

IN THE SUPREME COURT OF OHIO

Steve and Megen Hilmer, individually
and on behalf of Casey Hilmer, a minor

Plaintiffs

v.

Lance White, et al.

Defendants

CASE NO.

08-0304

On appeal from the Hamilton County
Court of Appeals, First Appellate District

Court of Appeals
Case No. C-070074

Safeco Insurance Company of America

Plaintiff-Appellant

v.

Federal Insurance Company

And

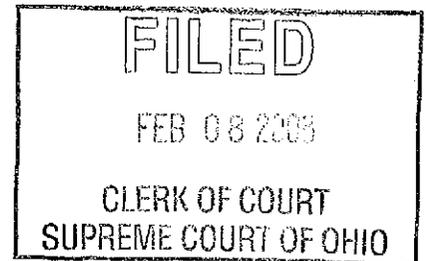
Pacific Indemnity Company

Defendants-Appellees

And

Benjamin White, et al.

Defendants



MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT SAFECO INSURANCE COMPANY OF AMERICA

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I. EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

There are nearly four and one half million households in Ohio.¹ Each of these households has an average of 2.49 people.² Many of these households have homeowners' insurance. There are nearly a thousand insurance carriers authorized by the Ohio Department of Insurance to write property and casualty insurance policies in Ohio.³ This case raises issues which have the potential to impact the insurance coverage available for every Ohio home or business owner and every insurance carrier who issues homeowners' policies or commercial property policies in Ohio. Specifically, this case presents three issues critical for the future of insurance coverage in Ohio: (1) whether the presence of a general severability of insurance provision within an insurance contract creates ambiguity pertaining to excluded conduct performed by an insured or any insured under the policy; (2) whether harm derivative of the excluded conduct of one insured under an insurance policy should be considered an accidental occurrence for other insureds under the policy; and (3) whether an insured's entry of a guilty plea to a criminal charge with the specific intent to cause harm precludes finding issues of material fact regarding the application of intentional acts exclusion under Nationwide Ins. Co. v. Kollstedt.⁴

In many ways, the issues raised by this case serve as the next logical progression in this Court's guidance to Ohio insurers, insureds and their counsel after the decision in Doe v. Shaffer.⁵ The Doe case, which was accepted on a discretionary appeal from the same Court of Appeals as this case, dealt with an insurer's duty to defend and indemnify the Catholic Diocese of Columbus, its Bishop and others related to the sexual abuse of a mentally retarded man allegedly committed by

¹ U.S. Census Bureau, 2000.

² Id.

³ Ohio Department of Insurance, List of Authorized Insurance Companies dated 2/6/2008.

⁴ 71 Ohio St.3d 624, 1995-Ohio-245.

⁵ 90 Ohio St.3d 388, 2000-Ohio-186.

employees of a residential care facility run by a Catholic religious order including negligent hiring, retention and supervision. *Id.* at 389-90. The Doe syllabus states “Ohio public policy permits a party to obtain liability insurance coverage for negligence related to sexual molestation when that party has not committed the act of sexual molestation.” However, Doe does not require that an insurer provide coverage in all situations involving negligent supervision of individuals who have committed intentional harmful acts.⁶ Rather, Doe suggests the appropriate inquiry is a close examination of the contractual language governing the relationship between insured and insurer in order to determine whether an insurance carrier is required to provide coverage in a situation involving negligent supervision of an individual who had committed an intentional harmful act.

As Ohio’s various courts of appeal have followed this path of close examination of the contract language after Doe, conflicts have arisen. The first two issues identified above have both been the subject of such conflicts. The insurance buying public and the insurance industry have a great interest in consistent decisions from Ohio courts. The Ohio Constitution recognizes this when it states: “[t]he Supreme Court shall review and affirm, modify or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.”⁷ Resolution of the conflicting positions on these issues serves as another reason why this case is one of great general interest.

The first issue set forth above involves the interaction between a general severability provision⁸ and exclusionary language which references the conduct of “an” or “any” insured. General severability provisions are common in insurance policies and have been in use since the late

⁶ Allstate Ins. Co. v. Dolman (Ohio App. 6 Dist.), 2006-Ohio-4134, ¶24.

⁷ Constitution of the State of Ohio, Article IV §2(B)(2)(f).

⁸ The Severability of Insurance provision in the Safeco policies states “This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence.”

1950s.⁹ All insurance policies contain exclusions and many of these exclusions refer to non-covered conduct by “an” or “any” insured. Consistent with the frequent presence of such language in policies, this issue has been the subject of consideration by more than thirty foreign jurisdictions, although never directly by this Court. However, in Doe this Court found guidance in a decision from a foreign court¹⁰ which, among other things, contrasted the impact of exclusions referencing “the” insured with those which used “an” or “any” insured language, all in conjunction with a general severability provision. Doe at 393. The foreign court determined that, even with a general severability provision present, the way to exclude coverage for all claims arising from all intentional acts regardless of who committed them was to include “any” insured language in the relevant exclusions. Silverball at 1158. The Third District Court of Appeals reached a similar conclusion.¹¹ Nevertheless the First District below reached the opposite conclusion claiming to follow a case from the Eleventh District.¹²

The second issue also raises concerns of great interest to the public because it potentially impacts the manner in which insurance coverage is determined for all Ohio households where more than one individual resides. When only a single individual is insured under a policy the determination of whether that individual’s conduct is covered or not is typically straightforward. However, when more than one person is an insured different claims can be asserted against each insured. The Doe decision referenced above does not provide a specific holding on this point because the individuals responsible for sexually abusing the victim were not insureds on the insurance policies at issue. Id. at 394. Nevertheless the Fifth District has concluded that claims of

⁹ Both insurance policies issued by Safeco and both insurance policies issued by Appellees contain such provisions.

¹⁰ Silverball Amusement, Inc. v. Utah Home Fire Ins. Co. (W.D. Ark. 1994), 842 F.Supp. 1151.

