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IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

NOTED CIVIL DOCKET
OCT 2 3 2009
JULIE BALL
CLERK CIRCUIT COURT
MERCER COUNTY

AMANDA R. SHREWSBURY and
ROGER SHREWSBURY,

Plaintiffs,

v. CIVIL ACTION NO. 07-C-478

SURINDER MOHAN, individually and as an employee of SMP ENTERPRISES, LLC d/b/a/ the COLONY CENTER and SMP ENTERPRISES, LLC d/b/a/ the COLONY CENTER and ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Defendants.

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ORDER GRANTING SUMMARY JUDGMENT

This matter came before the court on July 6, 2009, for hearing on Defendant Erie Insurance Property and Casualty Company's ("Erie") Motion for Summary Judgment. There appearing were Rachel Moore, counsel for Erie; Derrick Lefler, counsel for Defendant SMP Enterprises, LLC d/b/a The Colony Center ("SMP Enterprises"); and Kathrine Bayless, counsel for Plaintiffs.

Erie seeks a declaration determining its obligation to provide insurance coverage for the defense and indemnification of the tort claims asserted in the underlying civil action. In the trial of the tort portion of this case, the jury returned a verdict for the plaintiffs and awarded damages for emotional distress, loss of enjoyment of life, and loss of consortium. Erie argues that these categories of damages do not constitute the covered risk of "bodily injury," and, therefore, no insurance coverage exists for SMP Enterprises, and Erie has no duty to indemnify it.

In response, SMP Enterprises contends that the Erie policy provides coverage because "bodily injury" is encompassed within the meaning of "personal injury," thereby bringing it within the ambit of "Coverage B" for "personal and advertising injury." SMP Enterprises further posits that the physical harm to the plaintiff was a key element in the damages plaintiff sustained and a factor in the jury's verdict, and, thus, qualifies as "bodily injuries." The defendant points to two additional policy sections that bear on the existence of coverage: the "Limited Employers Liability Coverage" and the "Employment-Related Practices Exclusion" endorsement.

After careful consideration of the record, the motions, the exhibits, oral arguments, memoranda of law, and pertinent legal authorities, the court finds that the Erie insurance policy does not provide coverage for the indemnification of the tort portion of this litigation and grants Erie's Motion for Summary Judgment. As will be discussed below, also pending before the court is SMP Enterprises' Motion to Strike Erie's Reply brief. The court denies this motion.

I. Findings of Fact and Procedural History

The plaintiffs initiated the underlying civil action on July 9, 2007, against defendants Surinder Mohan and SMP Enterprises, LLC d/b/a The Colony Center. Surinder Mohan and Shushma Rani were the sole members of SMP Enterprises, which employed Mr. Mohan as manager of The Colony Center convenience store and gas station. Amanda Shrewsbury was employed as a clerk at The Colony Center from May 14, 2007 through May 25, 2007, and Mr. Mohan's conduct during Ms. Shrewsbury's employment caused the plaintiffs to file the instant action.

The plaintiffs' Complaint alleged that Defendant Mohan assaulted and battered Amanda Shrewsbury and that such conduct was "unwarranted, unjustified, unlawful, nonconsensual, intentional and malicious and was done by Defendant Mohan to satisfy his prurient, salacious and lascivious interests and desires." Notably, Surinder Mohan was convicted of three felony counts of first degree sexual abuse against Amanda Shrewsbury. The remaining allegations in Plaintiffs' Complaint included a hostile work environment/sex discrimination, negligent supervision/retention, tort of outrage, negligent infliction of emotional distress, and loss of consortium.

SMP Enterprises purchased the policy at issue (policy number Q467070030) from Erie with a policy period from October 20, 1996, through October 20, 2007. The policy is a commercial general liability policy ("CGL") containing Limited Employers Liability coverage. Both SMP Enterprises and Surinder Mohan sought coverage under this policy for the defense of, and indemnification for, the tort portion of this civil action, which Erie provided to both defendants under a reservation of rights.

