

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. ~~100579~~

35653

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AMANDA R. SHREWSBURY and ROGER SHREWSBURY,

Plaintiffs below, Respondents,

v.

SURINDER MOHAN, individually and as an employee  
of SMP ENTERPRISES, LLC d/b/a THE COLONY CENTER,

Defendants below, Petitioners,

And

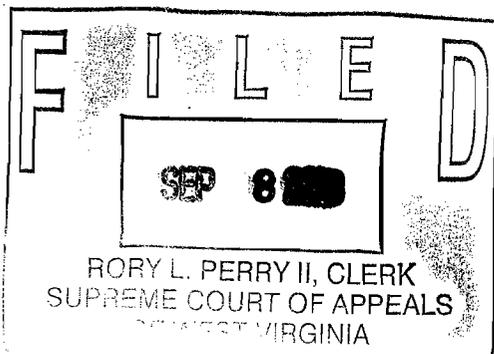
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Intervening Defendant below, Respondent.

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*Brief of Appellant*  
**RESPONSE OF SURINDER MOHAN TO RESPONSE OF ERIE  
INSURANCE PROPERTY AND CASUALTY COMPANY**

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## **BRIEF OF APPELLANT**

Comes now, Appellant, SMP Enterprises LLC, by counsel, and submits the following brief in support of its appeal from the order of the Circuit Court, Mercer County, West Virginia entered October 23, 2009, granting summary judgment to Erie Insurance Property and Casualty Company.

### **I.**

#### **Kind of Proceeding and Nature of Ruling in the Lower Tribunal**

Appellant, SMP Enterprises L.L.C, appeals from the grant of summary judgment in favor of Erie Property and Insurance Casualty Company. Mercer County Circuit Court Judge William Sadler granted Erie's motion seeking summary judgment with reference to indemnification under Erie's policy, for a jury award granted Amanda Shrewsbury and Roger Shrewsbury, plaintiffs in the underlying civil action.

The jury verdict in favor of the Shrewsbury's was the culmination of a civil action instituted against SMP Enterprises LLC and Surinder Mohan, an employee and one of its principals. The complaint instituting the civil action alleged that defendant, Surinder Mohan had sexually abused Amanda Shrewsbury while she was employed by SMP Enterprises LLC. The complaint also alleged independent causes of action against SMP Enterprises LLC, as the employer of Surinder Mohan.

## II.

### Statement of Facts

SMP Enterprises LLC (hereinafter “SMP”) was the owner and proprietor of the Colony Center, a gas station /convenience store and adjacent car wash, operating on the Ingleside Road near US Route 460 in Princeton, West Virginia<sup>1</sup>.

In May 2007, the plaintiff in the underlying civil action, Amanda Shrewsbury was hired by SMP to work as a cashier. At the time of Ms. Shrewsbury’s hire, SMP was insured under a policy of insurance with Erie Property and Casualty Insurance Company (hereinafter “Erie”). The policy, a Commercial General Liability policy was purchased through Castle Rock Insurance Agency an independent agent authorized to sell policies for Erie. (Exhibit C to Erie’s Memorandum in Support of Motion for Summary Judgment). The policy purchased by SMP was intended to cover all aspects of its operations.

Amanda Shrewsbury left her employment with SMP on May 25, 2007. At the time of her departure she alleged that Surinder Mohan, her supervisor and a principal of SMP<sup>2</sup>, had engaged in inappropriate contact of a sexual nature against her. Mohan was subsequently charged with three counts of first degree sexual abuse and two counts of attempt to commit first degree sexual assault. After a trial he was convicted of three counts of first degree sexual abuse, and acquitted on two counts of attempt to commit first degree sexual assault.<sup>3</sup>

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<sup>1</sup> The Colony Center suffered a fire in January 2009 which rendered the store structure a total loss.

<sup>2</sup> The other principal in SMP is Sushme Rani, Mohan’s wife.

<sup>3</sup> Mohan was subsequently sentenced to three 1-5 year sentences to run concurrently. He is currently incarcerated.