¹¹ United Ohio Ins. Co. v. Metzger (Ohio App. 3 Dist.), 1999 Ohio App. LEXIS 920, pp.12-13.

¹² Havel v. Chapek (Ohio App. 11 Dist.), 2006-Ohio-7014 ¶35.

negligence related to an intentional tort are not occurrences separate from the intentional tort.¹³

However, the First District reached the opposite conclusion claiming to follow cases from the Sixth and Eleventh Districts.¹⁴

Significantly, the Safeco insurance policies that are the subject of this litigation were in effect on July 15, 2003. All the conflicting case law identified by the First District was decided in either 2006 or 2007. For this reason alone this case is of great general interest to the insurance industry itself, because if left to stand, the First District's decision creates insurance coverage inconsistent with the contracting language and its interpretation in Ohio courts at the time the parties entered into their agreement. Insurance companies and their insureds should be free to contract consistent with Ohio's public policy. This freedom is eliminated when courts disregard the intent of the parties as expressed in the contractual documents. This Court has the opportunity to set the course of insurance law in this area for the present and future of Ohio. This Court should accept jurisdiction of this case to carry into effect the intent of the parties as expressed in the language in the contract and review the erroneous decision of the First District Court of Appeals. Further, this Court should clarify the narrow scope of the holding in Doe so that it is not applied to impose coverage in insurance policies where no coverage was bargained for, intended or expressed in the language used in the policy.

II. STATEMENT OF THE CASE AND FACTS

On July 15, 2003, seventeen year old Benjamin White ("Ben") tried to murder thirteen year old Casey Hilmer while she was jogging on Given Road in Indian Hill, Hamilton County, Ohio. Ben grabbed Casey, dragged her into the woods and knocked her to the ground. At that point Ben

¹³ Torres v. Gentry (Ohio App. 5 Dist.), 2007-Ohio-4781 ¶61 citing Offhaus v. Guthrie (2000), 140 Ohio App.3d 90, discretionary appeal not allowed (2001), 91 Ohio St.3d 1478.

¹⁴ Allstate Ins. Co. v. Dolman (Ohio App. 6 Dist.), 2007-Ohio-6361; Havel, *supra* ¶33.

withdrew a knife from his pocket and stabbed Casey repeatedly in the side and neck. On March 15, 2004 Ben plead guilty to one count of Attempted Murder and Felonious Assault and was sentenced to ten years in prison.

After Ben's sentencing, Casey and her parents, Steve and Megan Hilmer, filed suit in Hamilton County Common Pleas Court asserting various claims against Ben and his parents, Lance and Diane White. Ben was a resident of his parents' home at the time of the stabbing.¹⁵ After the Hilmer's Complaint was filed, Lance and Diane White tendered the defense of their case to their insurers, Safeco Insurance Company of America ("Safeco") and Federal Insurance Company and Pacific Indemnity Company ("Chubb"). In response, Safeco and Chubb both denied that the allegations in the Hilmer's Complaint were covered by the duty to indemnify in their respective policies.

Based on this coverage dispute, Safeco filed a separate Complaint for Declaratory Judgment, also in Hamilton County, asserting that its homeowners' policy issued to Lance and Diane White and personal umbrella policy issued to Lance White did not provide coverage for Ben or his parents for any of the claims arising out of Ben's attack. Safeco's Quality Crest Homeowner's Policy is separated into two sections: Section II of which provides liability coverage. Under Section II is Coverage Part E titled "**PERSONAL LIABILITY**". Coverage Part E provides:

If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable. Damages include prejudgment interest awarded against the **insured**; and
2. provide a defense at our expense by counsel of our choice even if the allegations, which if true would be covered, are groundless, false or fraudulent.

¹⁵ As a resident of his parent's home, Ben is an insured under both Safeco policies.

Those words in bold type in the previous quotation have specific definitions established in the contract. The “**POLICY DEFINITIONS**” section continues, in pertinent part:

8. “**Occurrence**” means an accident, including exposure to conditions which results in:
 - a. **bodily injury**; or
 - b. **property damage**;during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one **occurrence**.

Section II liability coverage’s are subject to various exclusions set forth under the heading “**LIABILITY LOSSES WE DO NOT COVER.**” Relevant policy exclusions state as follows:

1. **Coverage E - Personal Liability and Coverage F - Medical Payments to Others** do not apply to **bodily injury** or **property damage**:

- a. which is expected or intended by an **insured** or which is the foreseeable result of an act or omission intended by an **insured**; * * *

2. **Coverage E- Personal Liability**, does not apply to:

- a. Liability; * * *

- (4) arising out of any illegal act committed by or at the direction of an **insured**.

In addition to the Quality Crest Homeowners Policy, Safeco also issued to Lance White a Personal Umbrella policy. The Personal Umbrella policy outlines the specific coverages and states as follows:

We will pay on behalf of the **insured** for the **ultimate net loss** in excess of the **retained limit** which the **insured** is legally obligated to pay as damages because of covered **personal injury** or **property damage** caused by an **occurrence**.

As was the case in the homeowner's policy, those policy terms in bold are defined in the "DEFINITIONS" section of the Personal Umbrella policy. Relevant definitions include the following:

9. "Occurrence" means:

a. an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the coverage period, in:

- (1) **personal injury**; or
- (2) **property damage**;

b. an offense, committed during the coverage period, which results in **personal injury**.

The aforementioned coverages are subject to 22 enumerated exclusions. The "EXCLUSIONS" section states as follows, in pertinent part:

This policy does not apply to:

9. Any injury caused by violation of a penal law or ordinance committed by or with the knowledge or consent of any **insured**, except those caused by violation of a motor vehicle law.

10. Any **personal injury** arising out of sexual molestation or sexual harassment or physical or mental abuse. * * *

15. Any act or damage which is expected or intended by any **insured**, or which is the foreseeable result of an act or omission intended by any **insured**, which causes **personal injury** or **property damage**. But this exclusion does not apply to **personal injury** resulting from a reasonable action by any **insured** in:

- a. preventing or eliminating danger in the operation of **motor vehicles** or aircraft; or
- b. protecting persons or property.

