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Nos. 2008-0304 & 2008-0403

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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STATEMENT OF FACTS[1]

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 and Federal Insurance Company ("Federal") insured Lance and Diane White under a personal Umbrella policy (jointly "Chubb"). 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.[2] The Hilmers' complaint alleged only intentional conduct as to Benjamin White, both negligent and intentional conduct as to his parents, Lance and Diane White, and sought punitive damages against both Benjamin and his parents.[3] 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

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[1] Since this appeal involves consolidated cases which have individual transcripts of docket entries, T.d. references relative to *Hilmer v. White*, Hamilton C.P. No. A0403452 will be proceeded by "H-W" and T.d. references relative to the declaratory judgment action captioned *Safeco Ins. Co. of Am. v. White*, Hamilton C.P No. A0408943 will be proceeded by "DJ."

[2] Hamilton C.P. No. A0403452.

[3] Complaint, H-W, T.d. 2, Supp. 1-7.

Hilmers, Federal, and Pacific.[4] 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 included claims 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.[5] 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.[6] The jury found Lance and Diane White were only negligent.[7] The declaratory judgment action on the issue of coverage remained pending.[8]

Safeco, Federal, and Pacific had filed motions for summary judgment on the issue of coverage prior to trial.[9] Federal and Pacific, however, immediately withdrew their motion as to Lance and Diane White after the jury's finding that they were only negligent and not liable for punitive damages.[10] Safeco, however, continued to press its argument that Lance and Diane White's

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[4] Complaint, DJ, T.d. 2, Supp. 8-14; Hamilton C.P. No. A0408943.

[5] 7/29/05 Order, H-W, T.d. 188; 9/20/05 Order, DJ, T.d. 47, Supp. 153.

[6] General Verdict, H-W, T.d. 241, Supp. 156-62.

[7] Id. Supp. 158-9.

[8] 9/01/05 Agreed Order, H-W, T.d. 245.

[9] Safeco Motion for Summary Judgment, DJ, T.d. 37, Supp. 90-125; Federal & Pacific Joint Motion for Summary Judgment, DJ, T.d. 43, Supp. 142-52.

[10] Notice of Withdrawal, DJ, T.d. 45, Supp. 163-65.

negligence was excluded from coverage because their adopted son, Benjamin, had committed an intentional tort.[11]

On March 27, 2006, the trial court rendered its decision on the issue of coverage.[12] 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 [Lance and Diane White][13] 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 [Lance and Diane White].

(Appx. at A 17.) 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

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[11] On appeal, Safeco conceded that it provided coverage to Lance and Diane White for "Statutorily Imposed Vicarious Parental Liability" based on the actions of Benjamin White. (Safeco's Appellant's Brief in Hamilton App. No. C-070074, at p. 33, fn. 58, Supp. 453.) R.C. 3109.10 provides for strict vicarious parental liability for assault regardless of negligence or intent. Therefore, this additional coverage is irrelevant to the interpretation of the intentional and criminal acts exclusions at issue in the certified conflicts. Nonetheless, the existence of coverage does have relevance. It triggered Safeco's duty to defend Lance and Diane White. See, e.g., *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St. 3d 177, syllabus ("Where the insurer's duty to defend is not apparent from the pleadings in the action against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim.").

[12] Entry, H-W, T.d. 337, Supp. 292-94, Appx. A 16-19. Safeco discusses the two prior appeals from this Order which were dismissed for want of a final, appealable order. (Safeco's Merit Brief at 11.) Neither of these appeals have any relevance here. Chubb appealed only to protect its interests *after* Safeco appealed. Chubb indicated on its docketing statement that the order was not final and immediately sought dismissal of both appeals which the First Appellate District properly granted.

[13] The trial court referred to Lance and Diane White jointly as "the Whites" and Benjamin individually, independent of his parents.

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 [Lance and Diane White]" in the Hilmer-White Tort Action. Finally, the trial court found that a genuine issue of material fact regarding whether Benjamin White's mental state was "intentional" due to Benjamin's mental illness. Accordingly, the trial court did not determine whether coverage was afforded to Benjamin and indicated intent to set the matter for an evidentiary hearing pursuant to this Court's holding in *Nationwide Ins. Co. v. Estate of Kollstedt* (1995), 71 Ohio St. 3d 624, syllabus.

After the coverage issues as to Lance and Diane White had been ruled upon, the Hilmers, the Whites (including Benjamin), Federal, and Pacific settled the case pursuant to a Confidential Settlement Agreement.[14] Safeco refused to participate in the settlement. Federal and Pacific (assignees of Lance and Diane Whites' claims) then moved for the entry of a final monetary judgment against Safeco.[15] In response, Safeco agreed that the settlement amount was reasonable but challenged the reasonableness of the defense costs, fees, and expenses incurred relative to Lance and Diane White.[16] However, at a hearing conducted on January 3, 2007, this remaining issue was

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[14]

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because it is under seal

[15] Motion for Entry of Final Judgment, H-W, T.d. 350, Supp. 300-5.

[16] Opposition, H-W, T.d. 351, Supp. 397-404.

amicably resolved.[17] On January 17, 2007, the trial court entered judgment against Safeco.[18] 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 Lance and Diane White. 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 filed this appeal.

On December 28, 2007, the Court of Appeals issued its Opinion affirming the decision of the trial court.[19] The First District followed this Court's well-established 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."[20] The Court of Appeals then followed *Doe v. Schaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 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

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[17] Order and Judgment Entry Against Safeco, H-W, T.d. 360, Supp. 412-14, Appx. A 13-15.

[18] Id. The trial court entered judgment against Safeco as follows: 1) Safeco owes $300,000 in coverage under its Homeowner's policy; 2) Safeco owes an additional $313,636.36 in coverage under its Umbrella policy; and 3) Safeco's owes $115,000 of the defense costs, fees, and expenses incurred in defending Lance and Diane White. As part of the agreement negotiated at the January 3, 2007 hearing, Safeco agreed: 1) that "the settlement amount is reasonable"; 2) that the "allocation [between Federal, Pacific, and Safeco] under the Court's Order finding that Safeco does afford coverage" was proper; and 3) that the defense costs allocated to Safeco were "reasonable and necessary defense costs, expenses, and fees" incurred in defense of Lance and Diane White.

[19] *Safeco Ins. Co. of Am. v. Federal Ins. Co.*, Hamilton App. No. C-070074, 2007-Ohio-7068, Supp. 559-70, Appx. A 1-12.

[20] Id. at ¶¶ 9-10, citing *Doe v. Schaffer*, 90 Ohio St.3d 388, 2000-Ohio-186 and *Auto Club Ins. Co. v. Mills*, 90 Ohio St.3d 574, 2001-Ohio-21, Supp. 562-3, Appx. A 4-5.

negligence relates to the failure to prevent intentional conduct."[21] Finally, the Court of Appeals 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."[22]

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."[23]

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." 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 8, 2008 Safeco timely filed its Notice of Appeal and Memorandum in Support of Jurisdiction. Safeco's appeal was docketed as Case No. 2008-0304.

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[21] *Safeco*, at ¶18 citing *Allstate Ins. Co., v. Dolman*, Lucas App. No. L-07-1113, 2007-Ohio-6361 & *Havel v. Chapek*, Geauga App. No. 2004-G-2609, 2006-Ohio-7014, Supp. 565, Appx. A 7.

[22] *Safeco*, at ¶ 26, Supp. 568-9, Appx. A 10-11.

[23] Id. at ¶ 25, citing *Doe* at 395, Supp. 568, Appx. A 10.

Meanwhile, 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 same two issues previously certified on December 28, 2007. On February 13, 2008 a single judge from the First Appellate District granted Safeco's Motion for Reconsideration and for a second time certified the 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.