On July 9, 2007, Amanda and Roger Shrewsbury filed a civil complaint instituting the underlying civil action. The Shrewsbury's named as defendant's Surinder Mohan and SMP Enterprises LLC. The Shrewsbury's complaint set forth causes of action for assault and battery, as well as the tort of outrage specifically against defendant Mohan. The complaint also alleged negligent supervision/retention and negligent infliction of emotional distress against SMP. Finally, the complaint stated a cause of action against both Mohan and SMP for the creation of a hostile work environment/sexual discrimination. The discrimination claim as it related to SMP was alleged to have arisen out of SMP's negligence in failing to adopt a written employment policy regarding sexual harassment and failure to advise employees such plaintiff of the manner in which such complaints should be communicated to it. (Complaint). Subsequently, the plaintiff's filed an amended complaint adding a claim for declaratory judgment relating to coverage under the Erie policy. (Amended Complaint)

The Shrewsbury's claims came to trial on July 30, 2008. Surinder Mohan's convictions of first degree sexual abuse served as collateral estoppels as to the abuse to which Ms. Shrewsbury was subject. Following two days of trial, the jury returned a verdict on August 1, 2008 in the amount of \$425,000.00 jointly and severally against Surinder Mohan as well as SMP. In rendering its verdict, the jury made several specific findings.

First, the jury found that SMP had failed to take reasonable steps to protect Amanda Shrewsbury from the actions constituting sexual abuse committed by Surinder Mohan. The jury also answered a series of special interrogatories in which it found the following:

1. That there was a specific unsafe working condition that existed at Colony Center created by the presence of a female employee alone with Mr. Mohan which presented a high degree of risk and strong probability of serious injury;
2. That the employer had or should have had a subjective realization and appreciation for the unsafe working condition and the high degree of risk and strong probability of injury;
3. That the specific unsafe working condition of Mr. Mohan alone in the store with a female employee violated commonly accepted safety standards;
4. That SMP Enterprises exposed it's female employee, Amanda Shrewsbury, to the specific unsafe working conditions;
5. That employee exposed suffered serious injuries as a result of the unsafe working conditions and;
6. That SMP failed to take adequate precautions to prevent the sexual abuse of employees.

Following the trial, Erie filed its Motion for Summary Judgment in the declaratory judgment action which had been filed as part of plaintiff's Amended Complaint. After briefing and argument, the trial court issued its decision granting Erie summary judgment by its order of October 23, 2009. It is from this order that Appellant seeks relief.

**III.**

**Assignments of Error Relied Upon on Appeal  
and the Manner in Which They Were  
Decided in the Lower Court**

Appellant asserts the Circuit Court of Mercer County erred in granting Erie Property and Casualty Insurance Company summary judgment as to the following:

1. The trial court erred in determining that appellant was not entitled to coverage under "Coverage A" covering liability for "bodily injury."
2. The trial court erred in finding coverage for "bodily injury" does not encompass damages arising from sexual abuse involving significant physical contact of a sexual nature.
3. The trial court erred in determining appellant SMP was not entitled to coverage under "Coverage B" for liability for "personal injury."
4. The trial court erred in determining that coverage was precluded under Coverage A for "bodily injury" and Coverage B for "personal injury" under policy exclusions for "violation of rights of another" or "criminal activity."
5. The trial court erred in denying coverage under the "Limited Employer Liability" coverage and/or the "Employment Related Practices" exclusion.

**IV.**

**Points and Authorities Relied Upon**

**CASES**

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<u>Smith v. Animal Urgent Care Inc.</u> , 542 S.E.2d. 827 (W.Va. 2000).....	10, 13
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V.

**Discussion of Law**

A.

**The Standard of Review**

The trial court's grant of summary judgment is reviewed *de novo*. Syl. Pt. 1, Painter v. Peavy, 451 S.E.2d. 755 (W.Va. 1994) The standard to be applied in determining the propriety of summary judgment is whether there is any genuine issue to any material fact in the matter before the court. Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 133 S.E. 770 (W.Va. 1963). A genuine issue of material fact is any issue in which the evidence would allow a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In determining whether a genuine issue of material fact exists, this Court construes the facts in the light most favorable to the party against whom summary judgment was granted. Alpine Prop. Owners Assn. v. Mountaintop Dev. Co., 365 S.E.2d 57 (W.Va. 1987). However, the determination of coverage of an insurance contract when facts are not in dispute is recognized to be a question of law. See Syllabus Point 1, Tenant v. Smallwood, 568 S.E.2d. 10 (W.Va. 2002).

