
In the Ohio Supreme Court

SAFECO INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellant,

v.

FEDERAL INSURANCE COMPANY, et al.,

Defendants-Appellees.

CLAIMED APPEAL OF RIGHT AND DISCRETIONARY APPEAL FROM THE FIRST APPELLATE
DISTRICT, HAMILTON COUNTY, APP. № C-070074

FILED UNDER SEAL PURSUANT TO COURT ORDER

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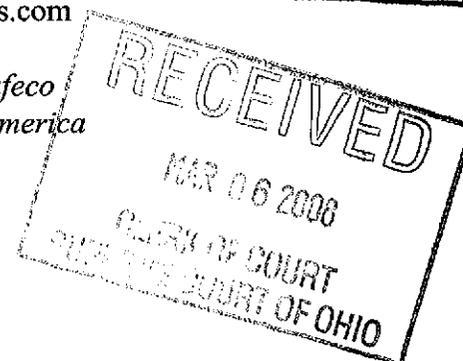
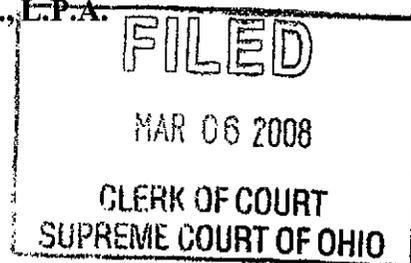


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I. EXPLANATION OF WHY THIS CASE DOES NOT PRESENT A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST OR INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Safeco's policies provide that coverage is afforded separately to each insured--not that the intentional acts or criminal acts of one insured will exclude coverage for all insureds. As this Court observed in *Doe v. Schaffer* (2000), 90 Ohio St.3d 388, "the intentions or expectations of the negligent insured must control the coverage determination, and not the intentions or expectations of the [criminal]." Safeco is essentially asking this Court to accept jurisdiction and abandon its precedent set only 8 years ago. But Safeco does not satisfy, or even address, any of the criteria set forth in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d, to modify or overrule precedent.

Safeco seeks to deny coverage for the negligent acts of its innocent insureds, due to the intentional, criminal acts of another insured. In effect, Safeco would interpret its policies to deny coverage for the very purpose for which insurance is purchased, i.e. negligence resulting in bodily injury. This would thwart the legitimate coverage expectations of insureds in almost 4 1/2 million Ohio households.

Appellant claims that its appeal presents, "three issues critical for the future of insurance coverage in Ohio." In fact, the issues raised by Safeco's appeal have already been answered by recent decisions from this Court or have been correctly resolved the appellate courts based on the particular policy language under consideration. There is no critical issue for review.

Safeco first claims that a conflict exists on the effect of a severability of insurance clause on a policy exclusion for intentional acts. The claimed conflict, in fact, is simply the result of differing policy language. There are now three lines of appellate court authority in Ohio, each perfectly in sync with the holdings of this Court and the varying policy language they interpret:

- ❶ The exclusion applies where "an insured" or "any insured" commits an intentional act, but

the policy also contains a separation of insurance clause providing coverage separately to each insured. In that case, coverage is found based on policy ambiguity. Accord *Buckeye Union Ins. Co. v. Philips* (Aug. 7, 1986), Defiance App. No. 4-84-7, 1986 Ohio App. LEXIS 7809; *Havel v. Chapek*, 11th Dist. No. 2004-G-2609, 2006-Ohio-7014 (“Each insured’s individual coverage under the Grange policy must be applied separately to each insured.”). That is this case.

② The exclusion applies where “an insured” or “any insured” commits an intentional act, but the policy contains no separation of insurance clause. In that situation, coverage is excluded for all insureds when any one insured commits and intentional act. That is the basis of the Fifth Appellate District’s holding in *Torres v. Gentry*, Ashland App. No. 06 COA 038, 2007-Ohio-4781, at ¶ 60 (holding that coverage was excluded under the “the clear and unambiguous language” of the policy at issue and never mentioning the existence a separation of insurance clause).