This Court accepted jurisdiction and ordered the parties to brief the following issues stated in the Court of Appeals Order filed February 13, 2008:

> "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?"
>
> "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?"

This Court further consolidated Safeco's discretionary appeal with Safeco's certified conflict appeal.

ARGUMENT

I. ARGUMENT UPON SECOND CERTIFIED CONFLICT

"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?"**

A. FIRST PROPOSITION OF LAW:

AN INSURANCE POLICY THAT "APPLIES SEPARATELY TO EACH INSURED" AFFORDS COVERAGE TO NEGLIGENT INSUREDS WHERE ANOTHER INSURED COMMITS AN INTENTIONAL OR CRIMINAL ACT AS THAT IS THE PURPOSE FOR WHICH INSURANCE IS PURCHASED. (*Doe v. Shaffer* (2000), 90 Ohio St. 3d 388, followed.)

Given the minutia of policy language presented in this appeal, it is easy to lose sight of what Safeco is actually advocating. Under Safeco's policy construction, the intentional act of an employee will exclude coverage for the negligence of his or her employer, the intentional act of a husband will exclude coverage for the negligence of his wife, and, as Safeco advocates here, the intentional acts of a child will exclude coverage for the negligence his parents. Under Safeco's theory, Ohioans will be left exposed to ruinous liability for negligence claims. As this Court has already recognized: "The average person would no doubt find such coverage to be the purpose for which he obtained insurance." *Doe v. Shaffer* (2000), 90 Ohio St. 3d 388, 395.

Although Chubb has no intention of re-litigating the underlying *Hilmer v. White* tort action here, its facts provide the context of this appeal. Lance and Diane Hilmer adopted a son, Benjamin White. His biological mother took acid, lemon 714 (whatever that is), speed, marijuana, cocaine,

and abused alcohol.[24] She had "serious psychological illness" and was a "drug abuser."[25] Not surprisingly, Benjamin was a very troubled child. But Lance and Diane White did their best to raise him and provide the help he needed. In the vein of "no good deed goes unpunished," Benjamin committed a horrible crime and his parents were sued for millions of dollars. Lance and Diane had plenty of insurance coverage--or so they thought--from Chubb and Safeco. Safeco, however, refused to provide them a defense or indemnity. Even after the jury found Lance and Diane White only negligent and awarded damages against them solely based on negligence, Safeco refused to provide coverage.[26] Luckily, Lance and Diane also had coverage from Chubb which did defend and indemnify them. Chubb did so even though it had the same policy exclusions as Safeco. Now Safeco asks this Court to incorporate its hardball "no coverage" position into Ohio law.

Safeco bases its "no coverage" position on intentional and criminal act exclusions which apply where an intentional or criminal act is committed by "an insured" or "any insured." Safeco interprets this language to mean that when an intentional act is committed by "any insured" all insureds are excluded from coverage. But that is not what the Safeco policies state. Safeco's language is far from clear especially since the Safeco policies also state that coverage "applies separately to each **insured**." This Court should decline Safeco's attempt to eviscerate insurance coverage in Ohio.

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[24] H-W, Trial Tr. at 2166.

[25] H-W, Trial Tr. at 2548 (closing argument of plaintiff's counsel).

[26] Jury Interrogatories Nos. 2 & 4, H-W, T.d 240, Supp. 158-59.

1. When Safeco's policies are read in their entirety, the intentional acts exclusions and Severability of Insurance clauses provide coverage for negligent insureds and exclude coverage for an (or any) insured who commits an intentional tortious act.

a. Safeco's policy language.

Safeco relies upon the following exclusions in its Homeowner's policy:

LIABILITY LOSSES WE DO NOT COVER

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**.[27]

Safeco relies on the following similarly worded exclusions in its Umbrella policy:

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 cause by violation of a motor vehicle law.

* * *

10. Any **personal injury** arising out of sexual molestation or sexual harassment or physical or mental abuse.[28]

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[27] DJ, T.d. 2 at Ex. 1, p. 12, Supp. 29.

[28] Safeco quotes this language at page 8 of its Brief but this language is not at issue under the certified conflicts accepted, nor is it addressed on the merits in Safeco's Brief. Regardless, Benjamin's conduct does not fall within the common meaning of "sexual molestation or sexual harassment or physical or mental abuse." See, e.g., *Am. Nat'l Gen. Ins. Co. v. Jackson* (S.D. Miss.

* * *

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 reasonable action by any **insured** in:
a. preventing or eliminating danger in operation of **motor vehicles** or aircraft; or
b. protecting persons or property.[29]

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 policy which provides as follows:

SECTION II–LIABILITY CONDITIONS

2. Severability of Insurance. This insurance applies separately to each **insured**. This condition will not increase our limit of liability for any one **occurrence**.[30]

Safeco also ignores the similarly worded "Severability of Insurance" language in its Umbrella policy:

CONDITIONS

* * *

2. Severability of Insurance.

This insurance applies separately to each **insured**. This condition shall not increase our limit of liability for any one **occurrence**.[31]

Safeco claims that despite the "Severability of Insurance" clause (a.k.a. Separation of Insureds clause), the intentional and illegal acts exclusions apply to exclude coverage for all insureds even

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2001), 203 F. Supp. 2d 674, 679 ("To subject to unwanted or improper sexual activity"); *Farmers Union Mut. Ins. v. Kienenberger* (1993), 257 Mont. 107, 112 ("an annoying sexual advance.").

[29] DJ, T.d. 2 at Ex. 2, p. 4, Supp. 53.

[30] DJ, T.d. 2 at Ex. 1, p. 15, Supp. 30.

[31] DJ, T.d. 2 at Ex. 2, p. 5, Supp. 54.

though only one insured committed an intentional or illegal act.

b. The meaning of the Severability of Insurance clause.

The Safeco policies expressly provide that "[t]his insurance applies separately to each **insured**." 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."[32] In policies containing a Severability of Insurance clause, the "modern view" is that the policy is treated as issued independently to each insured:

- *Sacharko v. Center Equities Limited Partnership* (1984), 2 Conn. App. 439, 443-44 ("Severability of interests provisions were adopted by the insurance industry to define the extent of coverage afforded by a policy issued to more than one insured. * * * Where a policy contains a severability of interests clause, it is a recognition by the insurer that it has a separate and distinct obligation to each insured under the policy[.]");

- *Admiral Ins. Co. v. Trident NGL, Inc.* (Tex. App. 1999), 988 S.W.2d 451, 455-456 ("When, as here, a policy has a 'severability of interests' clause, each insured against whom a claim is brought is treated as if it was the only insured under the policy.");

- *State Farm Fire & Cas. Ins. Co. v. Keegan* (C.A. 5, 2000), 209 F.3d 767, 769 ("State Farm does not dispute that a severability clause serves to provide coverage in a situation like that presented in *Walker*, where there exists an 'innocent' insured who did not commit the conduct excluded under

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[32] In finding "joint" coverage in *Wagner*, this Court cited to *Hall v. State Farm Fire & Cas. Co.* (C.A.5, 1991), 937 F.2d 210, 213-214, where in the insurance policy specifically stated: "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.) This highlights the inherent ambiguity in Safeco's policies. They do not include the clear language italicized above.

the policy.");

- *Western Heritage Ins. Co. v. Magic Years Learning Ctrs. & Child Care* (C.A. 5, 1995), 45 F.3d 85, 90 ("Mindful that we must adopt any construction of an exclusionary clause urged by the insured as long as it is not unreasonable, *Barnett*, 723 S.W.2d at 666, we must read the employer liability exclusion as applying separately to each insured, excluding coverage of an insured only if that insured is the employer of the injured party or the party's spouse.");