B.

**Argument**

Appellant, SMP Enterprises, seeks relief from the grant of summary judgment to Erie relating to coverage under the commercial general liability policy sold to SMP by Erie's agent. Erie sought summary judgment asserting that SMP was not entitled to coverage under its policy

because the injuries suffered were not "bodily injury." In addition, Erie asserted that exclusions in the policy relating to intentional acts precluded coverage as well.

In granting summary judgment the trial court found that Ms. Shrewsbury's injuries did not fall within the definition of "bodily injury" as contained in "Coverage A" of SMP's general liability policy. In addition, the trial court found that coverage was not afforded under the "personal injury" coverage found in "Coverage B" of the SMP policy. The court also found that under any circumstance, had coverage been afforded under any of these policies, such coverage would have been subject to policy exclusions relating to intentional acts.

Finally, the court found that its determination regarding "bodily injury" rendered unnecessary consideration of any issues relating to coverage under the policies "Limited Employer Liability" coverage or the "Employment Related Practices" exclusion in the policy.

An insured is entitled to the coverage purchased. This coverage includes coverage that is within the reasonable expectation of the party purchasing coverage. Syl. Pt. 4, Luikart v. Valley Brooke Concrete & Supply Inc., 613 S.E.2d 896 (W.Va. 2005). The language of the policy controls the coverage, and will be given its plain effect when unambiguous. Murray v. State Farm Fire and Casualty Company, 509 S.E.2d 1, 6 (W.Va. 1998). When policy provisions are ambiguous they will be strictly construed against the insurer. Syl. Pt. 4, National Mut. Ins. Co. v. McMahon & Sons, 356 S.E.2d 488 (W.Va. 1987). Coverage provided in policies is subject to exclusions which are properly incorporated into the policy. See: Syl. Pt. 10, National Mut. Ins. Co. v. McMahon & Sons, 356 S.E.2d 488 (W.Va. 1987).

1. THE TRIAL COURT ERRED IN FINDING THERE WAS NO COVERAGE AVAILABLE UNDER "COVERAGE A" RELATING TO "BODILY INJURY"

In addressing the "bodily injury" issue the trial court found that coverage set forth in "Coverage A" of the policy was unambiguous in its requirement that the injury covered be a "bodily injury". In considering whether the injuries in the case at hand qualified as "bodily injuries" the trial court looked to the Smith v. Animal Urgent Care Inc., 542 S.E.2d. 827 (W.Va. 2000) and fixed upon a definition of "bodily injury" as requiring a physical manifestation. (Summary Judgment Oder at Page 12).

In addressing "bodily injury" the court focused solely upon the verdict form which contains findings related to damages attributable to emotional distress and loss of enjoyment of life. Such a limited focus however, fails to appreciate or acknowledge other key aspects to the evidence in the case, and the nature of the harm inflicted upon Amanda Shrewsbury.

Plaintiff's initial complaint alleged that due to the physical assault suffered at the hands of defendant, Mohan, that she was injured both "in mind and body". (Complaint: Paragraph 33). Testimony at trial established that as a result of the attack on her, Ms. Shrewsbury suffered bodily injury resulting in bruising and injuries to her head.

Surinder Mohan was convicted of three counts of first-degree sexual abuse. "Sexual abuse," in the West Virginia Code provisions under which Mohan was convicted, is defined as requiring "sexual contact." W.Va. Code § 61-8B-7. "Sexual contact" as defined by the criminal code involves the "touching of the breasts, buttocks, anus or any part of the sex organs of another person." W.Va. Code § 61-8B-1. Therefore, the evidence before the jury in the civil trial, indisputably established by collateral estoppel, was that Surinder Mohan had physically accosted Ms. Shrewsbury, which resulted in the injuries that Ms. Shrewsbury testified to. Simply because

those injuries may not have been as significant physically as they were emotionally does not preclude their consideration as “bodily injury”.

