

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35653

AMANDA R. SHREWBURY and ROGER SHREWSBURY,

Plaintiffs below, Appellees,

v.

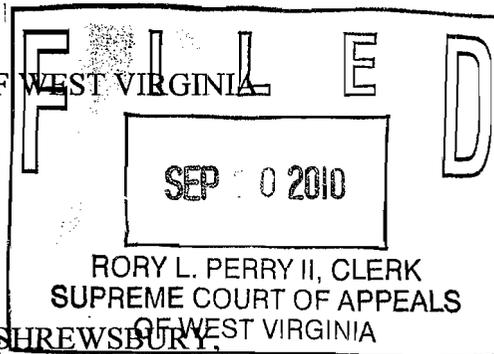
SURINDER MOHAN, individually and as an employee of SMP ENTERPRISES, LLC d/b/a
THE COLONY CENTER,

Defendants below, Appellants,

And

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Intervening Defendant below, Appellee



BRIEF OF APPELLEE ERIE INSURANCE PROPERTY AND CASUALTY COMPANY

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MISCELLANEOUS

1 Law and Prac. Of Ins. Coverage Litig. § 1:1323

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I. THE KIND OF PROCEEDING AND NATURE OF RULING BELOW

“[N]o insured would reasonably expect liability coverage for damages arising out of an act of sexual assault premised upon sexual contact.” *J.G., infra* at 491. Nevertheless, Appellants seek reversal of the trial court’s declaration that there was no duty to indemnify an employee’s suit for sexual harassment and assault. The tort verdict form, prepared by the Plaintiffs below¹, awarded damages for emotional distress, loss of enjoyment of life, and loss of consortium.² Relying upon this Court’s well-established precedent, the trial court correctly determined that “[t]he jury awarded the plaintiffs damages for emotional distress, loss of ability to enjoy life, and loss of consortium – none of which is a ‘bodily injury, sickness, or disease.’”³ Indeed, in *Smith v. Animal Urgent Care, Inc.*, this Court recognized that “[b]oth commentaries and tribunals alike identify the majority view to espouse that ‘absent physical manifestations or physical contact, purely emotional distress allegations are insufficient to qualify as bodily injury’” thereby triggering coverage under a commercial general liability insurance policy. 208 W.Va. 664, 542 S.E.2d 827, 830 (2000) (citations omitted). Thus, this Court held that “[i]n an insurance liability policy, purely mental or emotional harm that arises from a claim of sexual harassment and lacks physical manifestation does not fall within a definition of ‘bodily injury’ which is limited to ‘bodily injury, sickness, or disease.’” *Id.* at Syl. pt. 1. In essence, the Appellants are asking this Court to overturn *Animal Urgent Care*’s adoption of the majority rule. As this Court has repeatedly held, “ ‘the doctrine of stare decisis is of fundamental importance to the rule of law’” as it “ ‘ensures that ‘the law will not merely change erratically’ and ‘permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals’.”

¹ Order Granting Summary Judgment at 4.

² *Id.*

³ *Id.* at 14 (relying upon *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000)).

Murphy v. Eastern American Energy Corp., 224 W.Va. 95, 680 S.E.2d 110, 116 (citations omitted).⁴ Appellee submits that the *Animal Urgent Care* decision is sound and must be upheld. Appellants' remaining arguments for coverage are similarly erroneous. The trial court's decision being legally correct, the award of summary judgment must be affirmed.

II. STATEMENT OF FACTS

A. Factual and Procedural History

On or about July 9, 2007, Plaintiffs below initiated a civil action against Appellants Surinder Mohan and SMP Enterprises, LLC d/b/a The Colony Center. [Complaint]. The Complaint alleged that, at all times relevant thereto, Surinder Mohan and Shushma Rani were the sole members of SMP Enterprises, LLC, Mr. Mohan was an employee of SMP Enterprises, LLC, and Mr. Mohan was the manager of The Colony Center, a convenience store. *Id.* at ¶¶ 3, 28. Plaintiffs below further alleged in the Complaint that Amanda Shrewsbury was employed as a clerk at The Colony Center from May 14, 2007, through May 25, 2007. *Id.*

According to the Complaint, Appellant Surinder Mohan assaulted and battered Amanda Shrewsbury, and such conduct was "unwarranted, unjustified, unlawful, nonconsensual, intentional and malicious and was done by . . . Surinder Mohan to satisfy his prurient, salacious and lascivious interests and desires." [Complaint]. In fact, Surinder Mohan was convicted of three felony counts of first degree sexual abuse against Amanda Shrewsbury. [Verdict Form at 1]. The remaining allegations in the Complaint included hostile work environment/sex discrimination, negligent supervision/retention, tort of outrage, negligent infliction of emotional distress, and loss of consortium. [Complaint].

⁴ As more fully discussed herein, the doctrine of *stare decisis* is of particular importance in the context of contract law. *See, e.g.*, 21 C.J.S. *Courts* § 203 ("Courts tend to adhere to decisions that have become established rules of property or contract law, because of reliance on them.").

SMP Enterprises, LLC d/b/a The Colony Center purchased from Appellee Erie Insurance Property and Casualty Company (hereinafter “Erie”) a commercial general liability policy with limited employers liability coverage, policy number Q46 7050030, with a policy period of October 20, 2006, through October 20, 2007. [Policy, attached to Memorandum of Law in Support of Erie’s Motion for Summary Judgment as Ex. C]. SMP Enterprises, LLC and Surinder Mohan sought coverage under this policy for the defense of, and indemnification for, the tort portion of the underlying civil action and Erie provided the Appellants with a defense, under a reservation of rights.

With leave of the trial court, the Plaintiffs below filed an Amended Complaint on March 20, 2008. [Amended Complaint]. In the revised pleading, the tort Plaintiffs sought a declaration as to coverage under the policy of insurance issued by Erie for the defense and indemnification of the tort portion of the underlying civil action. *Id.*⁵

A jury trial of the tort portion of the underlying litigation began on July 30, 2008. On August 1, 2008, the jury returned a verdict in favor of the Plaintiffs below. The Verdict Form, prepared by the tort Plaintiffs, stated as follows regarding damages:

(FOR PLAINTIFFS AND AGAINST DEFENDANT SURINDER MOHAN)

⁵ On November 5, 2007, Erie initiated a declaratory judgment action in the United States District Court for the Southern District of West Virginia, asking the Court to determine whether or not it had a duty under the subject policy to defend or indemnify SMP Enterprises, LLC and/or Surinder Mohan in connection with the instant civil action. [1:07-CV-0706, Doc. No. 1]. After filing their Amended Complaint in the underlying state court matter to add a declaratory judgment count, Plaintiffs below moved to dismiss the federal action, or alternatively, stay that action pending resolution of the insurance coverage matters brought in their Amended Complaint. [1:07-CV-0706, Doc. No. 27]. On May 22, 2008, Erie made a similar motion in the state court matter. At the hearing on Erie’s motion of July 16, 2008, the trial court below granted Erie’s motion to stay the declaratory judgment portion of the state court action pending disposition of the federal action. On August 6, 2008, the district court stayed the federal action pending disposition of the declaratory judgment portion of the state court action. [1:07-CV-0706, Doc. No. 39]. On August 18, 2008, Erie moved for reconsideration of the district court’s order granting the motion to stay. [1:07-CV-0706, Doc. No. 40]. The trial court below subsequently reinstated the declaratory judgment portion of the underlying state court action to its active docket. The district court denied Erie’s motion for reconsideration on December 23, 2008. [1:07-CV-0706, Doc. No. 42].