- *Commercial Union Ins. Co. v. State Farm Fire & Casualty Co.* (D. Colo. 1982), 546 F. Supp. 543, 545-46 ("[the insurer] similarly argues that since Section II provides for severability and Section I does not, that Section I is joint in all its obligations and rights. Neither of these interpretations would be apparent to a layman reading an insurance policy. Both points are fairly susceptible to an interpretation different from that which Commercial Union urges. Since construction must favor coverage of the insured in such situations, the Court finds that the rights and obligations under this policy are several, and not joint.");

- *Premier Ins. Co. v. Adams* (Fla. App. 1994), 632 So. 2d 1054, 1057 ("a severability clause contained in the policy required that each insured be treated as having separate insurance coverage");

- *United States Fidelity & Guaranty Co. v. Globe Indem. Co.* (1975), 60 Ill. 2d 295, 299 ("A reasonable interpretation of the language of the severability clause, that 'the insurance afforded applies separately to each insured,' leads to the obvious conclusion that each insured is to be treated as if each were separately insured."); and

- *American Nat'l Fire Ins. Co. v. Estate of Fournelle* (Minn. 1991), 472 N.W.2d 292, 294 ("A reasonable interpretation of these words leads to the obvious and singularly correct conclusion that each insured must be treated as if each were insured separately, applying exclusions individually

as to the insured for whom coverage is sought.").

c. The history of the Severability of Insurance clause.

The history of the Severability of Insurance clause, in fact, proves that its intent was to assure that coverage would be afforded to negligent insureds independent of the intentional acts of co-insureds. Originally, insurance policies in the 1940s excluded intentional acts by "the insured." Risjord & Austin, "Who Is 'The Insured'" Revisited (1961), 28 Ins. Counsel J. 100, 101. The intent was "clearly understood by the insurance companies participating in the standard provisions program that * * * 'the insured' meant *only* the person claiming coverage[.]" (Emphasis original.) Id.; *Liberty Mut. Ins. Co. v. Iowa Nat'l Mut. Ins. Co.* (1970), 186 Neb. 115, 118. By 1954, the majority of courts, however, held that "the insured" referred to all the insureds under the policy and broadly excluded coverage for innocent co-insureds. 28 Ins. Counsel J. at 101. "Ironically, this is the only known situation where many courts persist in erring in favor of the insurance companies!" Id. In the mid to late 1950s, insurers began adding "severability" clauses to insure that courts would interpret policy exclusions to apply only to the insured seeking coverage--not to bar coverage for innocent co-insureds. Id.; *Marwell Constr. v. Underwriters at Lloyd's London* (Alaska 1970), 465 P.2d 298, 305; *Shelby Mut. Ins. Co. v. Schuitema* (Fla. App. 1966), 183 So. 2d 571, 573-74. When some courts continued to apply exclusions broadly to bar coverage for innocent co-insureds, insurers added further language to "even more clearly" express their true intent. 28 Ins. Counsel J. at 101. Thus, the express intent of the Severability of Insurance clause is that the intentional/criminal acts exclusions apply separately to each insured, depending upon *that* insured's intent.

Safeco concedes the original intent of the "severability clause" as discussed above. (Appellant's Brief at 16.) Safeco then argues that by changing "the" insured to "an" or "any" insured--***while leaving the severability clause in place***--the Safeco policies express the exact

opposite of what the Severability of Insurance clause states. That is the very definition of ambiguity--two conflicting provisions. Safeco cites to *Phoenix Assurance Co. v. Hartford Ins. Co.* (1971), 29 Colo. App. 548, 552, for the proposition that "[a] general severability clause was added to standard policies in 1955 to clarify that 'the insured' did not mean 'any insured' under the policy." (Appellant's Brief at 16.) *Phoenix* says no such thing. Rather, the *Phoenix* court recognized that "[i]t is now generally recognized that the severability clause was added to limit the word 'insured' in the employee exclusionary clause to mean only the particular person claiming coverage." Id. at 522. Indeed, that is both the intent of the severability clause and what it clearly states. Perhaps most telling is the conclusion of the journal article which Safeco relies upon at page 16 of its brief:

> The basic fact [is] that, regardless of any doubt which previously existed, the underwriters have now made their intention abundantly clear by spelling out either that "the term 'the insured' is used severally and not collectively" or, alternatively that "The insurance * * * applies separately to each insured against whom claim is made or suit is brought * * *."

Risjord & Austin, "Who Is 'The Insured'" Revisited (1961), 28 Ins. Counsel J. 100, at 108. The latter language is, of course, repeated almost word for word in the Safeco policies at issue here. One can only wonder why Safeco left this language in its policies if, as it now claims, its intent was the exact opposite. Fortunately for Safeco's insureds, Lance and Diane White, they are not required to puzzle over Safeco's intentions. Nor is this Court. Where two policy provisions conflict and one provides coverage, the one providing coverage controls. This is especially so when one of those provisions is an exclusion.

d. The exclusions Safeco relies upon must be construed narrowly.

Safeco devotes two pages of its brief to the rules governing the interpretation of an insurance policy. (Appellant's Brief at 13-15.) Conspicuously absent for Safeco's Brief is the fundamental rule that 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."[33] (Emphasis in original.) 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."[34] Insurance policies must be examined in their entirety.[35] A proper reading of an insurance policy generally cannot be accomplished by relying on one provision to the exclusion of others.[36]

Safeco asserts that applying the severability clause to afford coverage to negligent co-insureds would render the "any insured" language in the intentional and criminal acts exclusions meaningless. That is not so because it would still exclude coverage for damages from the intentional act of "an insured" or "any insured." The language would still have effect; it would just not bar coverage for innocent co-insureds. Safeco's interpretation, however, renders the entire Severability of Insurance clause meaningless. As the Illinois Court of Appeals recently held in *State Farm Fire & Cas. Co. v. Hooks* (2006), 366 Ill. App. 3d 819, 829: "State Farm does not purport to provide any alternate plausible purpose or function for that severability clause and we cannot, thereby, conjecture that the severability clause had some purpose behind it other than to treat each insured as if he or she had his or her own policy, subject only to the liability limits of the policy." 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.

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[33] *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.

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

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

[36] *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.

Of course, if there were contradiction between the Severability of Insurance condition and the intentional/criminal acts exclusions, then the Severability of Insurance language affording coverage controls.[37] A discussion of the issues created by Safeco's unjustifiably broad reading of the policy exclusions follows.

2. An insurance policy that provides coverage "separately to each insured" and purports to exclude coverage for negligent insureds when another insured commits an intentional or criminal act is inherently ambiguous. That ambiguity is construed against the insurer to provide coverage for negligent insureds.

a. The Ohio Courts are in accord; there is no conflict.

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.

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:

Example 1: The policy contains an exclusion which applies where "an insured" or "any insured" commits an intentional act, but the policy also contains a Severability 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,

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[37] *Faruque v. Provident Life & Acci. Ins. Co.* (1987), 31 Ohio St. 3d 34, 38, quoting *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St. 2d 95, syllabus.

1986 Ohio App. LEXIS 7809; *Havel v. Chapek*, Geauga App. 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.

Example 2: The policy contains an exclusion which applies where "an insured" or "any insured" commits an intentional act, but the policy contains no Severability of Insurance clause. In that situation, coverage is excluded for all insureds when any one insured commits an 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 Severability of Insurance clause).

Example 3: Whether or not there is a Severability 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*).

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 actually falls within the first line of authority, never analyzes whether an ambiguity exists, and is quite simply an early (and incorrect) decision.