The decision in Smith v. Animal Care, notwithstanding, the inclusion of mental pain and suffering as within the definition of “bodily injury” has been recognized by numerous courts. See: Williamson v. Historic Hurstville Ass’n, 556 So.2d 103, 107 (La. Ct. App. 4<sup>th</sup> Cir. 1990); Lowenthal v. Security Ins. Co. of Hartford, 436 A.2d 493, 499 (Md. App. 1981)(bodily injury, sickness or disease ... encompasses the claim of pain, suffering and mental anguish); Bloodsworth v. Carroll, 455 So.2d 1197, 1205(La. Ct. App. 2d. Cir. 1984); Lavanant v. General Acc. Ins. Co. of America, 595 N.E.2d 819 (N.Y. App 1992); NPS Corp v. Insurance Co. of North America, 517 A.2d 1211, 1214 (N.J. App. 1986)(it is common knowledge that emotional distress can and often does have a direct effect on other bodily functions); American Protection Ins. Co. v. McMahan, 562 A.2d 462, 466 (Vt. 1989); Allstate v. Troelstrup, 789 P.2d 415, 417 n.5 (Colo. 1990); Doyle v. Engelke, 580 N.W.2d 245, 250 (Wis. 1998)(a reasonable insured would understand mental, emotional, or psychological conditions to be included within the concepts of “sickness or disease” which the policy uses to define “bodily injury”); Lanigan v. Snowden, 938 S.W.2d 330, 332 (Mo. Ct. App. W.D. 1997); Allstate Ins. Co. v. Biggerstaff, 703 F.Supp. 23, 25 (D.S.C. 1989); State Farm Mutual Auto Ins. Co. v. Ramsey, 374 S.E.2d 896 (S.C. 1988); City of Old Town v. American Employers Ins. Co., 858 F.Supp. 264 , 268 (D. Me. 1994); Pekin Ins. Co. v. Hugh, 501 N.W.2d 508, 512 (Iowa 1993); Alfa Mut. Ins. Co. Inc. v. Morrison, 613 So.2d 381, 382 (Ala. 1993)(mental anguish constitutes bodily injury); First Ins. Co. of Hawaii, Ltd. v. Lawrence, 881 P.2d 489, 494 (Haw. 1994)(emotional distress covered as a “disease”); Evans v. Farmers Ins. Exchange, 34 P.3d 284, 287 (Wyo. 2001)(when, in policy’s

definition of “bodily injury” the term “bodily” does not modify the words “sickness or disease” emotional distress constitutes bodily injury).

These cases raise interesting issues not considered in this Court’s previous decisions. Why doesn’t mental distress qualify as a “bodily injury”? Is mental distress a “disease or illness”? What if there is a diagnosis of post-traumatic stress disorder? Would that fall under the parameters of the policy? See: Glikman v. Progressive Cas. Ins. Co., 917 A.2d 872, 873-74 ( Pa. Super. 2007)(post-traumatic stress disorder covered as a disease).

The evidence before the jury and the circumstance of Ms. Shrewsbury’s injuries should be recognized as constituting “bodily injury” under Smith. Additionally, this court should recognize the inclusion of mental distress as within the definition of “bodily injury.”

**2. THE TRIAL COURT ERRED IN FINDING THAT “BODILY INJURY” DID NOT INCLUDE DAMAGES ARISING FROM SEXUAL ABUSE**

It is clear the trial court, in granting summary judgment, believed that the decision it felt compelled to reach in light of existing precedent was unjust.

The court strongly disagrees with the archaic precedent that categorizes physical violations of one's body as anything less than a bodily injury and respectfully urges the West Virginia Supreme Court to bear this key distinction in mind when next confronted with a similar issue.

(Summary Judgment Order: Page 16.)

The trial court's discomfort arises from the tortured result required by the failure of previous decisions to recognize the nature of the intrusion involved with sexual misconduct, especially sexual abuse.