We the jury find by a preponderance of the evidence that the three felony counts of first degree sexual abuse committed by Surinder Mohan against Amanda Shrewsbury, proximately caused injury to Amanda Shrewsbury and find Plaintiffs' damages as follows:

| | |
|---|--------------|
| Amanda Shrewsbury for emotional distress | \$250,000.00 |
| Amanda Shrewsbury for loss of ability to enjoy life | \$100,000.00 |
| Roger Shrewsbury for loss of consortium | \$75,000.00 |

August 1, 2008
DATE

/s/Katherine B. Shott
JURY FOREPERSON

[Verdict Form at 1]. As Appellants indicate, the jury also “answered a series of special interrogatories” regarding an alleged “specific unsafe working condition” at the Colony Center and the alleged failure “to take adequate precautions to prevent the sexual abuse of employees”. See Appellants’ Brief at 4. Notably, however, no specific damages were awarded as a result of said “findings” and *the Appellants had no objections to the substance of the verdict forms as drafted by the Plaintiffs below*. See Trial Tr. At 3, attached hereto as Exhibit A (“Does the Defendant have any objection to the two different verdict forms submitted by the Plaintiff? MR. MOORE: No, other than the . . . signature line on the last page.”). Indeed, the Plaintiffs below explained that as to the second verdict form, containing the special interrogatories, “[i]n the event they find liability for the Corporation, it would seem that the damages are [al]ready set forth.” *Id.* at 8. The Plaintiffs below specifically noted that Mrs. Shrewsbury could not have “suffered emotional distress solely from the actions of the Corporation.” *Id.* Thus, Appellants’ counsel was asked “are we okay with the verdict forms?” and responded “I think so.” *Id.* at 12.⁶

⁶ Indeed, Erie repeatedly objected to the form, indicating “that without a separate line for [the] LLC there’s no way for the insurer to determine. . . if cover[age] is found for partial indemnity[,] what the amount the insurer is required to indemnify the insure[d] for.” *Id.* at 32. In *Camden-Clark Memorial Hosp. Ass’n v. St. Paul Fire and Marine Ins. Co.*, 224 W.Va. 228, 682 S.E.2d 566 (2009), this court recognized that the insured ordinarily has the burden of allocating liability between covered and non-covered claims. While the *Camden-Clark* decision indicated that the

As the trial court noted, having defended the tort litigation under a reservation of rights, Erie filed a motion for summary judgment seeking a determination that it had no obligation to indemnify “the tort claims asserted in the underlying case.” SMP Enterprises tendered its Response in Opposition to Erie’s motion on July 6, 2009, at the hearing on Erie’s motion for summary judgment. The [trial] court granted Erie’s request for time to reply to SMP Enterprises’ response brief, which Erie then filed on July 22, 2009.” [Order Granting Motion for Summary Judgment at 5]. Appellants filed a Motion to Strike Erie’s Reply brief which was denied in the trial court’s Order granting Erie’s Motion for Summary Judgment. *Id.* at 7-8.

On or about October 23, 2009, the trial court entered a lengthy order extensively analyzing the issues and awarding Erie summary judgment. The trial court determined that the subject policy did not provide coverage for the Plaintiffs’ damages below. [Order Granting Motion for Summary Judgment]. Specifically, the trial court found that “[a]pplying the definition of ‘bodily injury’ in the Erie policy compels the court to conclude that the plaintiffs injuries for which SMP Enterprises seeks insurance coverage do not fall within the ambit of ‘bodily injury.’” *Id.* at 14. Recognizing that at issue was “whether the insurer has a duty to indemnify the insured, not whether the insurer has the duty to defend”, and further recognizing that “Defendant Mohan was convicted of three counts of first degree sexual abuse”, the trial court determined that personal injury coverage was barred by the “criminal acts” and “knowing violation of the rights of others” exclusions. *Id.* at 19-20 (footnote omitted). Likewise, the trial

burden can shift to the insurer in the event of a duty to defend, in the absence of such a duty, the burden remains with the insured. In the instant case, Erie attempted to obtain an alternative verdict form; however, the insured opposed Erie’s attempts. While Erie had “control of the defense” under a reservation of rights, the Appellants’ had personal counsel present. Consequently, as the Appellants elected not to oppose the verdict form prepared by the Plaintiffs, they “should not be permitted to complain that the jury verdict is not allocated between covered and non-covered claims”. *See, e.g., Id.* at 577.

court found that the Limited Employers' Liability Coverage inapplicable due to the lack of a "bodily injury". *Id.* at 21. As the trial court specifically recognized:

Notably, the plaintiffs took particular care to draft their special interrogatories regarding SMP Enterprises' liability in the underlying tort action to mirror the five-paragraph exception to the Section 2 Exclusions for Expected or Intended Injury in the Limited Employers Liability Coverage. However, bodily injury is still a mandatory prerequisite for any type of coverage thereunder.

Id. at 21-22 (footnote omitted).

On or about February 22, 2010, Appellants requested an extension of time with which to file their Petition for Appeal. [Petitioners' Docketing Statement at 1]. The extension sought was granted the following day. *Id.* The Petition being granted, the instant appeal followed. Notably, however, the trial court's detailed order was correct:

The actual types of damages awarded to the plaintiffs by the jury – emotional distress, loss of enjoyment of life, and loss of consortium – do not fall within the ambit of 'bodily injuries' thereby precluding coverage under each policy section upon which coverage is predicated on the existence of bodily injury. Accordingly, no coverage exists under the Erie policy for the indemnification of damages awarded to the plaintiffs in the underlying tort case. In addition, to the extent that the plaintiffs' injuries may qualify as 'personal injuries,' they are not covered risks under Coverage B because the exclusions for knowing violations of the rights of another and for criminal acts specifically preclude coverage for the plaintiff's injuries.

[Order Granting Motion for Summary Judgment at 22-23]. Simply stated, the award of summary judgment was proper and must be affirmed.

B. Policy Language

Under the commercial general liability portion of the subject policy, the insuring clause for the bodily injury and property damage liability coverage part states as follows:

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result. But:

- 1) The amount we will pay for damages is limited as described in Section III - Limits of Insurance; and
- 2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

b. This insurance applies to 'bodily injury' and 'property damage' only if:

- 1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory';
- 2) The 'bodily injury' or 'property damage' occurs during the policy period.

- c. Damages because of 'bodily injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury'.

[Ex. C to Motion for Summary Judgment at Coverage For Punitive Damages Endorsement].

"Bodily injury" is defined by the subject policy as:

bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

[Ex. C to Motion for Summary Judgment at Commercial General Liability Coverage Form at 10 of 12, Limited Employers Liability Coverage Form at 4 of 4]. The Commercial General Liability Coverage Form of policy number Q46 7050030 excludes from "bodily injury" liability coverage damages resulting from:

- e. **Employer's Liability**

'Bodily injury' to:

- 1) An 'employee' of the insured arising out of and in the course of:
 - a) Employment by the insured; or
 - b) Performing duties related to the conduct of the insured's business; or
- 2) The spouse, child, parent, brother or sister of that 'employee' as a consequence of Paragraph 1) above.

This exclusion applies:

- 1) Whether the insured may be liable as an employer or in any other capacity; and
- 2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

[Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at 2 of 12]. The policy also states:

This insurance does not apply to:

a. **Expected Or Intended Injury**

‘Bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured.

[Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at 1 of 12].

The insuring clause for the personal and advertising injury liability coverage states:

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. **Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of ‘personal and advertising injury’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘personal and advertising injury’ to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or ‘suit’ that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

- b. This insurance applies to ‘personal and advertising injury’ caused by an offense arising out of your business but only if the offense was committed in the ‘coverage territory’ during the policy period.

[Exhibit C to Motion for Summary Judgment at Coverage For Punitive Damages Endorsement].

“Personal and advertising injury” is defined by policy number Q46 7050030 as:

injury, including consequential ‘bodily injury’, arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person’s right of privacy;
- f. The use of another’s advertising idea in your ‘advertisement’; or
- g. Infringing upon another’s copyright, trade dress or slogan in your ‘advertisement’.

[Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at

11 of 12]. The policy excludes from coverage damages resulting from:

- a. **Knowing Violation Of Rights Of Another**

‘Personal and advertising injury’ caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury’.

[Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at

4-5 of 12]. Also excluded is:

d. **Criminal Acts**

‘Personal and advertising injury’ arising out of a criminal act committed by or at the direction of the insured.

[Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at 5 of 12]. Similarly excluded are damages resulting from:

‘Personal and advertising injury’ to:

- a. A person arising out of any:
 - 1) Refusal to employ that person;
 - 2) Termination of that person’s employment; or
 - 3) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- b. The spouse, child, parent, brother or sister of that person as a consequence of ‘personal and advertising injury’ to that person at whom any of the employment-related practices described in Paragraphs 1., 2. or 3. above is directed.