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 it had a duty under the subject policy to defend or indemnify SMP Enterprises or Mr. Mohan in connection with the instant civil action. Thereafter and with leave of the court, Plaintiffs filed an Amended Complaint on March 20, 2008, to obtain a declaration of coverage under the policy of insurance issued by Erie for the defense and indemnification of the tort portion of this case. Plaintiffs then moved to dismiss the federal action, or alternatively, to stay that action pending resolution of the insurance coverage matters brought before this court in Plaintiffs' Amended Complaint. On May

22, 2008, Erie made a similar motion in the instant action. At the July 16, 2008, hearing before this court on Erie's motion, the Court granted Erie's motion to stay the declaratory judgment portion 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 instant action. On August 18, 2008, Erie moved for reconsideration of the district court's order granting the motion to stay. This court subsequently reinstated the declaratory judgment portion to its active docket. The district court thereafter denied Erie's motion for reconsideration on December 23, 2008.

Thereafter, the jury trial of the plaintiffs' tort claims began on July 30, 2008, and the jury returned a verdict for the plaintiffs on August 1, 2008. The Verdict Form, which Plaintiffs prepared, stated:

(FOR PLAINTIFFS AND AGAINST DEFENDANT SURINDER MOHAN)

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 /s/ Katherine B. Shott
DATE JURY FOREPERSON

In regard to SMP Enterprises' liability, the jury answered the six following Special Interrogatories in the affirmative:

> (1) Do you find that there was a specific unsafe working condition that existed at the Colony Center created by the presence of a female employee alone with Mr. Mohan and that this presented a high degree of risk and strong probability of serious injury jointly and severally liable for the damages?
> (2) Do you find that the employer had or should have had a subjective realization and appreciation of the unsafe working condition and of the high degree of risk and strong probability of injury?
> (3) Do you find that the specific unsafe working condition of Mr. Mohan alone in the store with a female employee violated a commonly accepted safety standard?
> (4) Do you find that, given your finding in 1,2, and 3 above, that the corporation exposed its female employee Amanda Shrewsbury to the specific unsafe working condition?
> (5) Do you find that the employee so exposed suffered serious injury as a result of such unsafe working condition?
> (6) Do you find that the corporation failed to take adequate precautions to prevent sexual abuse of employees?

The jury then entered a verdict against SMP Enterprises, finding by a preponderance of the evidence that SMP Enterprises failed to take reasonable steps to protect its employee Amanda Shrewsbury from the three counts of first degree sexual abuse committed by Surinder Mohan against Amanda Shrewsbury.

Seven months after the underlying trial concluded Erie filed the instant summary judgment motion on the issue of policy coverage for the defense and indemnification of 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 court granted Erie's request for time to reply to SMP Enterprises' response brief, which Erie then filed on July 22, 2009. Thereafter, SMP Enterprises filed a Motion to Strike said Reply arguing that Erie's Reply was "patently unfair" because it asserted grounds for summary judgment that it did not raise in its original motion and memorandum thereby denying SMP the opportunity to respond to Erie's new justification

for summary judgment. Erie then responded thereto. Given that the Motion to Strike and Erie's response were filed after the summary judgment hearing and no additional hearing has been noticed, scheduled, or otherwise anticipated for the Motion to Strike, the court's decision shall be based on the motion and the memoranda of law submitted by the parties.

II. Standard of Review

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record reveals 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." W.Va. R. Civ. Pro. 56(c); *see also Hager v. Marshall,* 202 W.Va. 577, 505 S.E.2d 640 (1998). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In applying the standard for summary judgment, the Court must view the underlying facts and inferences in the light most favorable to the nonmoving party, but the nonmoving party must nonetheless offer some concrete evidence from which a reasonable finder of fact could return a verdict in its favor or other significant probative evidence tending to support the complaint. See, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Additionally, West Virginia law dictates that the interpretation of an insurance contract is a legal determination as is the determination of proper coverage when the facts are not in dispute. *Murray v. State Farm Fire and Casualty Company*, 203 W.Va. 477, 509 S.E.2d 1 (1998) (internal citation omitted); Syl. pt. 1, *Tennant v. Smallwood*, 568 S.E.2d 10 (2002); See also, *Payne v. Weston,*195 W.Va. 502, 466 S.E.2d 161 (1995)(

"[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination. . .") *citing, Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). Thus, summary judgment is appropriate when the question presented involves the interpretation of an insurance policy, as in the instant case. The motion for summary in the case at bar presents purely legal questions and is ripe for consideration of whether the damages awarded to the plaintiff by the jury are covered under the terms of the Erie insurance policy issued to SMP Enterprises.