The court believes that the physical act of sexual abuse is so interconnected with the resulting psychological and emotional injury that they cannot be separated one from the other. As such, the heinous, abusive, and sexually intrusive nature of the sexual misconduct in this case, the three acts of first-degree sexual abuse which Mr. Mohan was convicted -- constitute injury to one's body per se. This court would find "bodily injury" to encompass mental, emotional, and other injuries resulting from sexual abuse. The Court points out that the current state of the law regarding bodily injury and sexual offenses evolved from cases involving sexual harassment claims, not sexual abuse convictions as in the present case. Perhaps when the West Virginia Supreme Court is confronted with a scenario like the one at bar, it may take a different stance on the issue.

(Summary Judgment Order : 15 -16)

Finding a "bodily injury" to result from a sexual assault or a sexual abuse would not require tortured logic or construction in any fashion. As noted in United Services Automobile Assn. v. Doe, 792 N.E.2d 708, 710 (Mass. App. Ct. 2003), acts of digital penetration of the victims vagina, "constituted an indecent assault and battery, i.e. violation of the body integrity of the victim and, therefore, an infliction of actual physical injury on her, even if not accompanied by bleeding or broken bones." The court also acknowledged, "decided cases, frequently without discussion, have taken sexual molestation, including fondling and certainly penetration, to be infliction of bodily injury." 792 N.E.2d at 710. [citations omitted]

This issue was addressed by Justice Starcher in his separate opinion in Tackett v. American Motorist Insurance Company, 584 S.E.2d 158 (W.Va. 2003). While Justice Starcher concurred with the result of the majority opinion, he dissented from the majority opinion in its reliance on Smith v. Animal Urgent Care, *supra*. In his dissent, Justice Starcher pointed out that the court in Smith v. Animal Urgent Care was addressing a claim of sexual harassment which, lacking physical manifestation, did not fall within the definition of "bodily injury". Starcher stated with obvious disapproval:

Frankly, this is an archaic conceptualization of human anatomy and physiology, based on the belief that there is a distinction between "mental" and "physical" injuries.. The science of today establishes that the brain can be physically injured solely through an emotional disturbance. And, ties get that can trigger severe chemical reactions in the brain, such that a cancer will injury to the brain can occur. Ask any combat veteran about posttraumatic stress disorder, or any doctor who treats that veteran -- they will tell you that under intense stress the brain can be "rewired".

584 S.E.2d at 168.

Justice Starcher also posited that the conclusion reached in Smith ignored modern science and ignored the physical, and chemical aspects of psychological injuries, which would obviously blur the distinction between the purely physical and purely mental. 584 S.E.2d at 168. See also: Guide One Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.2d 305, 311 (Tex. 2006)(bodily injury is a consequence of sexual assault and abuse).

Justice Starcher again expressed his concern in this area in a concurring opinion in West Virginia Fire and Casualty Company v. Stanley, 602 S.E.2d. 483 (W.Va. 2004) In his concurrence, Justice Starcher was concerned that the decision, along with Horace Mann Ins. Co. v. Leeber, 376 S.E. 2d. 581 (W.Va. 1988) would create the appearance that there could never be insurance coverage where sexual misconduct was alleged.

I join the majority's opinion with some fear and trepidation for what future litigation might bring. Whenever some sexual misconduct occurs, and a person is harmed by that misconduct, insurance companies are likely to wave the instant case and our holding in Horace Mann Insurance Company v. Leeber, 376 S.E.2d. 581 (W.Va. 1988) for the proposition that there can **never** be liability insurance coverage for sexual misconduct. That interpretation of the instant case in Leeber is wrong.

602 S.E.2d. at 498 [emphasis in original]

The observations and concerns of the trial court, as well as those of Justice Starcher, are well placed. To flatly refuse to acknowledge the harm wrought by sexual abuse based upon

arcane and strict definition defeats the purpose of insurance and frustrates the reasonable expectations of an objective insured.

3. THE TRIAL COURT ERRED IN FINDING THERE WAS NO COVERAGE UNDER "COVERAGE B" RELATING TO "PERSONAL INJURY"

While Erie contended that Amanda Shrewsbury's damages did not fall under the "bodily injury" coverage under the policy, coverage is provided under "Coverage B" of the policy relating to "personal and advertising injury liability". The personal and advertising liability policy provisions state "we will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies." The policy goes on to state "this insurance applies to personal and advertising injury caused by defense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period." (See Exhibit C, Page 4 to Erie's Memorandum in Support of Motion for Summary Judgment)

Support for a finding that coverage exists under the "personal injury" coverage, can be found in Tackett v. American Motorist Insurance Company, 584 S.E.2d 158 (W.Va. 2003). In Tackett, this court had occasion to consider a policy with a definition of personal injury virtually identical to the provisions in the Erie policy in question, in an analogous situation.