This exclusion applies:

- a. Whether the insured may be liable as an employer or in any other capacity; and
- b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

[Exhibit C to Motion for Summary Judgment at Employment-Related Practices Exclusion Endorsement].

Further, the insuring clause for the policy’s limited employers’ liability portion of the policy provides as follows:

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ sustained by your employee arising out of or in the course of employment by you. We will have the right and duty to

defend the insured against any 'suit' seeking such damages. However, we will have no duty to defend the insured against any 'suit' seeking damages to which this insurance does not apply. We may, at our discretion, investigate any occurrence or injury and settle any claim or 'suit' that may result. But:

- a. The amount we will pay for damages is limited as described in **Section III., Limits of Insurance – Limited Employers Liability Coverage**; and
- b. Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements.

Coverage applies only to 'bodily injury' to your lawful employee. The 'bodily injury':

- a. Must arise out of employment by you;
- b. Must occur from employment that is necessary or incidental to your work in the state of West Virginia;
- c. Must occur during the policy period;
- d. Must occur in West Virginia unless the employee is a citizen or resident of the United States of America or Canada and is temporarily outside West Virginia in connection with your business; but the insurance does not apply to the any 'suit' brought in or any judgment rendered by any court outside the United States of America, its territories or possessions, or to an action on such judgment wherever brought.

Damages because of 'bodily injury' include losses:

- a. For which you are liable to a third party by reason of a claim or 'suit' against you by that third party to recover damages claimed against the third party as a result of injury to your employee;

- b. For care and loss of service;
- c. For consequential 'bodily injury' sustained by a spouse, child, or dependent of an employee of yours as a consequence of 'bodily injury' to the employee arising out of employment by you;
- d. For 'bodily injury' to your employee arising out of employment by you and claimed against you in a capacity other than an employer.

[Ex. C to Motion for Summary Judgment at Limited Employers Liability Coverage Form at 1 of 4]. Again, under this coverage part, "Bodily injury" is defined by policy number Q46 7050030 as:

bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

[Exhibit C to Motion for Summary Judgment at Limited Employer Liability Coverage Form at 4 of 4]. The Limited Employer Liability Coverage Form of policy number Q46 7050030 also contains an "intentional act exclusion," which states:

This insurance does not apply to:

a. **Expected or Intended Injury**

'Bodily injury' to an employee intentionally caused or aggravated by or at the direction of the insured, including 'bodily injury' to an employee resulting from an act that is determined to have been committed by an insured with the deliberate intent to produce injury.

[Exhibit C to Motion for Summary Judgment at Limited Employer Liability Coverage Form at 1 of 4]. Also excluded are damages resulting from:

f. **Violation of Law**

- 1) 'Bodily injury' to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;

- 2) Damages arising out of the discharge of, coercion of, or discrimination against any employee in violation of law.

[Exhibit C to Motion for Summary Judgment at Limited Employer Liability Coverage Form at 2 of 4].

III. DISCUSSION OF LAW

A. The Standard of Review

As this Court has recently reiterated, “[t]his Court’s standards of review concerning summary judgments are well settled. Upon appeal, ‘[a] circuit court’s entry of summary judgment is reviewed *de novo*.’” *Perrine v. E. I. DuPont De Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010) (citations omitted). This Court has instructed that “ ‘[t]he term ‘*de novo*’ means ‘ [a]new; afresh; a second time.’ ” *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia*, 203 W.Va. 690, 510 S.E.2d 764, 775 (1998) (citations omitted). Thus, as this Court has recognized:

In conducting our *de novo* review, we are mindful that, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the record demonstrates ‘that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’

Perrine, supra at 839 (citations omitted).

Moreover, the award of summary judgment at issue herein was granted in the context of a declaratory judgment action. In *Mountain Lodge Ass’n v. Crum & Forster Ind. Co.*, 210 W.Va. 536, 558 S.E.2d 336, 341 (2001), this Court noted “that the standard of review for both types of judgments is the same” as “ ‘[a] circuit court’s entry of a declaratory judgment is reviewed *de novo*.’ ” [citations omitted]. Although “[w]hen employing the *de novo* standard of review, [the Court] reviews anew the findings and conclusions of the circuit court, affording no deference to the lower court’s ruling”, *Blake v. Charleston Area Med. Center*, 201 W. Va. 469, 498 S.E.2d

41, 47 (1997) (citations omitted), it is readily apparent that the trial court's decision was rendered in accordance with the well-established precedent of this Court. Accordingly, the underlying decision must be affirmed.

B. The Trial Court Correctly Determined That The Tort Verdict Did Not Include Damages For "Bodily Injury" So As To Trigger Bodily Injury Liability Coverage Under The Subject Policy.

Relying upon this Court's well-established decision of *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000), the trial court properly determined that "[t]he jury awarded the plaintiffs damages for emotional distress, loss of ability to enjoy life, and loss of consortium – none of which is a 'bodily injury, sickness or disease.'" [Order Granting Summary Judgment at 11, 14]. The trial court's decision must, therefore, be affirmed.

1. As A Matter Of Law, Well-Established By This Court, Purely Mental Or Emotional Harm That Lacks Physical Manifestation Does Not Fall Within A Policy Definition of "Bodily Injury" Limited To "Bodily Injury, Sickness or Disease".

As set forth above, under the commercial general liability portion of the subject policy, the insuring clause for the bodily injury and property damage liability coverage part states, in pertinent part, as follows:

2. COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of 'bodily injury' or 'property damage' to which this insurance applies.

...

[Exhibit C to Motion for Summary Judgment at Coverage For Punitive Damages Endorsement]. Thus, it is “bodily injury” that would trigger Erie’s duty to indemnify under the commercial general liability portion of the policy. *See Smith v. Animal Urgent Care*, 208 W. Va. 664, 667-8, 542 S.E.2d 827, 830-1 (2000) (stating that “[g]iven the fundamental restriction of the coverage at issue to claims which assert ‘bodily injury,’ we proceed initially to determine whether the complaint at issue contains averments of ‘bodily injury’” and “[l]ike the requisite ‘bodily injury’ necessary to invoke liability coverage, an ‘occurrence’ must similarly exist before American States is obligated to provide indemnification”).

In *Smith v. Animal Urgent Care*, this Court examined a commercial general liability policy, which, like the policy at issue, obligated the insurer to indemnify the insured for sums it became legally obligated to pay as damages because of “bodily injury.” *Id.* at 666, 542 S.E.2d at 829.⁷ The *Animal Urgent Care* insurer sought a determination of whether it was required to provide a defense or indemnification in connection with a lawsuit brought by a former employee against Animal Urgent Care and one of its veterinarians. *Id.* In the lawsuit, the former employee alleged sexual harassment, wrongful discharge, and intentional infliction of emotional distress arising from acts purportedly engaged in by the defendant veterinarian for the purpose of harassing, degrading, and embarrassing the plaintiff through unwelcome sexual advances and exploitation. *Id.* at 665, 542 S.E.2d at 828. According to the *Animal Urgent Care* Plaintiff, the defendant veterinarian’s acts included *both verbal and physical conduct*⁸ of a sexual nature. *Id.*

⁷ Moreover, the policy at issue in *Animal Urgent Care* contained a definition of “bodily injury” identical to that term’s definition in the subject policy: “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” *See* 208 W. Va. at 666, 542 S.E.2d at 829; [Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at 10 of 12, Limited Employers Liability Coverage Form at 4 of 4].