Safeco filed a Motion for Summary Judgment on the coverage issues¹⁶, which was opposed by Ben and his parents. In addition to opposing Safeco's Motion, Lance and Diane White filed their own Cross-Motion for Summary Judgment asking that the Trial Court determine they were entitled to coverage. After the Hilmer's original case was consolidated with the Declaratory Judgment proceeding and the completion of the jury trial in the original case, the trial court, on March 27, 2006, issued an Entry (over the objections of Safeco), which granted Lance and Diane White's Motion and denied Safeco's Motion and determined that Safeco owed a duty to defend and indemnify Mr. and Mrs. White in the original case and determined that genuine issues of material fact remained regarding whether coverage existed for Ben.

Safeco filed a timely Appeal of the Entry but that Appeal was dismissed by the First District because "although there was a final order under Revised Code §2505.02, it is not yet appealable" since it lacked Rule 54(B) language. During the pendency of the Appeal of the original Entry, the case settled, although Safeco was not a party to that confidential settlement.¹⁷ When the declaratory judgment case returned to the trial court, Safeco requested a trial of any unresolved coverage issues and in response, Chubb filed a Motion for Entry of Final Judgment, which Safeco opposed. Ultimately, after hearing, on January 17, 2007, the trial court signed an Order and Judgment Entry against Safeco incorporating the previous coverage rulings of the Trial Court and entering judgment against Safeco in a particular amount.¹⁸ Safeco timely appealed that Order and Entry and sought reversal of the trial court's decision on the coverage issues in the First District Court of Appeals.

¹⁶ Chubb also filed a Motion for Summary Judgment on the coverage issues. Chubb withdrew the portion of its Motion seeking summary judgment with respect to Mr. and Mrs. White after the conclusion of the jury trial in the original case.

¹⁷ After the settlement, the parties entered into a Joint Stipulated Confidentiality Order which resulted in the filing under seal of all subsequent pleadings discussing the settlement.

¹⁸ This Order included Rule 54(B) language.

After the completion of briefing and oral argument, on December 28, 2007 the First District Court of Appeals issued an Opinion affirming the decision of the trial court and *sua sponte* recognizing two certified conflicts with decisions of other Courts of Appeal.¹⁹ In its Opinion, the First District focused on the negligent supervision and negligent entrustment claims against Lance and Diane White. The Opinion did not address whether or not Ben White was entitled to coverage. Initially the First District determined that under the term “occurrence” in the Safeco policies could include a negligent claim even when the negligence pertains to failure to prevent intentional conduct. Then the Court of Appeals determined that the presence of a severability of insurance clause within both Safeco policies rendered ambiguous the various exclusions applicable to Ben’s conduct. Safeco appeals to this Court to overturn the First District’s decisions on these issues.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The presence of a general severability of insurance provision within an insurance contract does not create ambiguity pertaining to excluded conduct performed by an insured or any insured under the policy.

The presence of a general severability of insureds provision does not create ambiguity in an insurance policy which contains exclusionary language referencing “an” or “any” insured. A general severability clause was added to standard insurance policies in 1955 to clarify that “the insured” did not mean “any insured” under the policy.²⁰ Prior to 1955, the majority of jurisdictions reached the opposite conclusion. Thus, the First District’s conclusion based on the severability of

¹⁹ No Notice of Certified Conflict is currently pending. Safeco filed a timely Motion to Certify with respect to the Opinion. That Motion was overruled as moot by Entry on January 24, 2008. Safeco has Applied for Reconsideration of the January 24, 2008 Entry based upon the Clerk’s refusal to accept a Notice of Certified Conflict proffered January 31, 2008.

²⁰ Phoenix Assurance Co. v. Hartford Ins. Co. (Colo. Ct. App. 1971), 29 Colo. App. 548, 488 P.2d 206,207

insurance provision present in the Safeco policies would be correct if the Safeco policy referenced “the insured” instead of “an insured” or “any insured” in the relevant policy exclusions.

Thus the presence of the separation of insureds provision creates the above meaning only when “the insured” is used and does not trigger ambiguity for a policy exclusion that applies to the acts of “an” or “any” insured. Nor is there a significant difference between the presence of “an insured” versus “any insured” in a policy exclusion.²¹ “‘A’ or ‘an’ is indefinite article often used in a sense of ‘any’ and applied to more than one individual object; whereas ‘the’ is an article which particularizes the subject spoken of.”²² Responding to the original rationale for including a severability provision accompanied by the desired uniformity of court analysis of those policies insurers modified their contracts and replaced “the insured” language with “an” or “any insured” language, particularly in exclusions. As one treatise writer has noted “Many [of these] exclusions eliminate coverage for certain actions taken by “any” insured. Such an exclusion should be read to eliminate coverage for all insureds as long as the exclusion applies to one insured. * * * [I]t has been held that an “any insured” exclusion will be treated like a “the insured” exclusion if the policy contains a severability clause; that is, a provision stating that the ‘insurance applies separately to each insured.’ Such a holding is not justifiable. A severability clause provides that each insured will be treated independently under the policy. The fact remains, however, that as applied even independently to each insured, an ‘any insured’ exclusion unambiguously eliminates coverage for each and every insured.”²³

This particular area has been the subject of a great deal of discussion amongst the courts of other jurisdictions. Within those courts a majority position and a minority position have developed.

²¹ Metzger, supra, at pp.10-11.

²² Allstate Ins. Co. v. Foster (D. Nev. 1988), 693 F.Supp. 886,889.

²³ Windt, Insurance Claims and Disputes: Representation of Insurance Companies and Insureds §11:8 5th Ed. 2007.