III. Discussion

As discussed above, there are two motions pending before this Court: Erie's Motion for Summary Judgment and SMP Enterprises' Motion to Strike. Before turning to the Motion for Summary Judgment, the court will first discuss SMP Enterprises' non-dispositive motion.

A. SMP Enterprises' Motion to Strike

SMP Enterprises moves to strike Erie's Reply to Memorandum in Opposition to Motion for Summary Judgment, claiming that Erie proffered as "an additional ground or justification for summary judgment an "Intentional Acts" exclusion," thereby depriving SMP Enterprises of the opportunity to counter Erie's "new" argument. Erie argues in its Response to the Motion to Strike that its Reply at issue did not raise new legal grounds; rather, it raised policy provisions in direct response to SMP Enterprises' arguments, thereby fulfilling the purpose of a Reply. Erie further argues that (1) a Response brief is not a pleading and therefore does not fall within the ambit of Rule 12(f) of the West Virginia Rules of Civil Procedure, which allows a court to strike pleadings; (2) Erie's Reply did not argue an "intentional acts exclusion," as so characterized by SMP

Enterprises and, instead, properly addressed and responded to SMP's contention that the policy provides personal injury liability coverage under Coverage B; and (3) Erie points out the applicability of the "Employment Related Practices Exclusion" to the coverage parts under which SMP claims coverage exists. The court agrees that Erie's Reply was proper and denies SMP Enterprises' Motion to Strike for the reasons set forth herein[1].

SMP Enterprises' Response to Motion for Summary Judgment discusses at length how SMP Enterprises has coverage under the "Coverage B Personal and Advertising Injury Liability" section of the policy. Coverage B, in pertinent part, states:

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

> 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. 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. . .

2. Exclusions

> This insurance does not apply to:
>
> 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". . .
>
> d. **Criminal Acts**

[1] The question presented by the Motion to Strike is the propriety of Erie's Reply only, not the functional application of the particular policy provisions contained therein, which will be discussed later in this opinion.

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

"Bodily Injury" is defined in Section V as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

By relying on the "Insuring Agreement" for "Personal and Advertising Injury," SMP Enterprises directly brings into question the applicability of Coverage B to the damages awarded to the plaintiff by the jury. Erie's Reply memorandum emphasizes the two pertinent coverage Exclusions set forth in Coverage B immediately following the "Insuring Agreement" cited by SMP: (1) the Knowing Violation of the Rights of Another exclusion; and (2) the Criminal Acts exclusion. Even though these two Exclusions unmistakably bear on SMP Enterprises' argument for coverage, for whatever reason, SMP Enterprises chose not to address the Exclusions in any fashion in its Response brief. SMP cannot now argue that it is unfairly prejudiced by Erie relying on these Exclusions in its defense to point out the fallacy of SMP's assertion of coverage. Erie's Reply is in no way improper or patently unfair to the defendants, and the Court will not strike it. Accordingly, the court denies the Motion to Strike.

B. Erie's Motion for Summary Judgment

1. Bodily Injury

Even if the court granted SMP Enterprises' Motion to Strike, Erie would still be entitled to summary judgment because the damages awarded to the plaintiffs by the jury are not for a risk covered by the plain terms of the insurance policy. The Court's initial inquiry when examining an insurance policy is whether the policy is ambiguous. An insurance policy is ambiguous if the language in the policy is reasonably susceptible to two different meanings or is of such doubtful meaning that reasonable minds might be

uncertain or disagree as to its meaning. Syl. Pt. 1, *Prete v. Merchants Property Ins. Co. of Indiana*, 159 W.Va. 508, 223 S.E.2d 441 (1976). A court will strictly construe an ambiguous insurance contract against the insurance company and in favor of the insured. *Murray v. State Farm Fire and Casualty Company*, 203 W.Va. 477, 509 S.E.2d 1 (1998) (internal citation omitted). However, West Virginia law dictates that when the provisions of an insurance policy contract are clear and unambiguous, the provisions are not subject to judicial construction or interpretation and full effect will be given to the plain and ordinary meaning of language in the insurance policy. *Murray,* 203 W.Va. 482, 509 S.E.2d 6. Consequently, this court's decision is inextricably linked to the insurance policy language setting forth coverage, exclusions, and definitions of applicable terms.