The Ohio case law relied upon by Safeco is factually distinguishable. For instance, in *Taft v. West Am. Ins.* (Mar. 5, 1999), Trumbull App. No. 98-T-0015, 1999 Ohio App. LEXIS 853, the court found no ambiguity because the "severability clause * * * is notably absent from Section I of the policy relating to the property coverage that Taft seeks to recover in this case." The court in *Bocook v. Sandy & Beaver Valley Farmers Mut. Ins. Co.*, Highland App. No. 02CA4, 2002-Ohio-6307, ¶12, followed *Taft* but did not address the "Severability of Insurance" clause. Presumably, given the *Bocook* court's reliance on *Taft*, such clause was "notably absent" from the policy at issue in *Bocook* as well.

In *United Ohio Ins. Co. v. Metzger* (Feb. 8, 1999), Putnam App. No. 12-98-1, 1999 Ohio App. LEXIS 920, the court was not passing on an intentional acts exclusion. It was passing on a business risks exclusion. The court found that no coverage was afforded for any insured where the claim "arose out of or was in connection with" the business of "an insured." Id. at *5. The *Metzger*, court cited and relied upon its earlier decision in *Buckeye Union Ins. Co. v. Philips* (Aug. 7, 1986), Defiance App. No. 4-84-7, 1986 Ohio App. LEXIS 7809. Id at *8. In *Phillips*, the issue was whether arson and resulting insurance fraud by one insured operated to exclude coverage for "any insured." *Phillips,* at *6. The *Phillips* court recognized that "[t]he newer cases" "turn more on a construction of ambiguous policies in favor of the insured and the consideration that to deny recovery in effect imputes the wrongdoing of the arsonist to his or her spouse." Id. at *9. The *Phillips* court <u>went on to find coverage for the innocent spouse</u> despite the policy provision applying to "any insured" because the "policy further provided that 'this insurance applies separately to each insured.'" Id. The court's conclusion was based on several considerations: 1) "mere family relationship with the arsonist is inadequate to defeat the recovery of such indemnity";and 2) "'[w]e have regarded the rights of husband and wife [to be] separate under the contract, both logic and

justice require that the amount recoverable be likewise allocated.'" Id.

The same court decided both *Metzger* and *Philips*. Although neither *Metzger* nor *Phillips* are directly on point here, of the two, *Phillips* is more relevant. *Metzger* dealt with a business risks exclusion. *Phillips* dealt with intentional arson and fraud by a co-insured and whether those intentional acts excluded coverage for all insureds. The policy at issue in *Phillips* contained a Separation of Insureds clause, just as the policy here does. The policy in *Phillips* contained "any insured" language. Yet, the court found coverage for the innocent spouse–just as this Court should for the innocent parents of Benjamin White.

Assuming the exclusions mean what Safeco claims they mean, they are in direct conflict with the language and intent of the Severability of Insurance clause. That direct (and admitted) conflict results in ambiguity. If Safeco wanted its exclusions to apply as they had before the Severability of Insurance clause was added, then it should have simply removed that clause. Rather than doing do, Safeco changed "the" to "an" (or "any") in its 42 pages of policy language. Most reasonable consumers would not even notice the change, much less appreciate the import Safeco asserts here. By changing the exclusions while retaining the Severability of Insurance clause, Safeco created an irreconcilable conflict within its own policy language.

Accordingly, <u>if</u> the Severability of Insurance condition and the intentional/criminal acts exclusions cannot be reconciled (which they can, as discussed in the preceding section of this Brief), then there is an inherent ambiguity in the Safeco policies. Such ambiguity should be interpreted in favor of providing coverage for the Lance and Diane White. Accord *Faruque v. Provident Life & Acci. Ins. Co.* (1987), 31 Ohio St. 3d 34, 38, quoting *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St. 2d 95, syllabus ("[l]anguage in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.");

Wagner v. Midwestern Indem. Co. (1998), 83 Ohio St. 3d 287, 291, quoting *King v. Nationwide Ins. Co.* (1988), 35 Ohio St. 3d 208, syllabus.

b. The "majority rule" is that an inherent conflict exists between a broad "Severability of Insurance" clause and policy exclusions purporting to apply to all insureds by referring to "any insured" or "an insured."

The majority of courts nationwide have rejected Safeco's strained argument. These courts find that the severability language, at a minimum, creates an ambiguity that must be construed in favor of the insured. Even in Safeco's brief on appeal, Safeco cannot get away from the inherent ambiguity. Safeco quotes the holding in *Silverball Amusement v. Utah Home Fire Ins. Co.* (D. Ark. 1994), 842 F. Supp. 1151, 1158: "The separation of insureds provision in Utah Home means that the acts of 'the insured' are viewed independently of the acts of additional insureds." (Appellant's Brief at p. 23, fn. 16.)[38] Further, Safeco relies upon an article written by Risjord and Austin.[39] Those same authors state:

> The Assault and Battery condition is a situation where, if the reference to the "insured" meant any or every insured, the whole condition would be meaningless. The typical situation * * * is where the employee commits an assault and battery and his employer is sued. If the word "insured" means any and every insured (here the employee), *neither* the employer nor anyone else has coverage. In this condition, the word "insured" *must* mean only the person claiming coverage.

(Emphasis original.) Risjord & Austin, Who is "The Insured"? (1955-56), 24 U. Kan. City L. Rev. 65, 77, 81. Thus, the very authors upon whom Safeco relies to support its "no ambiguity" argument

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[38] Safeco claims that *Silverball* stands for the proposition that excluding coverage for "any insured" excludes coverage for all insureds regardless of the Separation of Insureds clause. That is incorrect. In fact, *Silverball* relies on *All American Insurance Co. v. Burns* (C.A. 10, 1992), 971 F.2d 438, which never addresses the Separation of Insureds clause. Further, the language in *Silverball* regarding the effect of the phrase "any insured" is dicta–that language was not at issue in *Silverball*.

[39] Appellant's Brief at 16.

recognize that Safeco's argument would render coverage under Safeco's policies "meaningless."

Safeco asserts that the "majority of courts" find that the Severability of Insurance clause does not render ambiguous policy exclusions purporting to exclude coverage for an intentional act committed by "any insured" or "an insured" when coverage is sought for negligence of co-insureds.[40] Of the cases Safeco cites, some mistakenly state that Safeco's position is the "majority view" and follow that "view." But of the cases cited by Safeco, only the Eighth Circuit (applying South Dakota law), and the Courts of Arizona, Colorado, Iowa, Maine, Missouri, Pennsylvania, Texas, and Washington support its view.[41] That is only nine jurisdictions.

Safeco cites to *Yerardi v. Pac. Indem. Co.* (D. Mass. 2006), 436 F. Supp. 2d 223, 248, (applying Massachusetts law) as supporting its view. But that case involved different policy language. Specifically, the policy language at issue in *Yerardi* excluded coverage "if you ***or any covered person*** has intentionally concealed or misrepresented any material fact relating to this policy before or after a loss." (Emphasis added.) That language is both clear and not at issue here. In fact, where language similar to that at issue in the Safeco polices is presented, Massachusetts Courts find it ambiguous. See, e.g., *Worcester Mut. Ins. Co. v. Marnell* (1986), 398 Mass. 240, 244-5 (one of the leading cases contra to Safeco's argument).

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[40] Appellant's Brief, p. 21, fn. 14.

[41] The cases cited by Safeco which offer some support for its position are as follows: *EMCASCO Ins. Co. v. Diedrich* (C.A. 8, 2005), 394 F.3d 1091, 1097; *Am. Family Mut. Ins. Co. v. White* (2003), 204 Ariz. 500, 507; *Chacon v. American Family Mut. Ins. Co.*(Colo. 1990), 788 P.2d 748, 752; *Am. Family Mut. Ins. Co. v. Corrigan* (Iowa 2005), 697 N.W.2d 108, 112; *Johnson v. Allstate Ins. Co.* (1997), 1997 ME 3, 8; *American Motorists Ins. Co. v. Moore* (Mo. App. 1998), 970 S.W.2d 876; *McAllister v. Millville Mut. Ins.* Co. (1994), 433 Pa. Super. 330, 340; *Bituminous Cas. Corp. v. Maxey* (Tex. App. 2003), 110 S.W.3d 203, 214; *Caroff v. Farmers Ins. Co.* (1999), 98 Wn. App. 565, 573. Safeco also cites various other decisions which are distinguishable or actually support Chubb's position, as further discussed in the body of this brief.