⁸ As discussed more thoroughly hereafter, the *Animal Urgent Care* Court indicated that it “reject[ed] outright Animal Care’s contention that the allegation of ‘physical contact’ in the complaint is sufficient to trigger the ‘bodily

Noting the “fundamental restriction of the coverage at issue to claims which assert ‘bodily injury,’” this Court discussed with approval the decision of *Citizens Insurance Company v. Leindecker*, 962 S.W.2d 446, 450-4 (Mo.Ct.App. 1998), stating as follows:

In discussing the rationale for excluding purely emotional injuries from the category of bodily injury, the court in *Leindecker* explained that ‘in insurance law “bodily injury” is considered to be a narrower concept than “personal injury” which covers mental or emotional injury.’ 962 S.W.2d at 453. Further elucidating the distinction between personal and bodily injury, the court commented:

It is well settled in insurance law that “bodily injury” and “personal injury” are not synonyms and that these phrases have two distinct definitions. The term “personal injury” is broader and includes not only physical injury but also any affront or insult to the reputation or sensibilities of a person. “Bodily injury,” by comparison, is a narrow term and *encompasses only physical injuries to the body and the consequences thereof.*

Id. (citation omitted) (quoting *Allstate Ins. Co. v. Diamant*, 401 Mass. 654, 518 N.E.2d 1154, 1156 (1988)).⁹

Id. at 667-8, 542 S.E.2d at 830-1 (emphasis added). Finding the reasoning of the majority position, as espoused by the *Leindecker* court, to be persuasive, this Court determined that “in an

injury’ component of the liability policy. This argument presupposes that any physical contact necessarily results in ‘bodily injury’ under the policy.” *Animal Urgent Care, supra* at n. 12. The precedent established by this Court, therefore, is dispositive of Appellants’ reliance upon the fact that “Surinder Mohan had physically accosted Ms. Shrewsbury, which resulted in the injuries that Ms. Shrewsbury testified to.” [Petition at 10].

⁹As the Court noted in *Moore, supra*, “[t]here are three types of personal liability coverage in the policy: the first, for ‘Personal Injury,’ involves noncorporeal torts, but does not cover the tort of negligent infliction of emotional distress; the second, for ‘Bodily Injury,’ uses the term bodily to describe the type of injury covered; and the third, for ‘Property Damage,’ uses the term physical to describe the type of property damage covered. It is reasonable to infer, therefore, that, to the extent that nonbodily or noncorporeal torts are covered, they are specified in the first category, namely, ‘Personal Injury.’ It is also reasonable to infer from this structure that the other categories *do* require some aspect of bodily harm, as in the case of ‘Bodily Injury,’ or physical damage, as in the case of ‘Property Damage.’” *Moore, supra* at 1255 (emphasis in original). Thus, under a similar analysis, in *Rolette Co. v. Western Cas. & Sur. Co.*, 452 F.Supp. 125, 130 (D. N.D. 1978), the Court stated “In arguing that the damages alleged by the Guzmans are covered, plaintiffs seem to be equating the policy definition of bodily injury with the broader term ‘personal injury.’ The use of the term ‘bodily injury’ in the policy limits the harm covered by the policy to physical injury, sickness, or disease and does not include nonphysical harm to the person.” (citations omitted).

insurance liability policy, purely mental or emotional harm that arises from a claim of sexual harassment and lacks physical manifestation does not fall within a definition of ‘bodily injury’ which is limited to ‘bodily injury, sickness, or disease.’” *Id.* at 668, 542 S.E.2d at 831 (footnotes omitted); *See also State Auto. Prop. And Cas. Ins. Co. v. Edgewater Estates, Inc.*, 2010 WL 1780253 (S.D. W.Va. April 29, 2010) (“Ms. O’Neil’s complaint alleges mental and emotional injuries, but no bodily injuries resulting from Mr. Chapman’s conduct. In *Smith* and other cases, the West Virginia Supreme Court has drawn a clear distinction between ‘bodily injury’ and ‘personal injury,’ declaring that ‘in an insurance liability policy, purely mental or emotional harm that arises from a claim of sexual harassment and lacks physical manifestation does not fall within a definition of ‘bodily injury’ which is limited to ‘bodily injury, sickness, or disease.’ . . . Accordingly, Ms. O’Neil’s failure to allege ‘bodily injury’ within the meaning of the policy also compels the court to find that coverage under the policy does not exist”). (citations omitted). In rendering its decision in *Animal Urgent Care*, this Court recognized that it was adopting the “majority view.” *Id.* at 830.¹⁰ Indeed, the United States Supreme Court has determined that the phrase “bodily injury” in the Warsaw Convention does not include purely emotional damages. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991).

As this Court recognized in *Animal Urgent Care*, a number of the decision constituting the majority view predicate their analysis on policy language. For example, in *Moore v. Continental Cas. Co.*, 252 Conn. 405, 746 A.2d 1252, 1254-5 (2000), the Court stated “the word bodily as ordinarily used in the English language strongly suggests something physical and

¹⁰ Citing Kathleen S. Edwards and Molly Nelson Ferrante, *Insurance Coverage for Employment-Related Claims*, 46 *Prac. Law.* 35, 36 (July 2000); *O’Dell v. St. Paul Fire & marine Ins. Co.*, 223 Ga.App. 578, 478 S.E.2d 418, 420 (1996); *Greenman v. Michigan Mut. Ins. Co.*, 173 Mich.App. 88, 433 N.W.2d 346, 348-49 (1988); *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 257 (Minn. 1993); *Citizens Ins. Co. v. Leiendecker*, 962 S.W.2d 446, 450-54 (Mo. Ct. App. 1998); *David v. Nationwide Mut. Ins. Co.*, 106 Ohio App.3d 298, 665 N.E.2d 1171, 1173 (1995); *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997); *Vienna Family Med. Assocs., Inc. v. Allstate Ins. Co.*, 78 F.3d 580, 1996 WL 93830, at *5 (4th Cir. March 5, 1996) (parentheticals omitted).

corporeal, as opposed to something purely emotional. Webster's Third New International Dictionary confirms this notion, and associates the term bodily with the physical aspects of the human body, and contrasts it with the nonphysical aspects of the human experience such as the mental and spiritual. In the insurance policy, the word bodily is used as an adjective to modify the terms injury, harm, sickness and disease. Including purely emotional harm arising out of economic loss as a form of bodily injury would be tantamount to defining the term bodily injury with an antonym. At the very least, such a construction would render the term bodily superfluous as an adjective modifying the term injury." As the Court explained, "[i]f the policy had referred to 'green vehicles,' and defined that term as 'green cars, trucks or motorcycles,' it is unlikely that there would be a reasonable dispute about whether blue trucks and red motorcycles were intended to be included in the definition." *Id.* at 1256.

Similarly, the Supreme Court of Georgia has indicated that "[t]he definition section of the policy provides that 'bodily injury' means bodily injury, sickness or disease. . . ." While it is true that the two words are not defined in intricate detail, nevertheless, we have a rule of construction . . . which provides that words 'generally bear their usual and common signification. . . .' These words cannot fairly be said to have misled anyone. The definition offered in the policy, that is that 'bodily injury means bodily,' is a genuine attempt to explain words which need no explanation, and it would be an onerous imposition indeed to require insurance companies to go beyond that with each and every term used to provide the insured with an unnecessary lexicon." *Cotton States Mut. Ins. Co. v. Crosby*, 244 Ga. 456, 260 S.E.2d 860, 862-3 (1979). *See also Chatton v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 10 Cal.App.4th 846, 13 Cal.Rptr.2d 318, 323 (1992) ("In brief, under definitional unanimity, the ordinary and popular meaning of the word 'bodily' does not reasonably encompass the purely mental, emotional and spiritual.");

Aetna Cas. and Surety Co. v. First Security Bank of Bozeman, 662 F.Supp. 1126 (D. Mont. 1987); *Bituminous Fire & Marine Ins. Co. v. Izzy Rosen's, Inc.*, 493 F.2d 257 (6th Cir. 1974); *E-Z Loader Boat Trailers, Inc. v. Travelers Ind. Co.*, 106 Wash.2d 901, 726 P.2d 439, 443 (1986) (“The policies . . . at issue here, were never intended to cover loss of earnings or any mental or emotional upset for which plaintiffs recovered a judgment against E-Z Loader. . . . The coverage contemplated actual bodily injury, sickness or disease resulting in physical impairment, as contrasted to mental impairment. Under the Travelers policy the terms ‘sickness’ and ‘disease’ are modified by the word ‘bodily’. Mental anguish and illness, and emotional distress are not covered by the express terms of the Travelers policy. The policy can not be stretched to the point where it would cover such problems.”) (citations omitted); *Nat’l Cas. Co. v. Great Southwest Fire Ins. Co.*, 833 P.2d 741 (Col. 1992); *West American Ins. Co. v. Bank of Isle of Wight*, 673 F.Supp. 760, 765 (E.D. Va. 1987) (“this Court holds that ‘bodily injury’ encompasses to actual physical harm caused by negligence, but not emotional distress caused by wrongful job termination”).