The court turns first to the Commercial General Liability policy ("CGL") issued by Erie to SMP Enterprises to determine whether the policy is ambiguous. Coverage A, in pertinent part, provides:

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. . .

2. Exclusions

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. . .

In regard to Coverage A, the court answers the question of ambiguity in the negative. Coverage A so clearly and unambiguously predicates insurance coverage on the existence of "bodily injury"[2] that the court cannot conceive any enlightening discussion of the issue other than to say that the policy language speaks for itself: absent "bodily injury," Erie has no duty to indemnify its insured, SMP Enterprises.

This conclusion leads to the next issue of whether the damages awarded to the Shrewsburys qualify as "bodily injury" within the meaning of the policy. The policy defines "bodily injury" in Section V as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time," and the jury awarded the plaintiffs damages for emotional distress, loss of ability to enjoy life, and loss of consortium. At first glance, the plaintiffs' injuries do not appear to be encompassed within the definition of "bodily injury." However, because the underlying cause of the plaintiffs' injury was sexual abuse, which could potentially be considered "bodily injury," the court looks to West Virginia jurisprudence for guidance.

In *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000), the West Virginia Supreme Court of Appeals ("our Court") delved into the meaning of "bodily injury" contained in a CGL policy, which, like the CGL policy at issue, obligated the insurer to indemnify the insured for sums it became legally obligated to pay as damages because of "bodily injuries." *Smith* involved a former employee of Animal Urgent Care who filed suit against it and one of its veterinarians for both verbal and

[2] Coverage for "property damage" is not applicable in the instant case.

physical conduct of a sexual nature, including 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. Significantly, however, the plaintiff suffered no physical injuries. A critical part of our Court's analysis addressed whether CGL policy coverage dependent upon the existence of "bodily injury" obligated the insurer to pay damages for mental and emotional injuries arising out of sexual harassment but which injuries lacked an actual physical manifestation of such injuries.

The lack of physical manifestation of the plaintiff's mental and emotional injuries formed the crux for our Court's conclusion that the plaintiff employee did not suffer any bodily injury. Noting the "fundamental restriction of the coverage at issue to claims which assert 'bodily injury,'" our Court discussed with approval the decision of *Citizens Insurance Company v. Leiendecker*, 962 S.W.2d 446, 450-4 (Mo.Ct.App.1998), stating

> In discussing the rationale for excluding purely emotional injuries from the category of bodily injury, the court in *Leiendecker* explained that 'in insurance law "bodily injury" is considered to be a narrower concept that "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 in jury" 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).

Smith, 208 at 667-8, 542 S.E.2d at 830-1. The reasoning of the majority position espoused in *Leiendecker* convinced the *Smith* Court that "in an insurance 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.[3] Further, the *Smith* court outright rejected Animal Care's contention that the allegation of "physical contact" in the complaint was sufficient to trigger the "bodily injury" component of the liability policy, finding that this argument "presupposes that any physical contact necessarily results in "bodily injury" as defined by a particular policy." *Id.* at 668, 542 S.E.2d at 831; *See, National Fruit Prod. Co. v. Fireman's Fund Ins. Col,* 178 F.3d 1285, 1999 WL 270033, at 3 n.2 (4th Cir. 1999)(noting that allegations of physical or bodily contact do not necessarily imply bodily injury). Accordingly, the court finds that "bodily injury" defined as "bodily injury, sickness, or disease" does not include mental or emotional