“The majority of courts hold, primarily in connection with a construction of the exclusion of coverage for intentional conduct found in many homeowner’s policies, that the existence of a severability clause does not effect a clearly worded exclusion” applicable if harm arises out of the actions of an insured or any insured.²⁴ The purpose of a general severability clause is solely to render the coverage actually provided by the insuring provisions of the policy applicable to all insureds equally, up to coverage limits.²⁵ The severability clause is not denominated a “coverage” provision and it would be unreasonable to find it operated independently in that capacity to partially nullify existing coverage exclusions.²⁶

The Sixth Circuit itself grappled with a form of this issue in Illinois Union Insurance Co. v. Shefchuk²⁷ While Shefchuk involved a non-standard severability provision and is thus factually distinguishable from our case, the analysis used by the Sixth Circuit is enlightening. In Shefchuk, the Sixth Circuit explained:

Although we recognize that the question is a close one, we conclude that in this case the severability clause in the Illinois Union policy makes the term “an insured” ambiguous. In the cases in which the courts have found to the contrary, the severability clauses in the disputed policies have tended to provide generally that “the insurance applies separately to each insured.” The clause in the Illinois Union policy on the other hand, includes an additional provision: “We will cover each such person or organization just as if a separate policy had been issued to each.” There is no way we can see to reconcile a provision this explicit with the assertion that the exclusions bar coverage of claims arising out of the excluded acts of anyone listed as “an insured” under the policy. If, under the Illinois Union policy, the actions of one insured can preclude another insured from coverage then the two were not being treated as though a separate policy had been issued to each of them.²⁸

²⁴ Argent v. Brady (N.J. Super. 2006), 386 N.J. Super. 343,353, 901 A.2d 419.

²⁵ Id. at 355.

²⁶ Id.

²⁷ (C.A. 6 2004), 108 Fed. Appx. 294.

²⁸ Id. at 303.

Thus, Shefchuk finds a close call in a situation where a policy does not even contain a general severability of insurance provision. This position is consistent with the determination made by the Third District Court of Appeals in Metzger. In Metzger, the Third District Court of Appeals determined that the existence of a severability provision did not change the analysis or create ambiguity with respect to enforcement of exclusionary language referencing “an insured.”²⁹ Similarly, this Court’s own opinion in Doe v. Shaffer cites favorably an Arkansas District Court decision which states that the way to make an exclusion enforceable for all claims arising from all intentional acts regardless of who committed them was use “any insured” language.³⁰

The Havel decision cited in the First District’s Opinion does not even involve a situation where a valid negligent supervision or entrustment claim existed against the intentional actor’s parents.³¹ As noted by the dissent in Havel, that Court determined as a matter of law that no negligence claim existed against the parents. The First District Court of Appeals decision, by refusing to follow historical evidence, treatise law, persuasive authority from the Third District, the majority of foreign jurisdictions as well as guidance provided by this Court in Doe, took a step in the wrong direction. Only this Court has the ability to prevent the First District’s misstep from becoming more.

Proposition of Law No. 2: Negligence in relation to an intentional tort is not an “occurrence” separate and apart from the underlying intentional tort but rather is a derivative claim arising out of the intentional act(s).

Both Safeco policies at issue in this case describe the duty to the insured as existing in relation to an occurrence. Ohio law interpreting what constitutes an “occurrence” has been shaped in large part by this Court’s efforts to address the issue regarding the duty to defend and indemnify

²⁹ Id. at pp.8-9.

³⁰ Silverball, *supra*, at 1158.

³¹ Havel, *supra*, ¶61.

insureds against lawsuits arising out of the allegations related to the sexual molestation of minors³². In Gearing v. Nationwide Ins. Co.³³ this Court held that providing liability coverage for injuries caused by criminal sexual conduct with a minor is prohibited and that no coverage exists for such acts:

Incidents of intentional acts of sexual molestation of a minor do not constitute "occurrences" for purposes of determining liability insurance coverage, as intent to harm inconsistent with an insurable incident is properly inferred as a matter of law from deliberate acts of sexual molestation of a minor.

The public policy of the state of Ohio precludes issuance of insurance to provide liability coverage for injuries resulting from intentional acts of sexual molestation of a minor.³⁴

In Cuervo v. Cincinnati Ins. Co.³⁵ this Court discussed the alleged negligence of a relative living in the same household as an alleged child molester. The parents of the minor victims in Cuervo obtained a judgment against Peter Snell for intentional sexual molestation and against Peter's father Stephen Snell, for negligently supervising his son. In a subsequent action, the victim's parents sought payment of the judgment from Stephen Snell's insurance company. This Court held that:

In Gearing * * * we held that incidents of intentional acts of sexual molestation of a minor do not constitute "occurrences" for purposes of determining insurance coverage; that intent to harm inconsistent with an insurable incident is properly inferred as a matter of law from deliberate acts of sexual molestation of a minor; and that the public policy of the state of Ohio, which prohibits the issuance of insurance to indemnify damages flowing from intentional torts, precludes issuance of insurance to provide liability coverage for injuries resulting from intentional acts of sexual molestation of a minor. * * *

³² This Court has stated that murder and child molestation are similar in that they are intentionally injurious by definition. Buckeye Union Ins. Co. v. New England Ins. Co. 87 Ohio St.3d 280,283-84, 1999-Ohio-67.

³³ (1996), 76 Ohio St.3d 34, 1996-Ohio-113.

³⁴ Id. at syllabus ¶¶ 1 and 2.

³⁵ (1996), 76 Ohio St.3d 41, 1996-Ohio-99

[T]he damages for which the Cuervos seek compensation [from Peter's father Stephen] flow from Peter's intentional acts of sexual molestation of a minor. Thus, and on this record, the obligation of [the insurance company] to pay the judgment entered against his father, Stephen, is precluded as well.