Appellants ask this Court to ignore clear and unambiguous policy language so as to incorporate into the corporeal the “physical, and chemical aspects of psychological injuries”. [Appellants Brief at 14]. The unintended, yet far-reaching, consequences of such an argument were addressed, with disapproval, by the Court in *Keating v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 995 F.2d 154, 156 (9th Cir. 1993), in the context of a bad investment case. The Court stated “Economic loss of the sort alleged by the investors is accordingly not potentially within the coverage of National Union’s policies. Nor, in our view of California law, is emotional and physical distress induced by an uncovered economic loss. It would expand coverage of these policies far beyond any reasonable expectation of the parties to sweep within

their potential coverage any alleged emotional or physical distress that might result from economic loss that is itself clearly outside the scope of the policy.” Simply stated, the trial court properly applied the majority rule, as set forth in this Court’s decision of *Smith v. Animal Urgent Care, Inc.*, and that decision must be affirmed.

2. In Analyzing Coverage For Indemnification, The Trial Court Properly Relied Upon The Damages Awarded By The Jury On The Verdict Form.

As stated previously, in rendering its detailed decision, the trial court examined the verdict form because at issue was coverage for “the damages assessed against SMP Enterprise”. [Order Granting Summary Judgment at 14]. Appellants take issue with the analysis employed, asserting that the trial court should have relied upon the allegations in the tort Plaintiffs’ Complaint. *See* Appellants’ Brief at 10 (“In searching for ‘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. . . .”). Notably however, Appellants fail to recognize the difference between an insurer’s duty to defend and an insurer’s duty to indemnify, a distinction well-recognized by the trial court. *See, e.g.*, Order Granting Motion for Summary Judgment at 18.; 43 Am.Jur.2d *Insurance* § 684 (“An insurer’s duty to indemnify and duty to defend are separate and distinct.”) (footnote omitted). In the instant matter, Erie provided its policyholder with a defense, under a reservation of rights, and sought a declaration as to its duty to indemnify said policyholder for the verdict rendered against it. Accordingly, the trial court’s decision was proper and must be affirmed.

This Court has instructed that the standards for determining the duty to defend are as follows:

[I]t is generally recognized that the duty to defend an insured may be broader than the obligation to pay under a particular policy. This ordinarily arises by virtue of language in the ordinary liability policy that obligates the insurer to defend even though the suit is groundless, false, or fraudulent.

Butts v. Royal Vendors, Inc., 202 W. Va. 448, 504 S.E.2d 911 (1998) (citations omitted). As commentators have noted “[t]he liability of the insurer for defending the insured and for paying any adverse judgment that is entered against the insured are determined by different considerations. A duty to defend arises, in general, if the allegations in the complaint could, if proved, give rise to a duty to indemnify. The duty to indemnify itself, however, arises only if it is determined, as a matter of fact, that the damages awarded to the injured party are actually within the policy’s coverage.” 2 Insurance Claims and Disputes 5th § 6:10 (footnotes omitted). Indeed, as the commentary indicates, “[t]he manner in which a case is tried can result in a judgment that could not have been predicted from the face of the complaint.” *Id.*

Thus, “[t]he duty to indemnify arises only on a showing that the insured contingency occurred.” 43 Am.Jur.2d *Insurance* § 684 (footnote omitted). As one Court has noted:

The duty to indemnify arises from proven, adjudicated facts establishing liability in the underlying suit for damages that are covered by the policy in dispute. . . . Thus no legal determination of ultimate liability is necessary before an insurer is obligated to defend a suit, but the insurer need only indemnify after the insured has been adjudicated to be legally responsible, whether by judgment or settlement. . . . An insurer may be found to have a duty to defend, but, if it is not found liable on the claims within the scope of the policy, it has no duty to indemnify.

Nutmeg Ins. Co. v. Clear Lake City Water Authority, 229 F.Supp.2d 668, 675-76 (S.D. Texas 2002) (citations omitted). Simply stated, “ [t]he obligation to indemnify . . . arises when the insured’s underlying liability is established Although an insurer may have a duty to defend, it ultimately may have no obligation to indemnify, either because no damages were awarded in the underlying action against the insured, or because the actual judgment was for damages not

covered under the policy.” *Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London*, 161 Cal.App.4th 184, 73 Cal. Rptr.3d 770, n. 3 (2008) (citations omitted). In the instant matter, the trial court properly recognized that the actual judgment rendered below was for non-covered damages.

Indeed, an insurer intervenes in a civil action so as to secure special interrogatories distinguishing between covered and non-covered claims. As the United States District Court for the Southern District of Alabama has recognized, “[a]bsent an itemized jury verdict. . . , resolution of the coverage issues at stake in the declaratory judgment action could be complicated considerably, as there would be no way distinguish among the types of claims and damages embraced by any damages award the jury might render.” *Thomas v. Henderson*, 297 F.Supp.2d 1311, 1327 (S.D. Ala. 2003).

At issue herein is not the duty to defend, but the duty to indemnify, and the indemnification sought is for a jury verdict awarding monetary damages for emotional distress. The trial court properly analyzed whether or not coverage existed for the indemnification of the damages awarded the tort plaintiff. The award of summary judgment being appropriate, it must be affirmed.¹¹

¹¹ A similar disregard of this Court’s precedent is found in the Appellants’ implication that they “reasonably expected” coverage under the subject policy. *See, e.g.*, Appellants’ Brief at 9 (“An insured is entitled to the coverage purchased. This coverage includes coverage that is within the reasonable expectation of the party purchasing coverage.”) (citation omitted). Recently, this Court reiterated that it “has made clear that, as a general rule, ‘[i]n West Virginia, the doctrine of reasonable expectations is limited to those instances . . . in which the policy language is ambiguous.’” *Boggs v. Camden-Clark Memorial Hosp. Corp.*, 225 W.Va. 300, 693 S.E.2d 53, 63 (2010) (quoting *National Mut.*, 177 W.Va. at 742, 356 S.E.2d at 496) (footnote omitted). As noted in *Luikart v. Valley Brook Concrete & Supply, Inc.*, the doctrine is applied outside of this general rule only “[i]n limited circumstances”. 216 W.Va. 748, 613 S.E.2d 896, 903 (2005). Respectfully, Appellants outline no special circumstances justifying the doctrine of reasonable expectations. Moreover, “the reasonable expectation doctrine can work both ways and allow courts to deny coverage where the policyholder’s claimed interpretation is not reasonable.” 1 Law and Prac. Of Ins. Coverage Litig. § 1:13. Notably, “no insured would reasonably expect liability coverage for damages arising out of an act of sexual assault premised upon sexual contact.” *J.G. v. Wangard*, 313 Wis.2d 329, 753 N.W.2d 475, 491 (2008).

3. **This Court’s Decision of *Smith v. Animal Urgent Care, Inc.*, Properly Distinguished Between “Physical Contact” and “Physical Manifestation”.**

As the Order Granting Summary Judgment noted, the trial court “reject[ed] SMP Enterprises’ argument – similar to that proffered by Animal Urgent Care – that coverage exists under Coverage A of the policy because the plaintiffs’ underlying Complaint alleged physical contact and physical injuries. Our Court’s thorough analysis in *Smith* addressed and rejected this very contention, thereby binding this court to do the same.” [Order Granting Summary Judgment at 14]. Indeed, in *Smith v. Animal Urgent Care, Inc.*, this Court indicated that it “reject[ed] outright Animal Care’s contention that the allegation of ‘physical contact’ in the complaint is sufficient to trigger the ‘bodily injury’ component of the liability policy. This argument presupposes that any physical contact necessarily results in ‘bodily injury’ under the policy.” *Animal Urgent Care, supra* at n. 12. As the United States District Court for the Eastern District of Virginia once recognized, “[b]ecause the Johnsons allege a battery, which requires some type of body contact, such claim, so Church Schools contends, fits within the definition of ‘bodily injury.’ *The policy makes no references to ‘body contact.’*” *American and Foreign Ins. Co. v. Church Schools in the Diocese of Virginia*, 645 F.Supp. 628, 634 (E.D. Va. 1986) (emphasis added). The District Court further stated that the “*argument appears to ignore the distinction between physical or bodily contact and injury.*” *Id.* (some emphasis added). As commentators have indicated, “[i]t has also been held that although distress that is not the result of bodily contact does not constitute bodily injury, emotional distress arising from bodily touching does constitute bodily injury. The foregoing distinction is not justifiable. It is not the source of the distress that is relevant. It is only the injury itself that controls. Either the claimed injury is a ‘bodily’ injury or it is not.” 3 Insurance Claims and Disputes 5th § 11:2 (footnote omitted).