Safeco also cites to *Travelers Indem. Co. v. Bloomington Steel & Supply Co.* (Minn. 2006), 718 N.W.2d 888, 894, claiming support for its position under Minnesota law. In fact, the *Bloomington Steel* Court held that "a severability clause requires that coverage exclusions be construed only with reference to the particular insured seeking coverage." *Bloomington Steel* at 894. Further, the Court was passing on an exclusion containing "the insured" language and its brief reference to "an insured" or "any insured" policy language was mere dicta. Id. at 895. The Minnesota Supreme Court addressed a more analogous policy in *American Nat'l Fire Ins. Co. v. Estate of Fournelle* (Minn. 1991), 472 N.W.2d 292, 294, holding:

> The policy states: "This insurance applies separately to each insured." A reasonable interpretation of these words leads to the obvious and singularly correct conclusion that each insured must be treated as if each were insured separately, applying exclusions individually as to the insured for whom coverage is sought. * * * There would be no point to a severability clause if it did not provide separately to each named insured. The analysis suggested by American National would render the clause a nullity.

The Oregon court of appeals decision relied upon by Safeco passed on completely different--and clear--policy language: "'bodily injury 'arising out of sexual molestation' is excluded, ***without any reference to*** the act of molestation having been committed '***by an insured***.'" (Emphasis added.) *Ristine v. Hartford Ins. Co.* (2004), 195 Ore. App. 226, 232.

In contrast, Chubb has found that at least fifteen jurisdictions support its view--including the Sixth Circuit applying Ohio law. 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, cert. denied, *Shefchuk v. Ill. Union Ins. Co.* (2006), 127 S. Ct. 379, the Court of Appeals for the Sixth Circuit, applying Ohio law, found the same argument Safeco presents here to be meretricious. The Court 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 noted above, the policy contains a "multiple insureds" provision that states, in part: "The inclusion of multiple insureds will not affect the rights of any such persons or organizations to be protected by this policy. We will cover each such person or organization just as if a separate policy had been issued to each." Courts considering similar provisions have split over whether such a severability clause makes the term "an insured" ambiguous. Those that have found ambiguity have been unable to reconcile a reading of the term "an insured" that denies coverage to people based on the actions of their co-insureds with a clause specifying that coverage is separate for each insured. 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 (applying Texas law), the Tenth Circuit (applying Utah law), and the Courts of Alabama, Florida, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, New York, Tennessee, Texas, and Wisconsin, have all held the same:

- *State Farm Fire & Cas. Ins. Co. v. Keegan* (C.A. 5, 2000), 209 F.3d 767, 771 ("Given the conflicting interplay between the definition of the term "insured," the meaning of the phrases 'the insured' and 'an insured,' and the severability clause, we find as a matter of law that the policy language is ambiguous.");

- *West Am. Ins. Co. v. AV&S* (C.A. 10, 1998), 145 F.3d 1224, 1229 ("Given the conflicting interpretations of the interplay between a severability clause and an exclusion clause using the term 'any insured,' we find the Policy in question in this case to be ambiguous.");

- *Transport Indem. Co. v. Wyatt* (Ala. 1982), 417 So. 2d 568, 571 ("We also agree with the trial court that the term 'any insured' in Exclusion B of Part II of the policy is ambiguous. The wording could be interpreted either to mean only singularly 'any one of the insureds' or could apply collectively to the whole group of insureds.");

- *Premier Ins. Co. v. Adams* (Fla. App. 1994), 632 So. 2d 1054, 1057 ("After weighing the alternatives, we find the reasoning of the Massachusetts Supreme Court in *Worcester* persuasive. The *Worcester* court held that a severability clause contained in the policy required that each insured be treated as having separate insurance coverage. The *Worcester* court acknowledged that its interpretation of the exclusionary clause rendered the term 'any insured' superfluous, but held that such interpretation was preferable to one which would 'render the entire severability clause meaningless.' Id. at 161. The court found its interpretation gave reasonable meaning to both the exclusionary clause and the severability clause.");

- *Ill. Farmers Ins. Co. v. Kure* (2006), 364 Ill. App. 3d 395, 403 (holding that under policy language excluding coverage for "bodily injury, property damage or personal injury which is * * * caused intentionally by or at the direction of an insured * * *; [the] language places the 'focus of the inquiry in determining whether an occurrence is an accident [on] whether the injury is expected or intended by the insured, not whether the acts were performed intentionally'" and finding coverage for innocent co-insureds accordingly) ;

- *Catholic Diocese v. Raymer* (1992), 251 Kan. 689, 699 ("in construing the exclusionary and severability of interests clauses of a homeowners insurance policy, the exclusions are to be applied only against the insured for whom coverage is sought.");

- *Litz v. State Farm Fire & Cas. Co.* (1997), 346 Md. 217, 227-28 ("The policy in issue here specifically bars coverage for bodily injury arising 'out of business pursuits of *an* insured.' (Emphasis added). To the extent that Pamela Litz, an *insured*, engaged in a 'business pursuit,' she is not entitled to coverage with respect to the tort suit. But the policy leaves open the question of whether coverage is barred for *all* policy holders or merely for the particular insured who has breached the insurance contract; the policy does not expressly state that coverage is denied to *all*

insureds based on the conduct of "*an* insured." . . . As I read the policy language, its plain meaning leads to the conclusion that *an* insured's business pursuits may result in the denial of coverage to that insured, but not to all other persons insured under the same policy."); see, also, *St. Paul Fire & Marine Insurance v. Molloy* (1981), 291 Md. 139, 150;

- *Worcester Mut. Ins. Co. v. Marnell* (1986), 398 Mass. 240, 244-5 (finding an ambiguity because "[w]hile 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.");

- *American Nat'l Fire Ins. Co. v. Estate of Fournelle* (Minn. 1991), 472 N.W.2d 292, 294 ("The policy states: 'This insurance applies separately to each insured.' A reasonable interpretation of these words leads to the obvious and singularly correct conclusion that each insured must be treated as if each were insured separately, applying exclusions individually as to the insured for whom coverage is sought.");

- *McFarland v. Utica Fire Ins. Co.* (D. Miss. 1992), 814 F. Supp. 518, 526 ("The defendant Oneida could have cured this ambiguity through clearer or more precise language, as found in *Hall v. State Farm Fire & Casualty Co.*, [(C.A. 5, 1991), 937 F.2d 210, 213 (passing on an exclusion for intentional acts by "you or any person insured under this policy")] or, alternatively, through the addition of a non-severability clause. See *McGory*, 527 So. 2d at 638; 11 A.L.R. 4th 1228, 1231. But, defendant's policy contains no non-severability clause. Instead, on page 1 of the policy, there is found language which states that all insureds under the policy are 'separate insureds.' While defendant argues that the thrust of this language is limited, nothing in the policy suggests as much.");

- *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 ("In this case, we reject plaintiff's attempt to read

the Employee Exclusion clause in a vacuum, as we find that doing so would render the Separation of Insureds clause 'unreasonable or of no effect.' Indeed, we find that the 'clear language' of the Separation of Insureds clause is intended to preclude consideration of Shelby Realty as an insured when determining if coverage is available to City Club, and likewise, to preclude consideration of City Club as an insured when determining if coverage is available to Shelby Realty.");

- *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, at *10 ("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 one. Thus, we must construe the policy against [the insurance company]. We cannot release an insurer from a risk that may have been excluded through more careful contract drafting.");

- *Walker v. Lumbermens Mut. Casualty Co.* (Tex. App. 1973), 491 S.W.2d 696, 699 ("a policy extending coverage to several persons creates several obligations on the part of the insurer so that a particular insured is not precluded from recovery merely because the claim of another insured is barred under the terms of an exclusion."); and

- *Northwestern Nat. Ins. Co. v. Nemetz* (1986), 135 Wis. 2d 245, 256 ("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.").