③ Whether or not there is a separation of insurance clause, the policy contains an intentional acts exclusion clearly applying to all insureds when any one of them commits an intentional act. Such was the case in *Allstate v. Collister*, Trumbull App. No. 2006-T-0112, 2007-Ohio-5201, ¶ 3, where the policy specifically stated that “[t]he terms and conditions of this policy impose joint obligations on persons defined as an insured person. This means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person.” (Emphasis added.) Accord *Allstate Ins. Co. v. Dolman*, Lucas App. No. L-07-1113, 2007-Ohio-6361 (addressing the same “Joint Obligations” clause as addressed in *Collister*); *Hall v. State Farm Fire & Casualty Co.* (5th Cir. 1991), 937 F.2d 210, 213.

The only outlying decision is *United Ohio Ins. Co. v. Metzger* (Feb. 8, 1999), Putnam App. No. 12-98-1, 1999 Ohio App. LEXIS 920. That decision is almost a decade old, inexplicably purports to follow *Philips* which neatly falls within the first line of authority, never analyzes whether

an ambiguity exists, and is quite simply an early (and possibly incorrect) decision. There is no current conflict presented to this Court and no issue of public or great general interest presented.

Safeco next claims that a conflict exists on the issue of whether negligence claims can be covered “occurrences” when “derivative” of an intentional tort. Safeco argues that the decision of the First Appellate District now conflicts with the *Torres* and *Offhaus*¹ decisions from the Fifth Appellate District. *Torres* reads as follows:

In the case sub judice, the clear and unambiguous language of the Grange policy states that it will not pay for loss or damage arising out of any act committed by or at the direction of any insured with the intent to cause a loss. * * * [T]he loss caused by Grange's insured is simply not covered under the terms of the Grange policy.

Furthermore, this Court has previously 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. * * * We find the decision of the Supreme Court in *Doe v. Shaffer*, 90 Ohio St.3d 288, 2000-Ohio-186, to be inapplicable to the present case in that such case was limited to cases involving incidents of sexual molestations and insurance coverage for a non-molester's negligence.

Id. at ¶¶ 60-62 (emphasis added). The language that presents the supposed “conflict” is, rather, dicta. The *Torres* court's actual decision was based on “the clear and unambiguous language of the Grange policy.” Id. at ¶60. Dicta has no precedential force and, hence, presents no conflict. *Cosgrove v. Williamsburg of Cincinnati Management Co.* (1994), 70 Ohio St. 3d 281, 284 (holding that a “non-essential illustration” “is dicta” and “has no binding effect”).

Further, *Torres* never mentions or analyzes this Court's decision in *Auto Club Ins. Co. v. Mills*, 90 Ohio St.3d 574, 2001-Ohio-21. In *Auto Club*, the insured mother sought coverage for claims of negligent supervision and failure to warn, after her son had murdered his fiance. The son and his fiance both lived in the mother's residence, and the son was an insured under the mother's

¹*Offhaus v. Guthrie* (2000), 140 Ohio App.3d 90.

homeowner's policy. The Court of Appeals, relying on *Cuervo*, held that the mother's negligent conduct did not fall within the definition of an "occurrence" under the policy because it stemmed from the son's intentional conduct. See *Auto Club Ins. Co. v. Mills* (July 10, 2000), 12th Dist. Nos. CA-99-07-064 and CA-99-07-070. In a one sentence opinion, however, this Court reversed that decision on authority of *Doe*. Thus, the *Doe* decision is not limited to cases of sexual molestation. The *Torres* opinion is just simply dead wrong.

The First District Court of Appeals certified that its decision was in conflict with the holding in *Torres* from the Fifth Appellate District. However, the reason for the "conflict" is the failure of the Fifth Appellate District to follow (or, more probably, the failure of the parties to brief) this Court's decision in *Auto Club*. This Court has already answered the question presented by the certified conflict. There is no reason for this Court to answer it again.

Finally, Safeco presents no argument as to why its third proposition of law is of great public or general interest. That omission is telling because Safeco was *denied* summary judgment at the trial court level on that issue and that denial of summary judgment is neither appealable, nor properly before this Court.²

The issues presented in this case lack the first two elements of a conflict: "First, * * * the asserted conflict must be 'upon the same question.' Second, the alleged conflict must be on a rule of law--not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596. In short, the decisions cited by Safeco are easily reconcilable when the actual policy language at issue in each

²Accord *Vaccariello v. Smith & Nephew Richards, Inc.* (2002), 94 Ohio St. 3d 380, 386; *Celebrezze v. Netzley* (1990), 51 Ohio St. 3d 89, 90; *State ex rel. Neer v. Industrial Com.* (1978), 53 Ohio St. 2d 22, 24; *Schlegel v. Gindlesberger*, Holmes App. No. 05 CA 10, 2006-Ohio-6916, ¶20 (holding that "[t]he denial of a motion for summary judgment does not constitute a final appealable order under R.C. 2505.02 and therefore, is not subject to immediate appeal" even with Rule 54(B) certification).

appeal is analyzed. There is no issue presented here that requires this Court's intervention to resolve.

