S.E.2d 308, 312 (W. Va. 1946) (noting that before any burden is placed upon an insurer, the insured must make out “a prima facie case of loss within the coverage provided by the policy”). Second, it is clear that in West Virginia, “[a]n insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operations of that exclusion.” *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 346, 495 n.5 (W. Va. 1987); *Jenkins v. State Farm Mut. Auto Ins. Co.*, 632 S.E.2d 346, 350 (W. Va. 2006) (“[W]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.”).

What is unclear, and requires certification to the West Virginia Supreme Court of Appeals, is whether these burdens remain the same when an insurer monitors the case but has no duty to defend, and where a jury verdict is ambiguous. At least one treatise states that although the burden to prove that a judgment is covered by a policy is usually on the insured, exceptions may exist “in those cases in which the circumstances surrounding the defense of the underlying action were such that the insurer was obligated to seek an allocated verdict or advise the insured of the need for one, but failed to fulfill that obligation.” 1 Allan D. Windt, *Insurance Claims & Disputes* § 6:27 (4th ed. 2001). Determining where the burden lies is especially vital if a court has no way to ascertain the

jury's intent. In that situation, it will be impossible for the party bearing the burden of proof to meet its burden, and that party will lose the coverage dispute.

Thus, there are two questions of law critical to the resolution of this case:

A. Under West Virginia law, when an insured is found liable for a tort, and the complaint indicates that the tort could be based on conduct that the insurance policy covers, on conduct that the insurance policy does not cover, or both, and when the jury verdict does not specify which conduct gave rise to the insured's liability, does the insured bear the burden of proving that the liability was based on covered conduct, or does the insurer bear the burden of proving that the liability was based on non-covered conduct?

B. Under West Virginia law, when a jury awards punitive damages against an insured, and the punitive damages could be based on a claim covered by the insurance policy, on a claim not covered by an insurance policy, or both, does the insured bear the burden of proving that the punitive damages were based on a covered claim, or does the insurer bear the burden of proving that the punitive damages were based on a non-covered claim?

### III. Acknowledgment

Pursuant to W. Va. Code § 51-1A-6, this court recognizes that the Supreme Court of Appeals of West Virginia may reformulate the certified question presented.

### IV. Names and Addresses of Counsel of Record

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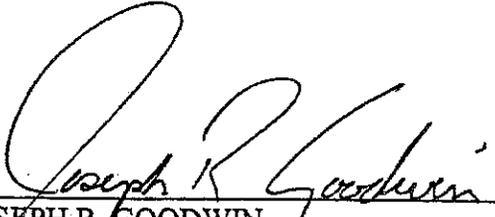
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The court **DIRECTS** the Clerk to send a copy of this Order to the Clerk of the Supreme Court of Appeals of West Virginia, counsel of record and any unrepresented party.

ENTER: February 20, 2008

  
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JOSEPH R. GOODWIN  
UNITED STATES DISTRICT JUDGE