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 rationale:

> 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 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. See *Desrosiers v. Royal Ins. Co.*, supra at 40. Moreover, the interpretation we adopt gives reasonable meaning to both the motor vehicle exclusion and the severability of insurance clause.

The same rationale applies here.

Safeco's view is, in fact, in the minority. Even if it were not, as discussed in Chubb's Second Proposition of Law, infra, under Ohio law "[w]here the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, ***the question whether such clause is ambiguous ceases to be an open one.***" (Emphasis added.) *George H. Olmsted & Co. v. Metropolitan Life Ins. Co.* (1928), 118 Ohio St. 421, paragraph one of the syllabus.

> **3. Where a policy excludes coverage whenever "an" or "any" insured commits an intentional or criminal act, the exclusion does not unambiguously apply to exclude coverage for "all insureds" when any one of them commits and intentional or criminal act.**

In addition, the terms "an insured" or "any insured" are themselves 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 *McFarland v. Utica Fire Ins. Co.* (D. Miss. 1992), 814 F. Supp. 518, 526, the Federal District Court also analyzed the meaning of "an" and found it ambiguous:

> The intentional acts exclusion provision at issue here admits of more than one interpretation. One could read the exclusion in the way the defendant suggests, that both insureds are denied coverage when one insured causes an intentional loss. However, one could also read the provision to preclude coverage for the wrongful

> insured only. The language of the exclusion withholds coverage for "an" act committed by "an" insured, not "an" act committed by "any" insured. Hence, one also may reasonably conclude that the exclusion provision is directed only at the acting insured. This court has looked to the meaning of "an" in its quest for a solution here. According to Webster's Dictionary, Black's Law Dictionary, and Corpus Juris, while "an" may mean "any"; it is seldom used to denote plurality. Thus, an insured reasonably could read either the singular or plural into the word. If the insured interprets only the singular from the word, the insured is left with the sole conclusion that the intentional acts exclusion pertains only to the culpable party.

In *Brumley v. Lee* (1998), 265 Kan. 810, 815, Safeco, as third-party defendant and appellee, 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 Court then concluded that the Severability of Insurance clause made the ambiguity even "easier to see":

> 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.

Id.

Safeco cites to several cases in support of its proposition that "an insured" or "a insured" or "any insured" mean "all insureds." (Appellant's Brief at 18.) None are on point. *Allstate Ins. Co. v. Freeman* (1989), 432 Mich. 656, *Allstate Ins. Co. v. Foster* (D. Nev. 1988), 693 F.Supp. 886, and *Bonin v. Westport Ins. Co.* (La. 2006), 930 So.2d 906, never mention the existence of a Severability of Insurance clause in the policies at issue in those cases, nor analyze the potential effect of such a clause on coverage. The *Argent v. Brady* (2006), 386 N.J. Super. 343, decision does analyze a policy containing a Severability of Insurance clause but its holding is readily distinguishable from the case

at bar. *Argent* dealt with the business risks exclusion. The *Argent* court reasoned that "[b]usiness risk insurance clearly was available to [the insured] upon the commencement of her day care business, albeit at a premium in addition to that paid for homeowner's insurance." *Argent* at 356. The court concluded that "[a]lleged ambiguities cannot be construed in favor of an insured if the only result is to create unexpected coverage." Id at 357. Indeed, that may have been the case in *Argent* given that coverage was sought under a personal homeowner's policy for liability stemming from a business venture. But the exact opposite is true here. *Doe v. Shaffer* (2000), 90 Ohio St. 3d 388, 395.

4. An insurance company may not narrow coverage for named insureds under the guise of expanding coverage to include resident relatives.

The Safeco Homeowner's policy identifies Lance and Diane White as the named insureds.[42] However, the definition of "insured" is then expanded to "relatives" who are "residents of your household."[43] Similarly, the Safeco Umbrella policy identifies Lance White as the "named insured," which is defined to include his "spouse if a resident of the same household."[44] The definition of insured is then expanded from "you" (defined as Lance White and his spouse Diane White) to include "any member of your household." Id. Thus, under each Safeco policy, the insured is first defined as Lance and Diane White and then *expanded* to include Benjamin White due to his status as a resident relative. It is that *expansion* of coverage which Safeco relies on to *exclude* coverage for Lance and Diane White. Under Safeco's analysis, more coverage would be afforded Lance and Diane White if Benjamin White was not added as an insured.

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[42] DJ, T.d. 2 at Ex. 1.

[43] Id. at Ex. 1, p.1.

[44] DJ, T.d. 2 at Ex. 2, p. 1.

Safeco's argument means that the inclusion of additional insureds under the policies actually limits coverage for all insureds when "an insured" or "any insured" commits an intentional act. Thus, the more insureds under the policy, then the less coverage each would have. Under Safeco's analysis, insureds would actually have *broader* coverage under policies insuring *only one individual*. This Court passed on a similar situation in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, and concluded that it "is neither a just result nor a logical consistency" that an endorsement intended to broaden coverage would operate to limit coverage. *Galatis*, at 230. The same is true here. As the Texas Court of Appeals cogently held in *Walker v. Lumbermens Mut. Casualty Co.* (Tex. App. 1973), 491 S.W.2d 696, 699:

> Plaintiff, the named insured, would obviously not be excluded from coverage for the wilful acts of his son if the clause defining additional insured persons did not appear in the policy. <u>That clause was intended to benefit plaintiff by broadening coverage, and its purpose would be defeated if coverage were restricted by using the clause to construe the exclusion provision favorably to defendant company</u>.

(Emphasis added.) In fact, the very authors Safeco relies upon at page 16 of its brief recognized the same logical flaw:

> But for the omnibus clause, the policy grants coverage only to the named insured. The omnibus clause is intended to *add* coverage for persons other than the named insured. It is not intended to detract from coverage granted by the policy to the named insured. The converse of our conclusion results in denial of coverage to the named insured.

(Emphasis original.) Risjord & Austin, 24 U. Kan. City L. Rev. at 81.

In *Safeco Ins. Co. v. Robert S.* (2001), 26 Cal. 4th 758, Safeco raised the same arguments presented here. In his concurring opinion, Justice Baxter of the California Supreme Court soundly analyzed and rejected Safeco's position. First, Justice Baxter analyzed that "even if the illegal act exclusion's reference to 'an' insured might be deemed collective when viewed alone, the policy's severability clause contradicted any such inference by stating that '[t]his insurance applies separately

to each insured.'" Id. at 777. He then recognized that "Safeco identifies no meaning for this provision other than the one apparent from its words, i.e., that each of multiple insureds under the policy was to be treated, within policy limits, as though the policy applied only to him or her. This promise of severable interests would be rendered meaningless if the single word 'an' in the exclusionary clause were nonetheless found to prevail, and to make the exclusion collective." Id. at 777. Second, Justice Baxter analyzed "the reasonable expectations of the insureds." Id. His conclusion mirrors that of this Court in *Galatis*:

> It is unlikely [that the intentional actor's] parents understood that by extending their homeowners' coverage to include [their son, the intentional actor,] as an additional insured, they were actually narrowing their own coverage for claims arising from his torts. In light of the severability provision, Safeco's intent to achieve that result was not clearly expressed, and the ambiguity must be resolved in the insureds' favor.