In Westfield Cos. v. Kette,³⁶ this Court revisited insurance coverage for conduct related to the sexual molestation of a minor. In Kette, the Court considered and rejected the Appellant's argument that a negligence claim against a child molester's spouse was covered by a homeowner's insurance policy. However, in Doe, this Court retreated from its previous holdings in Kette and Cuervo and construed its holding in Gearing. In Doe, this Court stated that "in light of the [syllabus] holding, we find that the court of appeals erred in holding that the acts of negligence alleged here could not constitute occurrences under an insurance policy as a matter of law." Id. at 395. However, the alleged molesters in Doe were not insureds under the same insurance policy as those seeking coverage. Id. at 394.

The First District Court of Appeals incorrectly determined that the negligent supervision or entrustment claims proven by the Hilmers against Mr. and Mrs. White constituted a separate occurrence distinct from the underlying intentional tort committed by Ben White. This is because, but for Ben White attacking and injuring Casey Hilmer the Hilmers would not have had a claim against Mr. and Mrs. White at all, since parents cannot be held liable in a civil suit for the acts of their minor children unless someone sustains injury and resulting damages.³⁷ Additionally the First District's position on this issue was rejected by the Fifth District Court of Appeals in Torres, *supra* and Offhaus, *supra*. The fact that the First District followed the determinations of the Sixth and Eleventh Appellate Districts further illustrates why the time is ripe for this Court to further clarify its holding in Doe with respect to these issues.

³⁶ 77 Ohio St.3d 154, 1996-Ohio-335.

³⁷ See R.C. §3109.10.

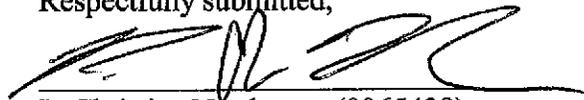
Proposition of Law No. 3: An insured's entry of a guilty plea to a criminal charge with the specific intent to cause harm precludes finding issues of material fact regarding the application of an intentional acts exclusion under Nationwide Ins. Co. v. Kollstedt.

Ben knowingly, voluntarily and intelligently pled guilty to purposely³⁸ attempting to murder Casey Hilmer. This Court has determined that a conviction for aggravated murder is sufficient to establish the intent to injure.³⁹ The Kollstedt decision involved an individual with a severely disabling psychotic illness who shot and killed his roommate and then died before ever becoming competent to stand trial. Id. at 624. The First District erred in refusing to determine that Kollstedt was inapplicable as a matter of law and that Ben's conduct was excluded from coverage under the Safeco policies.

IV. CONCLUSION

For the foregoing reasons, this case is a matter of public or great general interest. Safeco urges this Court to accept jurisdiction in this matter to reverse the First District's decision and provide guidance to Ohio insurers, insureds and their counsel regarding these critical issues.

Respectfully submitted,



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³⁸ "Purposely" is defined as acting with the "specific intention to cause a certain result." R.C. §2901.22(A)

³⁹ Preferred Risk Ins. Co. v. Gill (1987), 30 Ohio St.3d 108.

V.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was sent via ordinary mail to the following on this 8th day of February, 2008:

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APPENDIX

Opinion of the Hamilton County Court of Appeals (December 28, 2007)

Judgment Entry of the Hamilton County Court of Appeals (December 28, 2007)

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STEVE HILMER, et al.,	:	APPEAL NO. C-070074
Plaintiffs,	:	TRIAL NO. A-0403452
vs.	:	
LANCE WHITE, et al.,	:	
Defendants.	:	

SAFECO INSURANCE COMPANY OF AMERICA,	:	TRIAL NO. A-0408943
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Plaintiff-Appellant,

OPINION.

vs.

FEDERAL INSURANCE COMPANY

and

PACIFIC INDEMNITY COMPANY,

Defendants-Appellees,

and

BENJAMIN WHITE, et al.,

Defendants.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

DEC 28 2007

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed and Conflict Certified

Date of Judgment Entry on Appeal: December 28, 2007

Jenks, Pyper & Oxley Co., L.P.A., P. Christian Nortstrom, and Scott G. Oxley, for Appellant,

Gallagher Sharp, Jay Clinton Rice, and Richard C. O. Rezie, for Appellees.

Please note: We have removed this case from the accelerated calendar.

DINKELACKER, Judge.

{¶1} In this case, we are asked to determine whether a homeowners' insurance policy and an umbrella policy obligated the issuing insurance company to defend and indemnify when its insureds were sued for negligence relating to the intentional and criminal conduct of their child, also an insured. While the issue is close, we hold that coverage was afforded under the policies.

***Felonious Assault and Attempted Murder
Result in Litigation***

{¶2} Benjamin White, who was then 17 years old, attempted to kill Casey Hilmer. He grabbed the 13-year-old while she was jogging, dragged her into the woods, and stabbed her repeatedly in the side and neck. After this attack, White pleaded guilty to attempted murder and felonious assault, and was sentenced to ten years in prison.

{¶3} Casey Hilmer and her parents sued Benjamin White and his parents, Lance and Diane White. In that lawsuit, the Hilmers claimed that Lance and Diane White had been negligent for failing to properly supervise their son and for entrusting him with a dangerous instrument. That case proceeded to a jury trial. According to a jury interrogatory, Lance and Diane White had been negligent and their negligence had proximately caused injury to the Hilmers, though the manner of the negligence was not specified. The jury awarded \$6.5 million in compensatory damages and determined that Lance and Diane White were responsible for 70% of that amount.

{¶4} At the time of the attack, the Whites had two homeowners' insurance policies and two umbrella policies. One of the homeowners' policies was issued by defendant-appellee Federal Insurance Company. One of the umbrella policies was

issued by defendant-appellee Pacific Indemnity Company. Both Federal and Pacific were members of the Chubb Group of Insurance Companies (collectively "Chubb"). The remaining policies were issued by plaintiff-appellant, Safeco Insurance Company of America.

{¶5} Shortly after the Hilmers' lawsuit was filed, Safeco filed a declaratory-judgment action claiming that it owed neither a duty to defend nor a duty to indemnify the Whites. In that suit, Safeco also asked the trial court to determine the priority of coverage between the two policies that it had issued and the two issued by Chubb. During this litigation, Chubb withdrew its opposition to coverage for "the negligence claims and the jury verdict against Lance and Diane White."