Clearly, the well-reasoned precedent established by this Court is dispositive of Appellants' reliance upon the fact that "Surinder Mohan had physically accosted Ms. Shrewsbury, which resulted in the injuries that Ms. Shrewsbury testified to." [Appellants' Brief at 10]. The *Animal Urgent Care* Court analyzed, and rejected, the Appellants' argument. There being no justification for the abandonment of well-established precedent, the doctrine of *stare decisis* mandates that the *Animal Urgent Care* decision be upheld. As this Court has noted:

The principle of stare decisis . . . is firmly rooted in our jurisprudence. Uniformity and continuity in law are necessary. . . . While the principle of stare decisis admits of exception, deviation from its application should not occur absent some urgent and compelling reason. As this Court said in *Adkins v. St. Francis Hospital*, 149 W.Va. 705, 718, 143 S.E.2d 154, 162:

*** Stare decisis is not a rule of law but is a matter of judicial policy. *** It is a policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. *** In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted.

Dailey v. Bechtel Corp., 157 W.Va. 1023, 207 S.E.2d 169, 173 (1974) (additional citations omitted). This Court has further instructed that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Murphy v. Eastern American Energy Corp.*, 224 W.Va. 95, 680 S.E.2d 110, 116 (2009) (citations omitted).

Application of the doctrine is even more critical in the context of contracts. As commentators have noted, "[c]ourts tend to adhere to decisions that have become established rules of property or contract law, because of reliance on them." 21 C.J.S. *Courts* § 203; *See also Polly J. Price*, "A Constitutional Significance for Precedent: Originalism, Stare Decisis, and Property Rights," 5 Ave Maria L. Rev. 113, 133 (2007) ("judges also emphasized the importance of stare decisis for contracts and commercial cases. In his Commentaries, Kent had specifically

noted the ‘right’ of the community to regulate their contracts based upon prior court pronouncements.” [Footnote omitted]. Indeed, in *Citizens United v. Federal Election Comm’n*, the United States Supreme Court reiterated the importance of “reliance interests” to *stare decisis*, stating that “[r]eliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions.” ___ U.S. ___, 130 S.Ct. 876, 913, ___ L.Ed.2d ___ (2010) (citing *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). This Court has also long recognized the importance of *stare decisis* in matters of contract. See, e.g., *In re Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649, 669 (1959) (“ ‘The doctrine of *stare decisis* grows out of the necessity for a uniform and settled rule of property and definite basis for contracts and business transactions.’”) (citing Syl. pt. 5, *Burks v. Hinton*, 77 Va. 1).

Nowhere can the reliance on prior precedent be more important than in the formation of insurance contracts. The West Virginia Code defines “insurance” as “a contract whereby one undertakes to indemnify another or to pay a specified amount *upon determinable contingencies*.” W.Va. Code § 33-1-1 (emphasis added). As this Court has stated, “[g]enerally an insurance policy sets forth an agreement between parties whereby the insured agrees to pay a specified premium, and, in exchange, the insurer agrees to indemnify the insured *against the type of losses contemplated within the terms of the policy yet unknowable at its issuance*.” *McDaniel v. Kleiss*, 202 W.Va. 272, 503 S.E.2d 840, 845 (1998) (citations omitted) (emphasis added). In the instant matter, Erie, like countless other insurers, entered into a contract to indemnify its insureds against non-excluded “bodily injury” as defined by its policy and applied

by this Court. The doctrine of *stare decisis* dictates that said definition be maintained and, therefore, the trial court's decision must be affirmed.¹²

C. The Trial Court Correctly Determined That The Personal Injury Coverage Was Excluded By The "Criminal Acts"¹³ And "Violation of Rights" Exclusions.¹⁴

¹² Appellants also overlook the policy's exclusions. As the trial court recognized, due to various exclusionary provisions, even if it "would find the Shrewsburys' injuries to be encompassed within the definition of 'bodily injury,' the ultimate result would remain the same." [Order Granting Summary Judgment at 16-17].

¹³ The subject policy precludes personal injury coverage for:

d. Criminal Acts

'Personal and advertising injury' arising out of a criminal act committed by or at the direction of the insured.

[Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at 5 of 12]. The applicability of this exclusion is without question, Mr. Mohan, the Plaintiff-employee's supervisor and co-principal of the corporation, was convicted of three felony counts of first degree sexual abuse. See Order Granting Summary Judgment at 4. Accordingly, collateral estoppel operates to prevent any argument as to the applicability of the exclusion. In *Baber v. Fortner*, 186 W.Va. 413, 412 S.E.2d 814, Syl. pt. 4 (1991), this Court held that "[t]he adjudication of a killing which results in a voluntary manslaughter conviction conclusively establishes the intentional nature of that same act for the purposes of any subsequent civil proceeding." The *Baber* Court stated "no suggestion is made here that the appellant did not avail himself of all possible defenses at his criminal trial. Under the higher standard of proof utilized in criminal proceedings, a jury found Nicholas Fortner guilty of voluntary manslaughter and, by implication, thereby found that he acted with an intent to kill. A relitigation of the issue under a lesser civil standard would be pointless." *Id.* at 821. Critically, other courts have utilized the same doctrine in the context of the criminal acts exclusion. For example, in *Allstate Ins. Co. v. Simansky*, 45 Conn.Supp. 623, 738 A.2d 231 (1998), the insured was convicted of assault in the first degree after he stabbed the claimant in the throat with a knife. At issue was a homeowner's insurance policy which excluded "the intentional or criminal acts of an insured person. . . ." *Id.* at 233. The court stated "[t]he fact of the conviction has a collateral legal consequence on the enforcement of the policy exclusion. For purposes of the exclusion, the conviction cannot be disregarded as if it did not happen. It did happen, and in so happening triggered the exclusion." *Id.* at 235.

¹⁴ The policy precludes coverage for:

a. Knowing Violation Of Rights Of Another

'Personal and advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'.

[Exhibit C to Motion for Summary Judgment at Commercial General Liability Coverage Form at 4-5 of 12]. Courts have noted that this exclusion precludes coverage for intentional conduct. See *Custom Hardware Engineering & Consulting, Inc. v. Assurance Company of America*, 295 S.W.3d 557 (Mo. 2009). In light of the nature of the claims below, intent is inferred. See *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 376 S.E.2d 581 (1988). Accordingly, the applicability of the violation of rights exclusion is unquestionable.

Appellants challenge the trial court's declaration that "personal injury" coverage does not exist under the assumption that the ruling was predicated solely upon the definition of "personal injury". [Appellants' Brief at 15]. In actuality, the trial court determined that indemnity under the personal injury coverage part of the subject policy was precluded by the "criminal acts" exclusion and the "knowing violation of the rights of another" exclusion. [Order Granting Summary Judgment at 19-20]. Indeed, the trial court found:

The import of the exclusions in the present case is inescapable. As mentioned above, Defendant Mohan was convicted of three counts of first degree sexual abuse of Amanda Shrewsbury. Not only do Mr. Mohan's convictions exemplify the excluded 'criminal acts,' they also establish that Mr. Mohan's criminal conduct was done to intentionally injure Ms. Shrewsbury, thereby placing her injuries squarely within the 'knowing violation of the rights of others' exclusion. As held by the West Virginia Supreme Court, 'the intent to cause some injury will be *inferred* as a matter of *law* in a sexual misconduct liability insurance case, due to the nature of the act (the alleged sexual contact), which is so *inherently* injurious, or 'substantially certain' to result in some injury, that the act is considered a criminal offense for which public policy precludes a claim . . . that *no* harm was intended to result from the act.' *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568 (1990) (Emphasis in original) citing *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 376 S.E.2d 581 (1988).