[3] In reaching its conclusions, our Court considered a dearth of persuasive authority espousing the same fundamental principals. *Smith,* 208 at 667-8, 542 S.E.2d at 830-1 *citing*, Kathleen S. Edwards and Molly Nelson Ferrante, *Insurance Coverage for Employment-Related Claims,* 46 Prac. Law. 35, 36 (July 2000); *Trinity Universal Ins. Co. v. Cowan,* 945 S.W.2d 819 (Tex. 1997)(holding that "bodily injury" unambiguously requires injury to physical structure of human body and stating that "commonly understood meaning of 'bodily' . . .implies a physical, and not purely mental, emotional, or spiritual harm"); *Vienna Family Med. Assoc., Inc. v. Allstate Ins. Co.*, 78 F3d 580 (4th Cir. 1996)(noting that significant weight of authority holds that "bodily injury" does not encompass nonphysical injuries such as emotional distress; *see* also, *O'Dell v. St. Paul Fire Marine Ins. Co.*, 223 Ga.App. 578, 478 S.E.2d 418 (1996)(holding that alleged emotional distress arising from sexual harassment was not "bodily injury" where such distress did not result from physical harm or injury); *Greenman v. Michigan Mut. Ins. Co.*, 173 Mich.App. 88, 433 N.W.2d 346 (1998)(finding no coverage for alleged mental distress injuries arising out of sexual harassment and discrimination claim on grounds that injuries lacked any physical manifestation); *Garvis v. Employers Mut.Cas. Co.*, 497 N.W.2d 254 (Minn. 1993)(ruling that only emotional distress with appreciable physical injury could qualify as "bodily injury"); *Leiendecker*, 962 S.W.2d 446, 450-4 (adopting majority position that "bodily injury" encompasses only physical harm and excludes mental suffering or emotional distress and citing numerous state and federal decisions following majority position as well as limited authority espousing minority position); *David v. Nationwide Mut.Ins.Co.*, 106 Ohio App.3d 298, 665 N.E.2d 1171 (1995) (relying upon national judicial trend and ruling that emotional distress did not come within policy definition).

harm, and the term "bodily injury" as set forth in the Erie policy purchased by SMP Enterprises is clear and unambiguous. The court will give full effect to its plain, ordinary meaning.

Applying 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." By the definition of "bodily injury" alone, coverage does not exist. The 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." Instead, all the compensated injuries are "personal" injuries. See, *Tackett,* 213 W.Va. 524, 533, 584 S.E.2d 158, 167 (2003) citing *Smith* 208 W.Va. at 668, 542 S.E.2d at 831 (noting that personal injury covers mental or emotional injury)(internal quotations and citations omitted). As elucidated in *Smith*, "bodily injury" encompasses only physical injuries to the body whereas "personal injury" is a broader concept and includes mental and emotional injuries. *Smith*, 208 W.Va. at 668, 542 S.E.2d at 831, citing *Citizens Insurance Company v. Leiendecker*, 962 S.W.2d 446, 450-4 (Mo.Ct.App.1998). Thus, the damages assessed against SMP Enterprise are not for a risk covered by the plain, unambiguous terms of its insurance policy, and Erie has no duty to indemnify its insured.

Additionally, the court rejects 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. Consequently, SMP Enterprises

incorrectly asserts that the Complaint triggers insurance coverage, and the court's finding in favor of Erie still stands.

In light of the absence of "bodily injury," the court further concludes that the insurance policy does not cover the damages awarded to Mr. Shrewsbury for loss of consortium. The policy's CGL Coverage Part for Punitive Damages states "[d]amages because of 'bodily injury' include damages claimed by an person. . .for loss of services . . .resulting at any time from the 'bodily injury.'" *See*, Coverage for Punitive Damages Endorsement modifying CGL Coverage A – Insuring Agreement. Also, the Limited Employer's Liability Coverage Form provides that "[d]amages because of "bodily injury" include losses. . .for consequential "bodily injury" sustained by a spouse. . .as a consequence of "bodily injury" to the employee arising out of employment by you." Hence, insurance coverage for damages awarded to Mr. Shrewsbury depends upon his wife sustaining "bodily injury." As previously determined herein, no bodily injury to Ms. Shrewsbury exists and, therefore, neither does insurance coverage for damages dependant thereon.