Safeco Ins. Co., 26 Cal. 4th at 777. Justice Baxter's well-reasoned analysis is equally applicable here.

5. Clear policy language is available and in use by other insurers.

As addressed above, Safeco's proffered interpretation of its policy language is impossible to reconcile with the other policy language, is illogical, and creates numerous ambiguities that Safeco would have this Court interpret against its insureds. But Safeco chose the language it used. 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.* (C.A. 5, 1991), 937 F.2d 210, 213. The court quoted the language as follows: "14. Intentional Acts. If you <u>or any person insured under this policy</u> 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 <u>or any other insured</u> for this loss." (Emphasis added.) But Safeco chose to keep using

the same policy language which numerous courts have found to be ambiguous. All that is clear from Safeco's policies is that coverage is excluded for "any insured" or "an insured" who commits an intentional or criminal act. The Safeco policies do not designate whether coverage is excluded for the other insureds–i.e., "any other insured"–under the policy.

Safeco cites to a New Jersey appellate court decision, *Argent v. Brady* (2006), 386 N.J. Super 343, 353, 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 21.) Safeco 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.

B. SECOND PROPOSITION OF LAW:

WHERE COURTS IN NUMEROUS JURISDICTIONS NATIONWIDE HAVE PASSED ON SUBSTANTIALLY IDENTICAL INSURANCE POLICY LANGUAGE AND REACHED WIDELY VARYING CONCLUSIONS AS TO ITS MEANING, THE QUESTION OF WHETHER SUCH CLAUSE IS AMBIGUOUS CEASES TO BE AN OPEN ONE. (*George H. Olmsted & Co. v. Metropolitan Life Ins. Co.* (1928), 118 Ohio St. 421, paragraph one of the syllabus, followed.)

Judge Painter, in his well reasoned concurrence below, recognized that: "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." *Safeco*, 2007-Ohio-7068, ¶32, Appx. A 12 (Chubb also recognized the issue at page 19, footnote 6, of its brief to the First Appellate District).

Eighty years ago, this Court addressed this issue in *George H. Olmsted & Co. v. Metropolitan Life Ins. Co.* (1928), 118 Ohio St. 421, paragraphs one and two of the syllabus:

> 1. Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, ***the question whether such clause is ambiguous ceases to be an open one.***
>
> 2. The rule that ambiguous language is to be construed most strongly against the party selecting the language and most favorably toward the party sought to be charged, ***is especially applicable to contracts executed subsequently to such conflicting judicial constructions.***

(Emphasis Added.); *Equitable Life Ins. Co. v. Gerwick* (1934), 50 Ohio App. 277, 281 ("Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, the question whether such clause is ambiguous ceases to be an open one.").

This same principle was recognized by the United States Supreme Court in *Stroehmann v. Mutual Life Ins. Co.* (1937), 300 U.S. 435, 439-440:

> The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion. * * * Without difficulty [the insurer] could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt.

The principle is well followed down to today. Among others, the Florida, Indiana, and Pennsylvania Courts have all recognized this logical syllogism. *Sec. Ins. Co. v. Investors Diversified* (Fla. App. 1981), 407 So. 2d 314, 316 ("The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language."); *Travelers Indem. Co. v. Summit Corp. of Am.* (Ind. App. 1999), 715 N.E.2d

926, 938 ("This disagreement among the courts further indicates the ambiguity of the personal injury provisions."); *Cohen v. Erie Indem. Co.* (1981), 288 Pa. Super. 445, 451 ("The mere fact that several appellate courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation.").

It is undisputed that the language now before this Court has been passed upon in at least 24 jurisdictions. In fifteen of those jurisdictions ambiguity and coverage have been found.[45] In nine other jurisdictions coverage has been excluded based on the absence of ambiguity.[46] This is not an instance where a few outlying decisions have been made in distant jurisdictions. Rather, there is a clear split in authority among admittedly intelligent jurists. And that in itself is evidence of the

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[45] *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, cert. denied, *Shefchuk v. Ill. Union Ins. Co.* (2006), 127 S. Ct. 379; *State Farm Fire & Cas. Ins. Co. v. Keegan* (C.A. 5, 2000), 209 F.3d 767, 771; *West Am. Ins. Co. v. AV&S* (C.A. 10, 1998), 145 F.3d 1224, 1229;*Transport Indem. Co. v. Wyatt* (Ala. 1982), 417 So. 2d 568, 571; *Premier Ins. Co. v. Adams* (Fla. App. 1994), 632 So. 2d 1054, 1057; *Worcester Mut. Ins. Co. v. Marnell* (1986), 398 Mass. 240, 244-5; *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.

[46] *Am. Family Mut. Ins. Co. v. Corrigan* (Iowa 2005), 697 N.W.2d 108, 112; *EMCASCO Ins. Co. v. Diedrich* (C.A. 8, 2005), 394 F.3d 1091, 1097; *Bituminous Cas. Corp. v. Maxey* (Tex. App. 2003), 110 S.W.3d 203, 214; *Am. Family Mut. Ins. Co. v. White* (2003), 204 Ariz. 500, 507; *McAllister v. Millville Mut. Ins.* Co. (1994), 433 Pa. Super. 330, 340; *Chacon v. American Family Mut. Ins. Co.*(Colo. 1990), 788 P.2d 748, 752; *Caroff v. Farmers Ins. Co.* (1999), 98 Wn. App. 565, 573; *American Motorists Ins. Co. v. Moore* (Mo. App. 1998), 970 S.W.2d 876; *Johnson v. Allstate Ins. Co.* (1997), 1997 ME 3, 8.

ambiguity inherent in Safeco's policies.

And as this Court further held in *George H. Olmsted & Co. v. Metropolitan Life Ins. Co.* (1928), 118 Ohio St. 421, paragraph two of the syllabus: "The rule * * * ***is especially applicable to contracts executed subsequently to such conflicting judicial constructions***." (Emphasis added.) Here, the Safeco Homeowner's policy was issued December 11, 2002 and the Umbrella policy was issued September 4, 2002.[47] As set forth in the previous two footnotes detailing the conflicting authorities, the "conflicting judicial constructions" at issue here date back to the 1970s and became more pronounced in the 1980s and 1990s. This is not a "new" issue to arise subsequent to the formation of the Safeco policies at issue.

In fact, on August 20, 2001 the California Supreme Court analyzed Safeco's policy language and noted: "The concurring and dissenting opinion discusses at length the effect of the 'Severability of Insurance' clause in the policy on the illegal act exclusionary clause. It acknowledges, however, that ***there is a significant division of authority among the courts that have addressed this question***." (Emphasis added.) *Safeco Ins. Co. v. Robert S.* (2001), 26 Cal. 4th 758, 766 fn. 2. Three years prior to the California Supreme Court's decision, the Kansas Supreme Court addressed Safeco's policy language and found it ambiguous in *Brumley v. Lee* (1998), 265 Kan. 810, 815. Safeco was a third-party defendant and appellee in *Brumley*. Therefore, Safeco certainly knew that its broad interpretation of its policy exclusions was, at best, dubious and subject to considerable debate. Safeco did not change its policy language, as other insurers have, to alleviate the internal contradictions and ambiguities. Now Safeco must live with the consequences.

Safeco is simply attempting to avoid the coverage it contracted to provide the Whites through

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[47] Safeco Homeowner's policy Declarations, Supp. p. 21; Safeco Umbrella policy Declarations, Supp. p. 48.

a hyper-technical interpretation of its policy language. Chubb has substantially identical language in its policies--most insurers do. But Chubb stepped forward and protected its insureds. It withdrew its declaratory judgment action as to coverage for Lance and Diane White days after the jury found them merely negligent and not liable for punitive damages.[48] Here, there is not only a clear split of authority between courts, but also ***insurers themselves*** disagree as to the interpretation of the language at issue. To find the language at issue clear and unambiguous when viewed from the standpoint of an ordinary consumer reading his or her insurance policy would be a farce.