II. STATEMENT OF THE CASE AND FACTS

Appellant Safeco Insurance Company of America (“Safeco”) insured Lance and Diane White under a Homeowner’s policy and a personal Umbrella policy. Pacific Indemnity Company (“Pacific”) insured Lance and Diane White under a Homeowner’s policy. Federal Insurance Company (“Federal”) insured Lance and Diane White under a personal Umbrella policy. Benjamin White was Lance and Diane's 17 year old son. On July 15, 2003 Benjamin dragged 13 year-old Casey Hilmer into the woods and repeatedly stabbed her during an uncontrolled fit of rage. He subsequently pled guilty to the felonies of attempted murder and felonious assault.

On April 29, 2004, Casey Hilmer and her parents (“the Hilmers”) filed a complaint against Lance and Diane White and their adopted son Benjamin White (“The Whites”) (the “Hilmer-White Tort Action”). After the Hilmers’ complaint was filed, Lance and Diane White tendered their defense to Safeco, Pacific, and Federal pursuant to their respective policies of insurance. Pacific assumed the defense of Lance and Diane White under a reservation of rights. Safeco refused to join with Pacific and share in the defense of Lance and Diane White under Safeco’s Homeowner’s policy.

On November 4, 2004, Safeco filed a declaratory judgment action against the Whites, the Hilmers, Federal and Pacific. Safeco sought a declaratory judgment that it provided no coverage as to Benjamin White because his actions were intentional, criminal conduct. Safeco further argued that because Benjamin White’s acts were intentional, his parents, Lance and Diane White, were not afforded coverage – even though the claims presented against Lance and Diane White were for negligence. Safeco also requested a determination of Safeco’s rights and responsibilities with respect to the two policies issued by Pacific and Federal.

The trial court consolidated Safeco’s declaratory judgment action with the Hilmer-White tort

action, and then the matter proceeded to trial. On August 22, 2005, the jury returned a general verdict in favor of the Hilmers in the total amount of \$10 million, including \$3.5 million in punitive damages against Benjamin White. The jury found Lance and Diane White were only negligent. The declaratory judgment action on the issue of coverage remained pending.

Safeco, Federal, and Pacific had filed motions for summary judgment on the issue of coverage prior to trial. Federal and Pacific withdrew their motions as to Lance and Diane White after the jury's finding that they were only negligent. Safeco, however, continued to press its argument that Lance and Diane White's negligence was excluded from coverage because their stepson, Benjamin, had committed an intentional tort.

On March 27, 2006, the trial court rendered its decision on the issue of coverage. The court found that Safeco afforded coverage for Lance and Diane White under both the Safeco Homeowner's policy and the Safeco personal Umbrella policy. In part, the trial court held that:

The exclusions relied upon by Safeco do not specifically address negligent supervision or entrustment claims. The policies mandate that the "insurance applies separately to each insured." Homeowner's policy at p. 15; Umbrella policy at p. 5. The jury found that the Whites acted negligently. When the policy is read as a whole, the Court finds that the exclusions relied upon by Safeco do not apply. At a minimum, an ambiguity arises which must be resolved in favor of the Whites.

The trial court further held that the Safeco Homeowner's policy should pro rate with the Pacific Homeowner's policy by policy limits and that the Safeco Umbrella policy should pro rate with the Federal Umbrella policy by policy limits. The trial court also found that "Safeco was and is obligated to provide a defense for the Whites" in the Hilmer-White tort action. Finally, the trial court found that a genuine issue of material fact exists regarding whether Benjamin White's mental state was "intentional" so as to exclude coverage due to Benjamin's mental illness.

The Hilmers, the Whites, Federal, and Pacific settled the case pursuant to a Confidential

Settlement Agreement which Safeco agreed was reasonable. Nevertheless, Safeco refused to participate in the settlement. Federal and Pacific (assignees of the Whites' claims) then moved for the entry of a final monetary judgment against Safeco. On January 17, 2007, the trial court entered judgment against Safeco. The trial court's Order and Judgment Entry incorporated its previous coverage rulings and entered a monetary judgment against Safeco representing Safeco's proportionate share of the settlement and its share of the costs of defending the Whites. The trial court included Rule 54(B) language thereby making the coverage determination a final appealable order despite the unresolved issue of coverage for Benjamin White. Safeco appealed.