In contrast with its conclusions of law on the scope of "bodily injury," the court feels compelled to voice its strong dissent with the West Virginia Supreme Court and the majority of jurisdictions that require injuries from sexual violations to physically manifest in order to qualify as "bodily injuries." The court believes that the physical act of sexual abuse is so interconnect with the resulting psychological and emotional injury that they cannot be separated one from the other.[4] As such, the heinous, abusive, and

[4] Justice Starcher astutely stated in his dissent in *Tackett v. American Motorist Insurance* Company, 213 W.Va. 524, 584 S.E.2d 158 (2003) that the Court's conclusion that the definition of "bodily injury" did not include purely mental or emotional harm arising from sexual harassment was an "archaic conceptualization of human anatomy and physiology, based on a belief that there is a distinction between "mental" and

sexually intrusive nature of sexual misconduct – in this case, the three acts of first degree sexual abuse for which Mr. Mohan was convicted - constitute injury to one's body per se. Thus, 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 evolves 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. Until then, however, this court adamantly believes that the degree of physical offense and unlawful invasion of a person's body accompanying sexual abuse far exceeds that in sexual harassment and should be treated differently by the courts when analyzing insurance policy coverage. The court is not trivializing the suffering of any victim of sexual harassment. Rather, it is drawing the inherent distinction between intimidation, humiliation, and embarrassment caused by sexual harassment and the actual physical violation and horrific bodily intrusion forced upon a victim of sexual abuse. 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.

Nonetheless, though this court would find the Shrewsburys' injuries to be encompassed within the definition of "bodily injury," the ultimate result would remain

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"physical" injuries. Justice Starcher espoused the opinion that modern science establishes that "the brain can be physically injured solely through an emotional disturbance. A traumatizing event can trigger severe chemical reactions in the brain, such that a tangible injury to the brain can occur. Ask any combat veteran about post-traumatic stress disorder, or any doctor who treats that veteran-they will tell you that intense stress can cause the brain to be "rewired."" He further notes that ""rewiring"" manifests itself through emotional expression, but it is difficult to show with empirical data. . .[i]n other words, in the past when we said someone was "emotionally scarred" by an event, it might have been closer to the truth than we knew." *Tackett*, 213 W.Va. at 534, 584 S.E.2d at 168 (Starcher, J. dissenting).

the same. The Erie policy unambiguously exempts from personal injury coverage damages for knowing violations of the rights of others and criminal acts. *See, Infra.* at Section 2 "Personal Injury." The policy also provides no coverage for injuries occurring within the ambit of the employment-related practices exclusion endorsement and the limited employer liability coverage sections. *See, Infra.* at Section 3 "Other Exclusions."

2. Personal Injury

The court now turns to the "Coverage B Personal and Advertising Injury,"[5] section of the CGL policy, which SMP Enterprises contends entitles it to insurance coverage and indemnity for the damages awarded to the plaintiffs. Coverage B obligates Erie to pay damages for "personal injury,"[6] but excludes from coverage those personal injuries arising from the "knowing violation of rights of another" and "criminal acts." First, and without much ado, the court finds that the language in Coverage B is clear and unambiguous, and, indeed, neither party argues otherwise. As the court discussed in regard to Coverage A, it is difficult to conceive clearer policy language.

Next, the court proceeds with its analysis of Coverage B. SMP Enterprises relies upon the opinion of the West Virginia Supreme Court of Appeals in *Tackett v. American Motorist Insurance* Company, 213 W.Va. 524, 584 S.E.2d 158 (2003) to support its argument for coverage. Specifically at issue in *Tackett* was whether an insurer had a duty

[5] The specific policy language of Coverage B is set forth, supra, in the court's discussion of SMP Enterprises' Motion to Strike.