{¶6} Safeco filed a motion for summary judgment, as did Lance and Diane White. While the motions were pending, the declaratory-judgment action was consolidated with the underlying suit filed by the Hilmers. The trial court considered the arguments and found that the intentional-tort exclusions in the Safeco policies were rendered ambiguous by the "Severability of Insurance" language found in each policy. The trial court then concluded that Safeco owed coverage on a pro-rata basis with the Chubb policies and set forth the amounts owed under each policy. The trial court granted the motion of Lance and Diane White for summary judgment and denied Safeco's motion. Chubb settled with Lance and Diane White and took their place in the litigation with Safeco.

The Trial Court's Judgment Was Sufficient

{¶7} As an initial matter, Safeco argues that the decisions made by the trial court were insufficient to resolve all the matters presented to it by the declaratory-judgment action. We disagree. The trial court was asked to determine if coverage

was owed to the Whites and the priority of coverage between the Safeco and the Chubb policies. The trial court addressed those issues, declared the rights of the parties, and set forth the amounts owed under each insurance policy. Since the trial court decided all the issues before it, we overrule Safeco's first assignment of error.

The Issue of Coverage

{¶8} In its second assignment of error, Safeco argues that the trial court improperly determined that it owed coverage to Lance and Diane White.¹ To address this issue, we begin by analyzing whether such coverage was precluded as a matter of public policy in Ohio. We conclude that it was not.

Ohio Public Policy – Doe and Automobile Club Ins. Co.

{¶9} Both Safeco and Chubb refer to the Ohio Supreme Court's decision in *Doe v. Schaffer*.² In *Doe*, the court held that "Ohio public policy permits a party to obtain liability insurance coverage for negligence related to sexual molestation when that party had not committed the act of sexual molestation."³ While some courts have limited the application of this holding to cases that actually involve sexual molestation,⁴ we conclude that such a distinction is unjustified.

{¶10} One month after the *Doe* decision was released, the Ohio Supreme Court released the decision in *Automobile Club Ins. Co. v. Mills*.⁵ Neither party has referred to *Automobile Club* in their briefs. In that case, the insured mother sought coverage for a

¹ The trial court concluded that issues of fact remained regarding coverage for Benjamin White. While this decision is curious, since he pleaded guilty to attempted murder and felonious assault and since Benjamin White conceded in his answer that he was not seeking coverage under the Safeco policies, that aspect of the trial court's decision has not been appealed and is not before us.

² 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

³ *Id.* at syllabus.

⁴ See, e.g., *Torres v. Gentry*, 5th Dist. No. 06 COA 038, 2007-Ohio-4781, ¶161 ("We find the decision of the Supreme Court in *Doe v. Schaffer* * * * to be inapplicable to the present case in that such case was limited to cases involving incidents of sexual molestation and insurance coverage for a non-molester's negligence.").

⁵ 90 Ohio St.3d 574, 2001-Ohio-21, 740 N.E.2d 284.

claim of negligent supervision and failure to warn after her son had killed his fiancé.⁶ The son and his fiancé both lived in the mother's residence, and the son was an insured under the mother's homeowners' policy.⁷ The mother sought a defense and indemnification from the insurance company that had issued the homeowners' policy.⁸ The court of appeals held that the mother's negligent conduct did not fall within the definition of an "occurrence" under the policy.⁹ The court concluded that "the 'occurrence' here is Donald's act of murder," and that Ohio public policy prohibited the issuance of insurance to provide liability coverage to indemnify for damages flowing from intentional conduct or liability coverage resulting therefrom.¹⁰

{¶11} In a one-sentence decision, the Ohio Supreme Court reversed that decision on the authority of *Doe*.¹¹ Reading this sentence in the context of the appellate decision that preceded it, we cannot conclude that the *Doe* public-policy holding is limited to cases involving sexual molestation. We hold that Ohio public policy permits a party to obtain liability insurance coverage for negligence related to intentional conduct when that party does not commit the intentional act.

{¶12} But holding that such coverage is *permitted* by public policy is not the same as holding that coverage is *available* under the policies in this case. We agree with Safeco that *Doe* (and *Automobile Club*) leave room for such coverage to be excluded by the express terms of the policies.¹² The question becomes whether the policies issued by Safeco did so.

⁶ *Automobile Club Ins. Co. v. Mills* (July 10, 2000), 12th Dist. Nos. CA-99-07-064 and CA-99-07-070.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Automobile Club Ins. Co. v. Mills*, 90 Ohio St.3d 574, 2001-Ohio-21, 740 N.E.2d 284.

¹² See, e.g., *Lehrner v. Safeco Insurance/American States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, 872 N.E.2d 295, ¶46 ("Shaffer addressed public policy, not policy language. The fact

The Policy Language

{¶13} The Safeco homeowners' policy named Lance and Diane White as insureds. The term "insured" also included relatives if they were residents of the household. The policy provided liability coverage for a claim or suit against "an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies * * *." An "occurrence" was defined as "an accident * * * which results in bodily injury * * *." The policy excluded coverage for bodily injury "which is expected or intended by an insured or which is the reasonably foreseeable result of an act or omission intended by an insured * * *." Additionally, bodily injury "arising out of an illegal act committed by or at the direction of an insured" was also excluded.

{¶14} The Safeco umbrella policy named Lance White as an insured. The term "insured" also included any member of the named insured's household. The policy similarly provided liability coverage for an "occurrence." "Occurrence" was similarly defined—"an accident * * * which results, during the coverage period, in bodily injury * * *." The policy carried several exclusions, including "any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured." The policy also excluded from coverage "any act or damage which is expected or intended by any insured, or which is the foreseeable result of an act or omission intended by any insured * * *."

{¶15} Both policies contained the following "Severability of Insurance" condition: "This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence."

that public policy allows the purchase of insurance for negligence related to sexual molestation says nothing about whether the Utica policy exclusion applies in this case.").