Id. at 19. The trial court's decision was proper; therefore, it must be affirmed¹⁵

Appellants virtually concede the lack of coverage for Mr. Mohan. *See* Appellants' Brief at 17. Appellants maintain, however, that the business entity should be afforded coverage for its

¹⁵ Notably, the trial court also recognized that the policy contained "an Employment-Related Practices Exclusion Endorsement". [Order Granting Motion for Summary Judgment at 21]. The Court found examination of that exclusion unnecessary in light of the lack of a "bodily injury" triggering coverage. *Id.* Nevertheless, should the Appellants' arguments be persuasive, it must be remembered that employment-related practices exclusions are valid if they are "conspicuous, plain, and clear," are placed "in such a fashion as to make obvious their relationship to other policy terms," and were brought to the attention of the insured. Syl. pt. 2, *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W. Va. 748, 613 S.E.2d 896 (2005) (per curiam) (quoting syl. pt. 10, *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 346 (1987), *modified on other grounds by Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998)). In the instant matter, the valid exclusion is preclusive of coverage for the indemnification of the underlying judgment.

“negligent” conduct and/or vicarious liability.¹⁶ Erie questions whether or not such an argument is appropriate as the jury did not award any damages to the tort Plaintiffs as a result of the corporation’s alleged conduct.¹⁷ Moreover, the issue presented is confusing as the appellate briefs were purportedly filed on behalf of Surinder Mohan yet, in the text of the brief, SMP Enterprises is said to be the Appellant. Nevertheless, even if damages were assessed based upon the alleged “negligence” or “vicarious liability” of the corporation, and the summary judgment was properly appealed, the exclusions operate to bar coverage and the trial court’s decision must be refused.

In *Smith v. Animal Urgent Care, Inc.*, this Court addressed the employer/employee distinction, stating:

Animal Care does not dispute the accepted view that sexual harassment does not come within the meaning of an ‘occurrence’ under an accident-based definition, but instead argues that coverage is required because of the negligence-type allegations involving Animal Care. For the same reasons discussed in section B.1. of this opinion, *infra*, the inclusion of a negligence-oriented theory of recovery against Animal Care does not alter the essence of the claim for purposes of determining the availability of

¹⁶ In actuality, the jury only determined that *Mr. Mohan* proximately caused the damages awarded to the tort Plaintiffs. [Verdict Form at 1]. As to SMP Enterprises, the jury responded to “special interrogatories”, essentially mirroring a “deliberate intent” claim, but made no separate finding of damages. *Id.* at 2. The jury also found, albeit without awarding any resulting damages, that “the corporation failed to take adequate precautions to prevent sexual abuse of employees.” *Id.*

¹⁷ As stated previously, Erie attempted to fashion the verdict form such that, despite Erie’s position that no indemnity is owed the corporation, any indemnity the Court may determine owed would be isolated from that assessed against Mr. Mohan; however, the trial court refused Erie’s attempts. Notably, the Appellants indicated that they were not opposed to the jury verdict form utilized in this case. As a result, Appellants have waived their opportunity to argue for indemnification separate and apart from that sought by Mr. Mohan. As the Fourth Circuit Court of Appeals has recognized, when apportioning between covered and non-covered claims, “the burden is on the insured to prove the amounts attributable to covered claims.” *Perdue Farms, Inc. v. Travelers Cas. and Sur. Co. of America*, 448 F.3d 252, 264 (4th Cir. 2006) (citations omitted). As opposed to joining in Erie’s attempts to secure a verdict form which would distinguish between the corporation and Mr. Mohan, the Appellants indicated acceptance of the tort Plaintiffs’ verdict form. As this Court has instructed, “[t]o assert on appeal or at the trial court level that a jury verdict is defective or irregular in any respect, a party must object to the verdict when it is returned and prior to the jury’s discharge. Thus, in view of the authorities cited, we hold that absent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury’s discharge, constitutes a waiver of the defect or irregularity in the verdict form.” *Combs v. Hahn*, 205 W.Va. 102, 516 S.E.2d 506, 511 (1999) (footnote omitted).

insurance coverage. Sexual harassment, and its inherently non-accidental nature, remain the crux of the case regardless of whether negligence is alleged against Animal Care. See *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1118 (7th Cir. 1995) (holding that insured's negligence in failing to prevent employee's intentional act does not constitute an 'occurrence,' reasoning that 'volitional act does not become an accident simply because the insured's negligence prompted the act') (quoting *Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co.*, 915 F.2d 306, 311 (7th Cir. 1990)). We conclude that in an insurance liability policy, a claim based on sexual harassment does not come within the definition of 'occurrence,' which is defined as an 'accident, including continuous or repeated exposure to substantially the same general, harmful conditions.'

Animal Urgent Care, *supra* at 832. Initially, this Court recognized that a negligence standard is insufficient to establish liability on the part of the employer for sexual harassment committed by a supervisory employee.¹⁸ *Id.* at n. 16. In that regard, this Court also recognized that "artful pleading" is insufficient to trigger coverage. *Id.* at 833-34 ("An analogous argument was rejected by this Court in *Leeber* where the insured focused on the inclusion of allegations concerning the negligent seduction of the assaulted student involved in an attempt to secure coverage. Borrowing from a Maryland decision, we stated that 'the allegations of 'negligence' in the complaint are 'a transparent attempt to trigger insurance coverage by characterizing allegations of [intentional] tortious conduct under the guise of 'negligent' activity.'" (citations omitted). Additionally, the *Animal Urgent Care* Court cited, with approval, the decision of *American States Insurance Co. v. Natchez Steam Laundry*, 131 F.3d 551 (5th Cir. 1998), as in that case "the court determined that the 'intentional acts' exclusion applied to both the alleged harasser and the defendant business because the business was charged with intentional conduct: failure to investigate, failure to take action against alleged harasser, and failure to provide an avenue for redress." *Id.* at n. 17 (citations omitted). Likewise herein, the jury determined, by

¹⁸ Critically, Mr. Mohan is one of two (2) principals of SMP Enterprises. See, e.g., Appellants' Brief at 2.

way of special interrogatories, that SMP Enterprises had “exposed its female employee. . . to the specific unsafe working condition” of sexual harassment. [Order Granting Summary Judgment at 5].

Regardless, the fact that Mr. Mohan and his wife *are* the corporation cannot be overlooked. Essentially SMP Enterprises is the “alter ego” of Mr. Mohan; therefore, Mr. Mohan’s acts and omissions are the acts and omissions of the corporation. Consequently, exclusions from coverage resulting from said acts and omissions are applicable to both Mr. Mohan and the corporation.

In *Ashland Oil, Inc. v. Miller Oil Purchasing, Co.*, 678 F.2d 1293 (5th Cir. 1982), the Fifth Circuit Court of Appeals examined coverage under a primary liability policy and umbrella policy for claims arising out of the disposal of hazardous substances. In finding exclusionary provisions applicable to the employer, the Court focused on the fact that at issue were not the acts of an *employee* but of the “highest officers and important personnel”:

[T]his case does not involve the unauthorized intentional act of an individual employee or officer of Rollins; on the contrary, it involves the authorized intentional act of Rollins itself. The highest officers and important personnel of Rollins were privy to this disposal operation. This was not a reflexive reaction by one of Rollins’ many limbs, but rather the deliberate execution of a preconcerted plan, conceived in the mind of Rollins and carried out by a central system of key Rollins personnel. The intent to dispose of the waste in the manner detailed above was most definitely that of Rollins, the named insured.

Id. at 1317.

Likewise, in *Federal Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546 (5th Cir. 1990), the FDIC sought to recover from a law firm’s malpractice insurer for legal malpractice and breach of fiduciary duty. The partner and general counsel had been determined “dishonest”; however, the FDIC argued that the firm could not “be held ‘dishonest’ as they are liable only vicariously and

did no culpable acts outside of Mmahat's personal participation." *Id.* at 552. The Court indicated that the entire firm had been found "dishonest" by virtue of the breach of fiduciary duty. Moreover, the Court stated:

Here, though only Mmahat himself did the culpable acts, they weren't one-time, individual acts. Nor were they unauthorized. Rather, they were continuing and planned, made up a large portion of firm revenue, and were the pet of Mmahat, who was nothing if not key personnel of the firm.