The Tackett court discussed the parameters of "personal injury" as compared to "bodily injury." Acknowledging its recognition in Smith v. Animal Urgent Care, Inc., 542 S.E.2d 827 (W.Va. 2000) that "bodily injury" and "personal injury" are not synonymous and have two distinct definitions, the Court recognized that personal injury "is broader and includes not only

physical injury but also affront or insult to the reputation or sensibilities of a person." 584 S.E.2d at 167; quoting Smith, 542 S.E.2d at 831.

In determining that the insurer was obligated to provide defense, the Court in Tackett found that the allegations contained in the complaint brought the claim "squarely within the ambit of the personal injury coverage provisions of the policy." In reaching this conclusion the court noted that "among the claims stated are complaints that Mr. Tackett made sexual innuendos to the victim "touched her" and "entered the sanctity of her dressing room". The court found that each of these allegations "potentially state a covered claim pursuant to the above quoted policy definition of personal injury as well as under our broader judicial interpretation of that term." 584 S.E.2d at 167.

In the instant case, the trial court dismissed Tackett because the case involved an insurer's duty to defend, as opposed to the duty to indemnify in the present case. The trial court pointed to the difference in the breath or scope of a duty to defend, which considers potential coverage for any claims, versus a duty to indemnify which is involved in the narrower issue of whether actual damages fall within the parameters of coverage. Citing this "fundamental difference" between the issue in Tackett and the case at bar the trial court determined SMP's reliance on Tackett to be "misplaced and unpersuasive." (Summary Judgment Order; Page 19)

However, the trial court's focus on the fact that Tackett arose as a case concerning an insurers duty to defend in discounting its application to the instant case either fails or refuses to recognize the larger significance of the decision. The allegations in Tackett present significant similarity to the facts in the present case. The evidence in the case at bar was replete with descriptions of Mr. Mohan's inappropriate comments, unwanted and inappropriate touching and

his invasion of the restroom where Ms. Shrewsbury had sought refuge, and where incidentally, the most serious sexual contact and abuse occurred.

Under this Court's reading of the policy provisions relating to personal injury in Tackett, and the "broader judicial interpretation of that term", the facts of this case clearly support coverage under the personal injury provisions of the policy. It is the court's recognition that the allegations, similar to those in the case at bar, "fall squarely within the ambit of the personal injury coverage provisions" of the employer's policy. 584 S.E.2d. at 167. This is significant in that, given this clear declaration, when those occurrences which were merely "allegations" in Tackett have been substantiated and proven, as they were in the case at bar, the duty to indemnify would apply. Therefore, Tackett cannot simply be dismissed because it arose in the context of the duty to defend.

4. THE TRIAL COURT ERRED IN FINDING COVERAGE UNDER "COVERAGE A" OR "COVERAGE B" WAS PRECLUDED BY VALID EXCLUSIONS

The court also determined that its finding that neither "Coverage A" or "Coverage B" applied and provided coverage notwithstanding that SMP was not entitled to coverage under the intentional acts exclusions in the Erie policy. Within the Erie policy, these exclusions were styled as exclusions for injuries arising from the "knowing violation of rights of another" and "criminal acts".

Under an "intentional acts" exclusion, a policyholder may be denied coverage only if the policyholder (1) committed an intentional act and (2) expected or intended the specific resulting damage. Syllabus point 7, Farmers and Merchants Mut. Ins. Co. v. Cook, 557 S. E. 2d. 801 (W.Va. 2001)

The courts focus in finding that SMP was denied coverage under the criminal acts or intentional knowing violation of rights clauses focused on the conduct of defendant Surinder Mohan. However, the coverage issues do not relate to Mohan but rather are coverage issues relating to SMP. The liability in question for coverage is not the liability for Surinder Mohan. It is not the liability that arises vicariously due to the employment relationship. It is the liability that arises from the negligence and failures of SMP, as alleged in the Shrewsbury's complaint and as proven to, and found by, the jury that spurred the coverage in question.