[6] "Personal and advertising injury" as defined by the policy in Section V means injury including consequential bodily injury arising out of one of the following offenses: (a) false arrest, detention or imprisonment; (b) malicious prosecution; (c) wrongful eviction from, wrongful entry into, or invasion of the rights of private occupancy of a room, dwelling, or premises that 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' 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." (CGL Policy at Page 11).

to defend its insured's employee in civil litigation where the underlying Complaint alleged that the employee, in his capacity as such, intentionally caused personal injury to a third party.[7] *Id.* at 528, 584 S.E.2d at 162. The insurer, American Motorists Insurance Company, had issued to the clothing store a CGL policy that restricted coverage to claims which asserted "bodily injury." The insurer declined to provide counsel to represent Mr. Tackett in the lawsuit, and Mr. Tackett filed an action against the insurer seeking a declaration that the policy issued to the clothing store owed him a defense in the litigation brought by the store customer. Our Court concluded that the customer's allegations *potentially* stated a claim covered under both the policy definition of "personal injury" and the broader judicial interpretation of that term, and, thus, the insurer should have provided legal representation to Mr. Tackett. *Id.* at 533 (Emphasis added).

The case at bar is materially distinguishable from *Tackett* because the issue in the instant case is whether the insurer has a duty to indemnify the insured, not whether the insurer has the duty to defend as in *Tackett*. When an insurance coverage issue requires a court to determine an insurer's duty to indemnify an insured, actual damages have already been decided and awarded by a trier of fact, resulting in the narrow consideration of whether such damages fall within the risks covered by the insurance policy and obligate the insurer to pay. In contrast, and as noted by the *Tackett* Court, the duty to defend is encumbered with the inherent speculation of determining *potential* coverage, which results in a broader obligation for insurance companies to defend than to

[7] In *Tackett*, a customer of a retail clothing store sued the store and its assistant manager, Steven Tackett, because Mr. Tackett "sexually harassed, molested, and violated" the customer by making sexual innuendos to her, touching various parts of the customer's body, including her breasts, entering the customer's changing room while she was unclothed, and doing all of these things in front of another individual. The complaint further alleged that Mr. Tackett's actions resulted in the customer suffering "injury, great embarrassment, consternation, mental pain and anguish, and emotional upset."

indemnify or pay under a particular policy. See, *Tackett*, 213 W.Va. 524, 584 S.E.2d 158. The *Tackett* Court observed that "if part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims, although it might eventually be required to pay only some of the claims." *Tackett*, 213 W.Va. at 528-9, 584 S.E.2d at 162-3 citing *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 376 S.E.2d 581 (1988). The West Virginia Supreme Court further emphasized that an insurer's duty to defend is determined by looking to the complaint to see if it is reasonably susceptible of an interpretation that states a claim for a covered risk, and the duty to defend arises when the averments in a complaint state a claim potentially covered by the particular insurance policy at issue. See, *Tackett*, 213 W.Va. at 528-9, 584 S.E.2d at 162-3, citing Syl. pt. 3, in part, *Bruceton Bank v. United States Fid & Guar. Ins. Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997). Hence, the duty to defend an insured may actually be broader than the obligation to pay. *Tackett*, 213 W.Va. at 529, 584 S.E.2d at 163 citing *Aetna Cas. & Sur. Co., v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986). The fundamental difference between the issue in *Tackett* and that in the present case renders SMP Enterprises' reliance on *Tackett* misplaced and unpersuasive.

The gap between the case at bar and *Tackett* is further widened by exclusions contained in the respective policies. SMP Enterprises' insurance policy specifically excludes from personal injury coverage those injuries resulting from "criminal acts"[8] and the "knowing violation of the rights of another."[9] The *Tackett* policy contained no such

[8] Criminal Act Exclusion excludes from coverage "personal" injuries arising out of a criminal act committed by or at the direction of the insured.

[9] Knowing Violation of Rights of Another excludes from coverage "personal" injuries 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"...

policy exclusions, thereby making it a much broader policy than SMP's policy. See, *Tackett*, 213 W.Va. at 533, 584 S.E.2d at 167 (remarking that "[u]nquestionably, the terms of the pertinent insurance contract govern the parties' relationship and define the scope of coverage" and that "the subject policy does not contain an intentional acts exclusion applicable to its personal injury coverage"). 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[10] 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). Therefore, the inference of intent to injure in conjunction with the findings the of the jury

[10] W.Va. Code §61-8B-7 Sexual Abuse in the First Degree: A person is guilty of sexual abuse in the first degree when . . .such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion.