Id. at 553.

Perhaps the most compelling decision is that of *Premium Finance Co., Inc. v. Employers Reinsurance Corp.*, 979 F.2d 1091 (5th Cir. 1992), wherein the entity, Edgar Coco Agency, was comprised of a husband and wife. Coverage was sought under a policy of insurance for the improper acts of the husband as he was an "employee" and it was asserted that the Agency did not personally participate in, or ratify, the husband's acts. *Id.* at 1094. The Court stated:

Andre Coco was the alter ego of the Edgar Coco Agency. He was solely vested with all the decision-making power. For all intents and purposes, he was the only board of director for the Agency because his wife was a rubber stamp. Moreover, Andre Coco owned all of the stock in the Agency. Therefore, Andre Coco and the Edgar Coco Agency have coalesced into one entity for our purposes.

...

The endorsement expressly excludes coverage when the named insured participates in or ratifies the criminal act. From the foregoing discussion, it is clear that the acts of the corporate control center are attributable to the corporation. Therefore, if actions taken by key personnel, in the course of a deliberate corporate policy or scheme, are within the exclusion, then those same actions are attributable to the named insured corporation.

Id. at 1094-1095.

Indeed, it is not uncommon for Courts to refuse to find coverage for the insured entity's vicarious liability for an agent's intentional acts. As the Court stated in *Townsend Ford, Inc. v.*

Auto-Owners Ins. Co., 656 So.2d 360, 363 (Ala. 1995) “[a] corporation is a legal entity, an artificial person, and can only act through its agents. . . . Inasmuch as Townsend Ford’s salespeople were acting as agents on behalf of the corporation and its business operations, their intent is the intent of the corporation. While an insurer’s duty to defend liability actions is more extensive than its duty to pay . . . we conclude that the trial court correctly held that Auto-Owners was not obligated under the policy to defend claims against Townsend Ford alleging intentional fraud committed by its agents in the course of its business.” *See also Presidential Hotel v. Canal Ins. Co.*, 188 Ga.App. 609, 373 S.E.2d 671 (1988) (“It is alleged by plaintiffs that the hotel, by and through its agents, sexually harassed and defrauded plaintiffs. Given these allegations of intentional conduct, it cannot be said that any resulting bodily injury to plaintiffs was unintended.”); *New York Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 339 (5th Cir. 1996) (“Although the complaint alleged negligent and unknowing acts by the insured, we held the insured’s liability was ‘related’ and ‘interdependent’ to the agent’s fraud. . . . Because the suit would never have occurred absent the fraud, we found that ‘the ‘ultimate issue’ is whether the policy covers [the agent’s] fraudulent activities.’ As to that question, we determined that fraud does not, as a matter of law, fall within the plain meaning of the definition of ‘occurrence.’”) (citations omitted).

Likewise herein, Mr. Mohan *was* SMP Enterprises, LLC. Mr. Mohan’s criminal acts were those of SMP Enterprises, LLC. The exclusionary provisions in the liability coverage operate to preclude coverage for both Mr. Mohan and the corporation.¹⁹

¹⁹ Indeed, Erie questions the concept of one “negligently supervising” oneself. In *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal.App. 4th 1595 (1993), an employer sought coverage for a suit arising out of sexual harassment claims against an employee. Initially, the Court noted that “the trial court properly found that there was no way Coit, the corporate entity, could have disciplined or supervised its president, chairman of the board, and major shareholder” and that the “sexual misconduct with female employees was affirmatively known to, and ratified by, the board of directors and Coit.” *Id.* at 1606. Moreover, the Court stated “[c]overage cannot be created by

D. The Trial Court Correctly Determined That The Tort Verdict Did Not Include Damages For “Bodily Injury” So As To Trigger Limited Employers’ Liability Coverage.

The Trial Court determined that the “Limited Employers Liability Coverage Form” did not operate to provide indemnity coverage as it too provided coverage for a “bodily injury” which was not present herein.²⁰ [Order Granting Summary Judgment at 21]. Indeed, the Court indicated that “the plaintiffs took particular care to draft their special interrogatories regarding SMP Enterprises’ liability in the underlying tort action to mirror the five-paragraph exception to the Section 2 Exclusions for Expected or Intended Injury in the Limited Employers Liability Coverage. However, bodily injury is still a mandatory prerequisite for any type of coverage thereunder.” *Id.* at 21-22 (footnote omitted).²¹ As set forth previously, the trial court’s decision

claimed negligence in failing to dissuade oneself from committing an intentional act, otherwise every intentional act would be covered and section 533 would have no meaning.” *Id.* at 1609 (citations omitted).

Likewise, in *Quality Painting, Inc. v. Truck Ins. Exchange*, 26 Kan.App. 2d 473, 988 P.2d 749 (1999), a corporate insured sought reimbursement for defense costs following a sexual harassment and discrimination suit. The Court stated “Quality clearly tolerated or ratified Holloway’s intentional sexual harassment of Pfeiffer. Holloway is the sole owner and proprietor of Quality. Holloway and Quality are one and the same for our purposes. We agree with the district court that it would defy logic to say that Quality might not have authorized or ratified Holloway’s intentional acts. Quality cannot be regarded as a negligent, nonculpable insured. It would be directly liable for sexual harassment by Holloway.” *Id.* at 753.

²⁰ The insuring clause for the policy’s limited employers’ liability portion of the policy provides as follows:

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ sustained by your employee arising out of or in the course of employment by you.

Again, under this coverage part, “Bodily injury” is defined as:

bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

[Exhibit C to Motion for Summary Judgment at Limited Employer Liability Coverage Form at 4 of 4].

²¹ In *Erie Ins. Prop. And Cas. Co. v. Stage Show Pizza*, 210 W.Va. 63, 663 S.E.2d 257, 262 (2001), this Court recognized that “employers liability” policies are designed to protect businesses from “gaps” in coverage between

that the mental injuries for which the insureds' seek indemnification do not constitute "bodily injury" is correct. Thus, the award of summary judgment must be affirmed.

IV. CONCLUSION AND RELIEF PRAYED FOR

This Court's less than ten-year-old decision of *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000) was correctly applied by the trial court as dispositive of the issues herein. Although arguing against the application of *Animal Urgent Care*, the Appellants have not provided this Court with any justification to disregard the doctrine of *stare decisis*. Appellants' omission is not unexpected, there simply is no basis for overturning such a recent, well-reasoned decision adopting the majority rule on the issue. Both the Plaintiffs below and Appellants were aware of the coverage issues yet drafted and/or approved a jury verdict form which awarded damages only for emotional injuries. Mental injuries are, as a matter of law, not encompassed within the policy definition of "bodily injury" so as to trigger coverage under a commercial general liability insurance policy. The trial court's decision was correct and, therefore, the award of summary judgment must be affirmed.

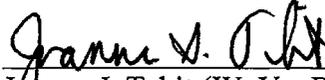
WHEREFORE the Appellee respectfully requests this Court affirm the trial court's decision granting Erie summary judgment on the requests for declaratory relief.

Respectfully submitted this _____ day of September, 2010.

commercial general liability policies and workers' compensation coverage. The Erie policy at issue was clearly designed for that purpose, to cover *bodily injury* allegedly caused by *deliberate intent*.

**ERIE INSURANCE PROPERTY
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35653

AMANDA R. SHREWBURY and ROGER SHREWSBURY,

Plaintiffs below, Appellees,

v.

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

Defendants below, Appellants,

And

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Intervening Defendant below, Appellee

CERTIFICATE OF SERVICE

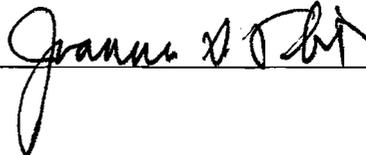
I hereby certify that on the 30th day of September, 2010, I served the foregoing "**BRIEF OF APPELLEE ERIE INSURANCE PROPERTY AND CASUALTY COMPANY**" upon all counsel of record by depositing a true copy thereof in the U.S. mail, postage prepaid, in envelopes addressed as follows:

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EXHIBITS

ON

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CLERK'S OFFICE