On December 28, 2007, the Court of Appeals issued its Opinion affirming the decision of the trial court. The First District followed well-established Ohio Supreme Court precedent in observing 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." Opinion at p. 5, citing *Doe v. Schaffer*, 90 Ohio St.3d 388, 2000-Ohio-186; *Auto Club Ins. Co. v. Mills*, 90 Ohio St.3d 574, 2001-Ohio-21. The court then followed *Doe* and appellate court decisions from the Sixth and Eleventh Appellate Districts in holding that, "[w]hen 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." Opinion at p. 8 citing *Allstate Ins. Co., v. Dolman*, 6th Dist. No. L-07-1113, 2007-Ohio-6361; *Havel v. Chapek*, 11th Dist. No. 2004-G-2609, 2006-Ohio-7014. Finally, the court applied *Wagner v. Midwestern Indemn. Co.*, 83 Ohio St.3d 287, 1998-Ohio-111, in determining that the presence of a severability-of-insurance clause within both Safeco policies rendered Safeco's exclusions ambiguous. The court reasoned as follows:

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 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.”

Opinion at p. 10. The Court of Appeals further reasoned that, “[t]he average person would no doubt find such coverage to be the purpose for which he obtained insurance.” Citing *Doe* *supra* at 395.

In its Opinion and Judgment Entry, the First Appellate District, *sua sponte*, certified conflicts on two issues. On January 7, 2008, Safeco filed a Motion to Certify a different (single) conflict. Appellees opposed because they believed Safeco was improperly attempting to raise a new issue by way of an certified conflict which had not been raised or briefed on appeal. On January 24, 2008, the Court of Appeals denied Safeco's Motion to Certify stating that:

“In its judgment entry and opinion [of December 28, 2007], the Court sua sponte certified a conflict to the Ohio Supreme Court.” (Emphasis added.)

Safeco attempted to file its Notice of the Court of Appeals' certification with this Court on January 31, 2008 but that filing was rejected as untimely.

On February 1, 2008 Safeco filed a Motion for Reconsideration of the January 24, 2008 Order denying Safeco's motion to certify a conflict. Safeco asked the Court of Appeals to re-certify a conflict on the *exact same two issues previously certified on December 28, 2007*. Safeco stated no legitimate basis for reconsideration. Rather, Safeco asked the Court of Appeals to issue a *second* order certifying the *same* issues to enable Safeco to get around the 30 day jurisdictional requirement set forth in S.Ct. Practice Rule IV, Section 1.

Appellees filed their Brief in Opposition to Safeco's Motion for Reconsideration on February 8, 2008. Appellees asserted that the Supreme Court no longer has jurisdiction over the conflict certified on December 28, 2007. For the same reason, appellees filed in this Court a Motion a Strike Appellant's “Notice of Pending Application for Reconsideration and Motion to Certify Conflict.”

Meanwhile, on February 13, 2008 a *single* judge from the First Appellate District granted Safeco's Motion for Reconsideration and certified the *same* two issues originally certified on December 28, 2007. On February 21, 2008 Safeco filed with this Court the February 13, 2008 Order granting its Motion for Reconsideration as the Order certifying a conflict. That certified conflict appeal was docketed as S.Ct. No. 2008-0403. Appellees have now moved to dismiss that separate appeal for want of jurisdiction.

III. ARGUMENT REGARDING THE PROPOSITIONS OF LAW

A. **Rebuttal to Appellants Proposition of Law No. 1.: An Insurance Policy Which "Applies Separately to Each Insured" Affords Coverage to Negligent Insureds Even Though Another Insured Commits an Intentional or Criminal Act.**

The jury found that Lance and Diane White were negligent and that their negligence was a proximate cause of bodily injury to Casey Hilmer. Nevertheless, Safeco argues that its insureds are not entitled to liability coverage based on the "Intentional Acts" exclusion and the "Illegal or Criminal Acts" exclusion in Safeco's Homeowner's policy and Umbrella policy.