W.Va. Code §61-8B-1 defines "sexual contact" as any *intentional* touching, either directly or through clothing, or the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party. (Emphasis added).

against SMP Enterprises in the underlying civil action[11] establish that SMP Enterprises intended to injure Ms. Shrewsbury, and, as a result, no coverage exists under Coverage B.

3. Other Policy Exclusions

1. Employment-Related Practices Exclusion

SMP Enterprises' policy of insurance contains an Employment-Related Practices Exclusion Endorsement ("ERPE") to the CGL policy which depends on the presence of "bodily injury." When "bodily injury" exists, this particular Endorsement bars insurance coverage for "bodily injury" arising out of "employment-related practices, policies, acts or omissions, such as coercion, demotion, . . .harassment, humiliation or discrimination directed at [Ms. Shrewsbury]." See, Employment-Related Practices Exclusion. Thus, if the court had determined that the jury awarded the plaintiffs damages for bodily injuries, it would then be necessary to determine whether the ERPE applied. However, given ruling on the absence of "bodily injury," the ERPE policy section unquestionably bars coverage in the instant case.

2. Limited Employers' Liability Coverage

The Limited Employers Liability Coverage Form applies to "damages because of bodily injury sustained by your employee arising out of or in the course of employment by you." The presence of "bodily injury" is again an inextricable component for insurance coverage under this section. 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

[11] See, supra at p.4-5. Special Interrogatories and verdict against SMP Enterprises.

Intended Injury in the Limited Employers Liability Coverage.[12] However, bodily injury is still a mandatory prerequisite for any type of coverage thereunder.

The court has thoroughly considered both the Employment-Related Practices Exclusion and the Limited Employers' Liability Coverage sections and concluded that the absence of damages for bodily injuries summarily precludes coverage. Of course, the court could have assumed, *arguendo*, that the damages in the case at bar were for bodily injury and then proceeded to examine every policy section that hinged upon the existence of "bodily injury." However, the court declines the opportunity to delve into the deep, dark abyss of lengthy insurance policy provisions that could potentially have applied in a different scenario but simply are inapplicable to the pending case. Hence, because bodily injuries are absent from the case at bar, neither the EPRE nor the Limited Employers Liability Coverage affect to the instant case, and the court will not engage in hypothetical analysis at this juncture.

C. Conclusion

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

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[12] Limited Employers Liability Coverage Form Section I – Limited Employers Liability Coverage:
2. Exclusions
This insurance does not apply to:
A. Expected or Intended Injury. . .
This exclusion does not apply if the insured's legal liability for an act committed with the deliberate intent to injure is proven by all five of the following facts:
1) a specific unsafe working condition existed in the workplace which presented a high degree of risk. . .
2) the insured, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk. . .
3) the specific unsafe working condition was a violation of state or federal safety statute. . .or of a commonly accepted and well-known safety standard within the industry. . .as demonstrated by competent evidence. .
4) notwithstanding the existence of the facts set forth in paragraphs 1) through 3). . .the insured nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
5) the employee exposed suffered serious compensable injury . . .as a proximate result.

"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 plaintiffs' injuries.

RULING

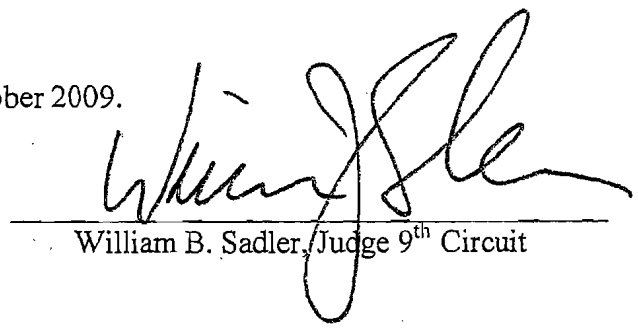
The Court hereby **ADJUDGES** and **ORDERS**:

1. Erie Insurance Company's Motion for Summary Judgment is **GRANTED**.

2. SMP Enterprises' Motion to Strike is **DENIED**.

3. The Court directs the Clerk of this Court to provide a copy of this Order to all counsel of record in the above-styled action.

ENTERED this 23 day of October 2009.



William B. Sadler, Judge 9th Circuit