This court in West Virginia Fire and Casualty Company v. Stanley, *supra*, considered a case wherein the defendants were the parents of a minor who had sexually abused and sexually exploited another minor, and the minor himself. In addressing the "several negligence causes of action" stated in the complaint against the parents, Glen and Helen Stanley, the Court noted that the plaintiff's complaint had "failed to clearly allege negligent supervision of Jesse Stanley by Glen and Helen Stanley." The court noted that although the word "negligent" was use in the complaint that the allegations actually revolved around the actual knowledge possessed by the parents and their permitting their son to continue to sexually abuse and exploit the minor child. The court also noted that the conduct of the parents was characterized in the complaint as "willful, wanton, reckless, outrageous, intentional, and malicious." The court recognized these terms to be associated with intentional actions. Ultimately, the court found that under the facts alleged the parents would have at least expected harm to result as a result of their conduct.

In his concurring opinion Justice Starcher recognized that the liability of the parents was not a simple function of the actions of their minor son but of the allegations against them.

As for Jesse's parents, the same analysis applies, but a different result might have been had - if the plaintiff's complaint had been drafted differently. If Jesse's parents had not intentionally sent their granddaughter into harms way, or had not expected that their son would physically and emotionally harm their granddaughter, then they might have been entitled to indemnity and a defense from their liability insurance company.

602 S.E.2d. at 498

Justice Starcher's dissent in Tackett also addressed this issue in the context of the employee/employer relationship, recognizing that the holding in Smith was harmful to the insured because sexual harassment by an employee is usually not an intentional or expected act by the employer. He noted that an intentional act exclusion should not exclude liability for unintentional or unexpected injury. The mere act of doing an intentional act by the insured does not relieve the insurer where the resultant injuries were unintended "in other words for the "intentional acts exclusion to operate, the insured must have both committed an intentional act and intended or expected the consequential injury." He recognized that "if one bad employee gropes a customer, the purchaser of the liability insurance, the business owner, can be left holding the bag with no liability coverage." "In the circumstances, there should be coverage because, from the standpoint of the business owner, the injury to the customer was not expected or intended. 584 S.E.2d. at 169.

5. THE TRIAL COURT ERRED IN DENYING COVERAGE UNDER THE “EMPLOYER’S LIMITED LIABILITY COVERAGE” OR THE “EMPLOYMENT RELATED PRACTICES” EXCLUSION

The trial court also found coverage under the Erie policy was precluded under the policy’s “Limited Employers Liability Coverage”, or and “Employment Related Practices” exclusion. However, the trial court’s decision on these points was based upon the court’s previous conclusion that there was no “bodily injury”. Therefore, should this court determine the “bodily injury” issue in favor of the appellant, the trial court’s conclusions regarding these coverage issues would be resolved favorably to the extent they have been addressed by the trial court’s summary judgment decision.

V.

The Relief Prayed For

BASED UPON THE ARGUMENTS SET FORTH HEREIN AND IN LIGHT OF THE ERRORS ASSERTED HEREIN, APPELLANT, SMP ENTERPRISES L.L.C. , RESPECTFULLY REQUESTS THE ORDER OF THE CIRCUIT COURT OF MERCER COUNTY GRANTING SUMMARY JUDGMENT BE REVERSED, AND THE MATTER REMANDED TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA FOR FURTHER PROCEEDINGS CONSISTENT WITH THE ORDER OF THIS COURT.

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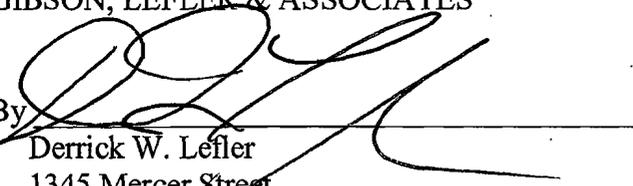
**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have on this the 7<sup>th</sup> day of September, 2010, served a true and correct copy of the foregoing and hereto annexed *Brief of Appellant*, SMP Enterprises L.L.C. by United States Mail, postage prepaid, upon the following:

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