Safeco claims that because coverage is excluded for intentional or criminal acts of "an insured" or "any insured," (i.e. Ben White) even negligent insureds (i.e. Lance and Diane White) are not entitled to coverage. Safeco ignores the "Severability of Insurance" condition in the homeowner's and umbrella policies which provides as follows:

2. Severability of Insurance. This insurance applies separately to each **insured**. This condition will not increase our limit of liability for any one **occurrence**.

In *Wagner v. Midwestern Indem. Co.* (1998), 83 Ohio St. 3d 287, 291, this Court recognized that "modern cases" "have adopted an approach based on contract principles to determine whether the parties intended joint or several coverage." Under the Severability of Insurance condition, it is

as if the policy was issued separately to each insured.³

Thus, the intentional/criminal acts exclusions apply separately to each insured, depending upon *that* insured's intent. Exclusions are construed narrowly: "an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded."⁴ Further, "[a] defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it."⁵ Insurance policies must be examined in their entirety.⁶ A proper reading of an insurance policy generally cannot be accomplished by relying on one provision to the exclusion of others.⁷ Thus, by reading the intentional/criminal acts exclusions together with the Severability of Insurance condition, their meaning is clear: coverage is excluded for *only* the insured who committed the intentional tort. No insured would expect coverage for multiple insureds to be less comprehensive than it would be for a single insured. In fact, under Safeco's flawed reasoning, more coverage would be afforded Lance and Diane White if Benjamin White did not qualify as an insured.

³ Accord *Sacharko v. Center Equities Limited Partnership* (1984), 2 Conn. App. 439, 443-44; *Admiral Ins. Co. v. Trident NGL, Inc.* (Tex. App. 1999), 988 S.W.2d 451, 455-456; *State Farm Fire & Cas. Ins. Co. v. Keegan* (C.A. 5, 2000), 209 F.3d 767, 769; *Western Heritage Ins. Co. v. Magic Years Learning Ctrs. & Child Care* (C.A. 5, 1995), 45 F.3d 85, 90; *Commercial Union Ins. Co. v. State Farm Fire & Casualty Co.* (D. Colo. 1982), 546 F. Supp. 543, 545; *Premier Ins. Co. v. Adams* (Fla. App. 1994), 632 So. 2d 1054, 1057; *United States Fidelity & Guaranty Co. v. Globe Indem. Co.* (1975), 60 Ill. 2d 295, 299; *American Nat'l Fire Ins. Co. v. Estate of Fournelle* (Minn. 1991), 472 N.W.2d 292, 294.

⁴*Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St. 3d 512, 519, quoting *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St. 3d 657, 665.

⁵*Continental Ins. Co. v. Louis Marx & Co.* (1980), 64 Ohio St. 2d 399, 401.

⁶*Zanco v. Michigan Mut. Ins. Co.* (1984), 11 Ohio St. 3d 114, 115-16; *Hartong v. Makary* (1995), 106 Ohio App. 3d 145, 149.

⁷*Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v. Shane & Shane Co., L.P.A.* (1992), 78 Ohio App. 3d 765, 769; *Wurth v. Ideal Mut. Ins. Co.* (1987), 34 Ohio App. 3d 325, 329; *Hartong v. Makary* (1995), 106 Ohio App. 3d 145, 149.

The Court of Appeals for the Sixth Circuit passed on this issue in *Ill. Union Ins. Co. v. Shefchuk* (C.A. 6, June 25, 2002), Nos. 02-3698/3767/3714, 108 Fed. Appx. 294, 304, 2002 U.S. App. LEXIS 28174, and, applying Ohio law, held that:

In some cases, courts considering the meaning of "an insured" in insurance contract exclusions have held that the exclusions apply if any co-insured under the contract engages in the excluded conduct. In this case, however, the issue is complicated by the policy's severability clause. . . . As the Wisconsin Court of Appeals wrote in *Nemetz*, 135 Wis. 2d 245, 400 N.W.2d 33, 38 (Wis. Ct. App. 1986): "We conclude that this contract is ambiguous because the severability clause creates a reasonable expectation that each insured's interests are separately covered, while the exclusion clause attempts to exclude coverage for both caused by the act of only one." 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.