***Occurrence Means Accident – But What
Is An Accident?***

{¶16} Safeco first argues that the attack on Casey Hilmer was not an “occurrence” under its policies. An “occurrence” was defined in both policies as an “accident.” Safeco contends that the attack was not an accident.

{¶17} At least one appellate district has agreed with Safeco’s position. In *Torres v. Gentry*, the Fifth Appellate District held that “negligent supervision and negligent entrustment are not ‘occurrences’ separate and apart from the underlying intentional tort but are derivative claims arising out of the intentional acts.”¹³

{¶18} But other districts have renounced this approach. In the most recent decision on the topic, the Sixth Appellate District held that coverage was owed.¹⁴ In that case, a wife was sued for negligence after her husband had molested a neighbor’s child. The wife sought coverage under the couple’s homeowners’ policy. The court held that “a common meaning of ‘accident’ (‘an unfortunate event resulting from carelessness or ignorance’) places the allegation of negligence within the policy meaning of an ‘occurrence.’”¹⁵ The Eleventh Appellate District has reached the same conclusion.¹⁶

{¶19} We agree with the Sixth and Eleventh Appellate Districts. The problem with the derivative analysis embraced by the Fifth Appellate District is that it runs counter to the rationale of the Ohio Supreme Court in *Doe*. The *Doe* court

¹³ *Torres v. Gentry*, 5th Dist. No. 06 COA 038, 2007-Ohio-4781, ¶61, citing *Offhaus v. Guthrie* (2000), 140 Ohio App.3d 90, 746 N.E.2d 685, discretionary appeal not allowed (2001), 91 Ohio St.3d 1478, 744 N.E.2d 775.

¹⁴ *Allstate Ins. Co. v. Dolman*, 6th Dist. No. L-07-1113, 2007-Ohio-6361.

¹⁵ *Id.* at ¶46, citing *Owners Ins. Co. v. Reyes* (Sept. 30, 1999), 6th Dist. No. OT-99-017 (internal citations omitted).

¹⁶ See *Havel v. Chapek*, 11th Dist. No. 2004-G-2609, 2006-Ohio-7014, ¶33, (“This court, consistently with other courts, has defined ‘accident’ as ‘an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence.’”), citing *Chepke v. Lutheran Brotherhood* (1995), 103 Ohio App.3d 508, 511, 660 N.E.2d 477, and *Randolf v. Grange Mut. Cas. Co.* (1979), 57 Ohio St.2d 25, 29, 385 N.E.2d 1305 (“the word ‘occurrence,’ defined as an ‘accident,’ was intended to mean just that—an unexpected, unforeseeable event”).

stated that “the intentions of the molester are immaterial to determining whether the allegedly negligent party has coverage. * * * [T]he critical issue is the nature of the intent—inferred or otherwise—of the party seeking coverage.”¹⁷ Therefore, we conclude that when an insurance policy defines an “occurrence” as an “accident,” that definition will include allegations of negligence even when the negligence relates to the failure to prevent intentional conduct.

Severability-of-Insurance Clause Creates Ambiguity

{¶20} Having concluded that the negligence of Lance and Diane White constituted an “occurrence” under the Safeco policies, we must now determine if coverage was otherwise excluded by the terms of the policies. We conclude that it was not.

{¶21} Safeco’s homeowners’ policy excluded bodily injury “which is expected or intended by an insured * * *” and bodily injury “arising out of an illegal act committed by or at the direction of an insured.” The umbrella policy excluded “any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured” and “any act or damage which is expected or intended by any insured, or which is the foreseeable result of an act or omission intended by any insured * * *.” Each policy also contained a condition that “[t]his insurance applies separately to each insured.” We agree with Chubb that, at the very least, this language created an ambiguity when read in conjunction with the foregoing exclusions.

¹⁷ *Doe*, 90 Ohio St.3d at 393, 394, 2000-Ohio-186, 738 N.E.2d 1243, citing *Preferred Mut. Ins. Co. v. Thompson*, 23 Ohio St.3d 78, 81, 491 N.E.2d 688, and *Transamerica Ins. Group v. Meere* (1984), 143 Ariz. 351, 356, 694 P.2d 181.

{¶22} In *Wagner v. Midwestern Indemn. Co.*,¹⁸ the court held that in “determining whether the parties contemplated joint or several coverage, the terms of the contract are to be considered, and where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.”¹⁹

{¶23} In *Havel v. Chapek*, the Eleventh Appellate District held that coverage was still afforded for the negligence of an insured—even when the injury was caused by the intentional conduct of another insured. In that case, the parents were sued after their son had killed his girlfriend. The parents sought coverage from their homeowners’ policy, which contained exclusions that were similar to those at issue in this case.²⁰

{¶24} The *Havel* court concluded that applying the intentional-conduct exclusions to a negligent insured “is contrary to the Ohio Supreme Court’s holding under *Doe* and is inconsistent with the Supreme Court’s holding in *Automobile Club Ins. Co. v. Mills* * * *. *Doe* distinguished its analysis as to any intentional act of an insured, but permitted appellants to obtain coverage for negligence related to the sexual molestation when they did not commit the molestation. * * * Each insured’s individual coverage under the Grange policy must be applied separately to each insured. The physical abuse and bodily injury exclusion in question only applies to an insured who actually commits an intentional act—in this case, Jeremy, who committed murder. The exclusion does not apply to potentially innocent negligent insureds, such as Jeremy’s parents, who may have negligently contributed to the injury through failure to warn or protect. Pursuant to the holdings in *Doe* and *Automobile Club*, Jeremy’s parents have coverage and Grange has an absolute duty

¹⁸ 83 Ohio St.3d 287, 1998-Ohio-111, 699 N.E.2d 507.

¹⁹ *Id.* at 291 (internal quotations and citations omitted).

²⁰ *Havel* at ¶35.

to defend under the policy.”²¹ The court rejected the position of the dissenting judge, noting that the “dissent would deny coverage for the negligent acts of an innocent insured, due to the intentional, criminal act of another insured. In effect, the dissent would deny coverage for the very purpose for which insurance is purchased, i.e., negligence resulting in bodily injury.”²²

{¶25} We agree with this analysis. When confronted with an issue of contractual interpretation, a court must give effect to the intent of the parties to the agreement.²³ The *Doe* court established that, in the context of negligence tied to sexual molestation, “[w]hile it is indeed true that the average person would likely find liability coverage for the intentional tort of sexual molestation loathsome, the same rationale cannot extend to negligence. The average person would no doubt find such coverage to be the purpose for which he obtained insurance.”²⁴

{¶26} When determining coverage, we examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy.²⁵ When reading the severability condition in conjunction with the exclusions in the Safeco policies, we hold that the exclusions are ambiguous. Construing that ambiguity in favor of the insureds, in light of the policyholder expectation recognized in *Doe*, we hold that the exclusions for intentional conduct do not apply to insureds who have been merely negligent, when the policies contain language indicating that coverage applies “separately to each insured.”

²¹ *Id.* (citations omitted).

²² *Id.* at ¶37.

²³ *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 1999-Ohio-162, 714 N.E.2d 898, citing *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus.

²⁴ *Doe*, 90 Ohio St.3d at 395, 2000-Ohio-186, 738 N.E.2d 1243.

²⁵ *Westfield* at ¶11, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus.

{¶27} We acknowledge the admonition of the Ohio Supreme Court in *Westfield v. Galatis* that this “rule [of construction] will not be applied so as to provide an unreasonable interpretation of the words of the policy.”²⁶ But we conclude that our interpretation is reasonable in light of *Doe*. For these reasons, we overrule Safeco’s second assignment of error.

Conflicts Sua Sponte Recognized

{¶28} Having examined the decisions in our sister districts, we find that our decision in this case is in conflict and, on our own motion, certify the conflicts to the Ohio Supreme Court for its consideration.

{¶29} First, our holding that the negligence of the insureds constitutes an “occurrence” conflicts with the holding in *Torres v. Gentry* from the Fifth Appellate District, which has held that “negligent supervision and negligent entrustment are not ‘occurrences’ separate and apart from the underlying intentional tort but are derivative claims arising out of the intentional acts.”²⁷ We therefore certify the following question for review: “When an insurance policy defines an ‘occurrence’ as an ‘accident’ that results in bodily injury, does an ‘occurrence’ include injuries that result from an intentional act when the insureds seeking coverage are claimed to have been negligent in relation to that intentional act?”

{¶30} We also conclude that our holding regarding the effect of the “Severability of Insurance” language conflicts with the holding in *United Ohio Ins. Co. v. Metzger*,²⁸ which held that the existence of a severability provision did not

²⁶ *Westfield* at ¶14, citing *Morfoot v. Stake* (1963), 174 Ohio St. 506, 190 N.E.2d 573, paragraph one of the syllabus.

²⁷ *Torres v. Gentry*, 5th Dist. No. 06 COA 038, 2007-Ohio-4781, ¶61, citing *Offhaus v. Guthrie* (2000), 140 Ohio App.3d 90, 746 N.E.2d 685, discretionary appeal not allowed (2001), 91 Ohio St.3d 1478, 744 N.E.2d 775.

²⁸ (Feb. 8, 1999), 3rd Dist. No. 12-98-1; see, also, *Lehrner v. Safeco Insurance/American States Ins. Co.*, 171 Ohio App. 3d 570, 2007-Ohio-795, 872 N.E.2d 295, ¶53 (“The separation-of-insureds

change the analysis or create an ambiguity with respect to enforcement of exclusionary language referring to “an insured.”²⁹ We therefore certify the following question for review: “When an insurance policy excludes an injury ‘which is expected or intended by [an or any] insured * * *’; injuries ‘arising out of an illegal act committed by or at the direction of an insured’; or ‘any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured,’ do the exclusions become ambiguous when read in conjunction with a ‘Severability of Insurance’ condition, in light of the announced expectation by policyholders that their negligence will be covered?”

Conclusion

{¶31} For the reasons given above, the judgment of the trial court is affirmed.

Judgment affirmed.

HENDON, J., concurs.

PAINTER, P.J., concurs separately.

PAINTER, P.J., concurring separately.

{¶32} I concur with every word of Judge Dinkelacker’s excellent analysis. When different appellate districts can come to different conclusions about the meaning of language, then that fact alone is good enough evidence that the language is ambiguous. If lawyers and judges must puzzle over meaning, then of course the meaning is unclear.

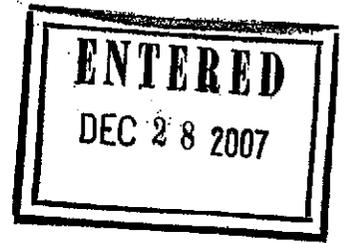
Please Note:

The court has recorded its own entry on the date of the release of this opinion.

clause makes the coverage actually provided by the policy applicable to all insureds equally. It does not purport to create coverage where a policy exclusion applies.”).

²⁹ Id.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
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STEVE HILMER, et al., : APPEAL NO. C-070074
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SAFECO INSURANCE COMPANY OF AMERICA, : TRIAL NO. A-0408943
Plaintiff-Appellant, :
vs. :
FEDERAL INSURANCE COMPANY :
and :
PACIFIC INDEMNITY COMPANY, :
Defendants-Appellees, :
and :
BENJAMIN WHITE, et al., :
Defendants. :

JUDGMENT ENTRY.



D76473947

This cause was heard upon the appeal, the record, the briefs, and arguments.
The judgment of the trial court is affirmed and conflict certified for the reasons set forth in the Decision filed this date.
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.
The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 28, 2007 per Order of the Court.

By: M. J. Paul
Presiding Judge