The Fifth Circuit, the Tenth Circuit (applying Utah law), the Florida courts, the Minnesota courts, the Wisconsin courts, the Kansas courts, the Maryland courts, the Mississippi courts, the Texas courts, the Illinois courts, the New York courts, and the Tennessee courts, have all held the same.⁸

In its seminal treatment of the issue in *Worcester Mut. Ins. Co. v. Marnell* (1986), 398 Mass. 240, 244-5, the Massachusetts Supreme Court explained its well-reasoned opinion:

In this case, the severability of insurance clause provides in relevant part that the insurance provided by the policy "applies separately to each insured." [The insured] correctly states that this clause requires that each insured be treated as having a separate insurance policy. Thus, the term "insured" as used in the motor vehicle

⁸Accord *State Farm Fire & Cas. Ins. Co. v. Keegan* (5th Cir. 2000), 209 F.3d 767, 771; *West Am. Ins. Co. v. AV&S* (10th Cir. 1998), 145 F.3d 1224, 1229; *Premier Ins. Co. v. Adams* (Fla. App. 1994), 632 So. 2d 1054, 1057; *American Nat'l Fire Ins. Co. v. Estate of Fournelle* (Minn. 1991), 472 N.W.2d 292, 294; *Northwestern Nat. Ins. Co. v. Nemetz* (1986), 135 Wis. 2d 245, 256; *Catholic Diocese v. Raymer* (1992), 251 Kan. 689, 699; *St. Paul Fire & Marine Insurance v. Molloy* (1981), 291 Md. 139, 150; *Litz v. State Farm Fire & Cas. Co.* (1997), 346 Md. 217, 227; *McFarland v. Utica Fire Ins. Co.* (D. Miss. 1992), 814 F. Supp. 518, 526; *Walker v. Lumbermens Mut. Casualty Co.* (Tex. App. 1973), 491 S.W.2d 696, 699; *Ill. Farmers Ins. Co. v. Kure* (2006), 364 Ill. App. 3d 395, 403; *Tennessee Farmers Mut. Ins. Co. v. Evans* (May 18, 1990), Court of Appeals of Tennessee, Western Section, at Jackson, No. 1, 1990 Tenn. App. LEXIS 356; *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC* (S.D.N.Y. Apr. 30, 2003), Case. No. 02 Civ. 7379(NRB), 2003 U.S. Dist. LEXIS 7266.

exclusion refers only to the person claiming coverage under the policy. * * * While our interpretation of the policy makes the word "any" in the motor vehicle exclusion superfluous, the construction urged by Worcester Mutual would render the entire severability of insurance clause meaningless.

In fact, the term "an insured" or "any insured" is itself ambiguous, even without reference to the severability clause. "The wording ['any insured' in an exclusion clause] could be interpreted either to mean only singularly 'any one of the insureds' or could apply collectively to the whole group of insureds." *Transport Indem. Co. v. Wyatt* (Ala. 1982), 417 So. 2d 568, 571. In *Brumley v. Lee* (1998), 265 Kan. 810, 815, Safeco made the same argument it does here to the Kansas Supreme Court. The Court's well-reasoned rationale for rejecting Safeco's argument was as follows:

The words "an" and "any" are inherently indefinite and ambiguous. The two words can and often do have the same meaning. The Random House Dictionary of the English Language 68 (1973) gives many definitions for the word "any." The first definition listed is "one, a, an, or some." Correspondingly, the Random House Dictionary includes the word "any" among its definitions for the word "a" or "an." Hence, the words may have the same meaning. Thus, the word "any" is not materially different from the word "a" or "an," and, contrary to the district court's ruling, Safeco's use of "any" instead of "an" in its policy does not eliminate the ambiguity created by the policy's severability clause. With the severability clause each insured, in effect, has his or her own insurance policy. When looked at in that light, the ambiguity is easier to see.

The ambiguity in Safeco's policies can, and has been, eliminated by other insurers through the use of precise and clear language. The Fifth Circuit noted the existence of such language in *Hall v. State Farm Fire & Casualty Co.* (5th Cir. 1991), 937 F.2d 210, 213. The court quoted the language as follows: "14. Intentional Acts. If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss." (Emphasis added.) The language used in the Safeco policies is both imprecise and ambiguous. All that is clear is that coverage is excluded for "any insured" or "an insured" who actually commits an intentional

or criminal act.

Safeco cites to a New Jersey appellate court decision, *Argent v. Brady* (2006), 386 N.J. Super 343, 353, 901A.2d 419 for the proposition that, “[t]he majority of courts hold . . . that the existence of a severability clause does not affect a clearly worded exclusion such as that existing in the present case.” (Appellant’s Brief at 11). Appellant failed to mention the emphasized language in its brief. Safeco should have read the *Argent* case more carefully. The policy at issue in *Argent* provided that personal liability coverage does not apply to bodily injury, “with respect to all insureds, which is expected or intended by one or more insureds. . . .” Thus, the policy reviewed by the court in *Argent* has the clear policy language which Safeco’s policies are lacking. Safeco’s appeal in the case at bar simply concerns its failure to draft clear and unambiguous policy language. This hardly presents a case of public or great general interest.

B. Rebuttal to Appellant’s Proposition of Law No. 2.: The Determination of Whether an Act Is Intentional Is Viewed from the Standpoint of Each Insured Seeking Coverage.

Safeco argues that the Court of Appeals incorrectly determined that the negligent supervision and negligent entrustment claims against Lance and Diane White constituted a separate occurrence distinct from the underlying intentional tort committed by Ben White. (Appellant’s Brief at 14). In fact, the Court of Appeals correctly held 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.” (Opinion at page 8). This means that Safeco’s policy provides liability coverage for the negligent acts of its insured – the purpose for which insurance is purchased (i.e. negligence resulting in a bodily injury).

In arriving at its conclusion, the Court of Appeals relied upon binding Ohio Supreme Court precedent. See *Doe*, supra and *Auto Club*, supra. Appellant relies upon case law which has been

either modified or overruled by this Court in *Doe*.

In *Doe v. Shaffer* (2000), 90 Ohio St. 3d 388, 394, this Court expressly found that negligent supervision claims are covered “occurrences” even if they result in an intentional act by another insured: “A contrary interpretation that refuses to distinguish between the abuser's intentional conduct and the insured's alleged negligence would impermissibly ignore the plain language of an insurance policy that excludes from coverage bodily injury that was expected or intended from the standpoint of the insured.” This Court “decline[d] to adhere to that portion of *Cuervo* that precludes insurance coverage for a nonmolester’s negligence related to sexual molestation.” *Id.* at 393. The *Doe* court further stated that:

While 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.

Safeco makes a half-hearted argument based on the now repudiated decisions of *Gearing*, *Cuervo*, and *Westfield*⁹ that somehow because the negligent acts of Lance and Diane White allowed the intentional misconduct of Benjamin White to occur, there was no “occurrence.” Appellant’s reliance upon discredited and overruled case law reflects the weakness of its position.

In *Cuervo*, this Court held that the negligence claim against a father was not covered because that claim “flow[ed] from [the son's] intentional acts[.]” This is precisely the rationale which Safeco asks this Court to adopt. In *Doe*, however, this Court specifically rejected that rationale holding that “the intentions or expectations of the negligent insured must control the coverage determination, and not the intentions or expectations of the [intentional, criminal actor].” *Doe*, 90 Ohio St. 3d at 393-94. Further, in *Auto Club*, this Court made clear that *Doe* is not limited to cases of sexual

⁹*Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34; *Cuervo v. Cincinnati Ins. Co.* (1996), 76 Ohio St. 3d 41; and *Westfield Cos. v. Kette* (1996), 77 Ohio St.3d 154.

molestation. Thus, Safeco cannot impute Benjamin's intentional conduct on his parents to exclude coverage for their negligence. This Court has already addressed and rejected Safeco's second proposition of law. Safeco presents no justification for this Court to revisit the issue.

C. Rebuttal to Appellant's Third Proposition of Law: Where a trial court denies a motion for summary judgment, finding there to be genuine issues of material fact, an appellate court has no jurisdiction to review the decision on appeal.

The trial court found a genuine issue of material fact as to Benjamin White's mental state which precluded the entry of summary judgment without an evidentiary hearing (which has not yet occurred). The trial court entered final judgment, with Rule 54(B) certification, against Safeco on the issue of coverage for Lance and Diane White. It is well settled that this Court is without jurisdiction to pass on the denial of the motion for summary judgment. See p. 4, fn. 2, *infra*.

IV. CONCLUSION

For the foregoing reasons, this case does not present any issue of public or great general interest. Accordingly, Appellees Pacific and Federal respectfully submit that this Court should decline jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

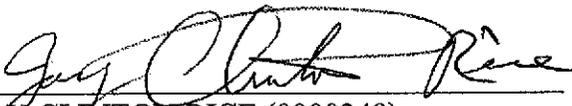
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