Safeco offers no justification for this Court to abandon what has been the law of Ohio for eighty years under the criteria set forth in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d, to modify or overrule precedent. Therefore, for the additional reason that courts nationwide have analyzed the language at issue and reached differing conclusions, this Court should find the language of Safeco's policies ambiguous as a matter of law and affirm the holdings of the trial court and Court of Appeals.

II. ARGUMENT UPON FIRST CERTIFIED CONFLICT

"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?"

PROPOSITION OF LAW:

NEGLIGENT FAILURE TO PREVENT THE INTENTIONAL TORTIOUS MISCONDUCT OF ANOTHER QUALIFIES AS AN "OCCURRENCE." (*Doe v. Shaffer* (2000), 90 Ohio St. 3d 388, and *Auto Club Ins. Co. v. Mills*, 90 Ohio St.3d 574, 2001-Ohio-21, followed.)

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[48] Chubb's Notice of Partial Withdrawal of it Motion for Summary Judgment, D.J., T.d. 45, Supp. at 163-65.

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 27.) In fact, the Court of Appeals correctly held 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." *Safeco v. Federal*, at ¶ 19. 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 the binding precedent of this Court. *Doe*, 90 Ohio St. 3d 388; *Auto Club*, 90 Ohio St.3d 574. Appellant relies upon case law which has been either modified or overruled by this Court in *Doe*.

In *Doe*, at 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.

Thus, in *Doe* this Court recognized two important principles: 1) negligent conduct of an insured is covered even if the harm complained of was expected or intended from the standpoint of another

insured; and 2) the proper point of view from which to apply the intentional acts exclusion is from the "standpoint of the insured" seeking coverage. This Court accordingly found negligence which results in the intentional acts of another to qualify as an "occurrence" because it is "no doubt" "the purpose for which [Ohioans] obtain[] insurance." Numerous other jurisdictions are in accord.[49]

In *Auto Club*, 90 Ohio St.3d 574, this Court made clear that its holding in *Doe* was not limited to sexual molestation cases. 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 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), Clermont App. Nos. CA-99-07-064 & CA-99-07-070, 2000 Ohio App. LEXIS 3060. In a one sentence opinion, however, this Court reversed that decision on authority of *Doe*. *Auto Club*, 90 Ohio St.3d 574. Thus, the *Doe* decision is not limited to cases of sexual molestation. The *Torres v. Gentry*, Ashland App. No. 06 COA 038, 2007-Ohio-4781, opinion is simply an aberrant opinion which is dead wrong because the court (probably due to a failure of the parties to brief the issue) was unaware of this Court's decision in *Auto Club*.

Both the Safeco Homeowners policy and the Safeco Umbrella policy define an "Occurrence"

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[49] See, e.g., *Evangelical Lutheran Church v. Atlantic Mut. Ins. Co.* (C.A. 5, 1999), 169 F.3d 947, 951; *Westfield Ins. Co. v. Tech Dry Inc.* (C.A. 6, 2003), 336 F.3d 503, 510 (applying Kentucky law); *American Employers Ins. Co. v. Doe* (C.A. 8, 1999), 165 F.3d 1209, 1212; *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.* (Iowa 2002), 642 N.W.2d 648; *King v. Dallas Fire Ins. Co.* (Tex. 2002), 85 S.W.3d 185, 191-192; *Agoado Realty Corp. v. United Int'l Ins. Co.* (2000), 95 N.Y.2d 141.

as "an accident."[50] Usually, insurance policies provide that the "occurrence" must not be "expected nor intended from ***the standpoint of the insured.***" (Emphasis added.) *Hybud Equipment Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St. 3d 657, 661, fn. 1. Here, however, neither of Safeco's policies state from whose standpoint the "occurrence" must be viewed.[51] Absent controlling policy language, the policies must be interpreted in favor of the insureds. *Westfield Insurance Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶ 35; *Faruque v. Provident Life & Acci. Ins. Co.* (1987), 31 Ohio St. 3d 34, 38, quoting *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St. 2d 95, syllabus. Thus, whether an occurrence is an "accident" must be determined separately from the standpoint of each insured. See, e.g., *Talbert v. Cont'l Cas. Co.* (2004), 157 Ohio App. 3d 469, 479, 2004-Ohio-2608, ¶ 37 ("there is nothing in the policy stating that this event had to be unexpected from the standpoint of the insured * * *. We find that the term 'accident' is ambiguous and thus should be interpreted in favor of the insured[.]"); *Ill. Farmers Ins. Co. v. Kure* (2006), 364 Ill. App. 3d 395, 402 ("In Illinois, as in Texas, whether an occurrence has occurred is determined from the insured's standpoint."); *Property Cas. Co. of MCA v. Conway* (1997), 147 N.J. 322, 325; *Am. Justice Ins. Reciprocal v. Cates* (D.S.D. Feb. 13, 1996), No. Civ. 95-5038, 1996 U.S. Dist. LEXIS 22834 ("Since the term 'accident' is not defined in the policy, it should be construed in favor of the insured."); *Virginia Ins. Reciprocal v. Forrest County Gen. Hosp.* (S.D. Miss. 1993), 814 F. Supp. 535, 537. Each insured is accordingly afforded coverage if, from that insured's standpoint, the "occurrence" is an unintentional "accident." The "Severability of Insurance" condition discussed above, further supports this conclusion.

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[50] DJ, T.d. 2, at Exs. 1 & 2, Supp. 23 on reverse, 52 on reverse.

[51] DJ, T.d. 2, at Exs. 1 & 2, Supp. 23 on reverse, 52 on reverse.

Safeco makes a half-hearted argument based on the now repudiated decisions of *Gearing*, *Cuervo*, *Westfield*,[52] and their progeny, that somehow because the negligent acts of Lance and Diane White allowed the intentional misconduct of Benjamin White to occur, there was no "occurrence." Safeco's reliance upon discredited and overruled case law reflects the weakness of its position. Safeco cites to *Offhaus v. Guthrie* (2000), 140 Ohio App.3d 90 and *Noftz v. Ersberger* (1998), 125 Ohio App.3d 376. Both predate this Court's decisions in *Doe* and *Auto Club*. Neither are good law after those decisions. Safeco claims that this Court's denial of a discretionary appeal in *Offhaus* has some significance here. (Appellant's Brief at 27, fn. 20.) But in *Keesecker v. G.N. McKelvey Co.* (1943), 141 Ohio St.162, at paragraph three of the syllabus, this Court held that: "The overruling of a motion to require a court of appeals to certify its record in a case does not constitute an affirmance of the judgment of such court."

As the Eleventh Appellate District recognized in *Havel v. Chapek*, Geauga App. No. 2004-G-2609, 2006-Ohio-7014, ¶¶35-37:

> The next question is whether any of the exclusions to coverage in the Grange policy apply. Grange argues that the exclusions for "[b]odily injury * * * expected or intended by any insured person" and for "[b]odily injury * * * arising out of * * * physical * * * abuse" apply to deny the Chapeks coverage. This 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*, 90 Ohio St.3d 574, 2001 Ohio 21, 740 N.E.2d 28, which extended the public policy position adopted in *Doe* to wrongful death, as well as molestation. *Doe* distinguished its analysis as to any intentional act of an insured, but permitted appellant to obtain coverage for negligence related to the sexual molestation when they did not commit the molestation. *Doe* at syllabus. Grange's attempt to parse and dissect each individual intentional act for coverage is misplaced; i.e., negligence for sexual molestation is covered but, negligence in wrongful death is not. ***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

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[52]*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.

> actually commits an intentional act - in this case, Jeremy, who committed murder. ***The exclusion does not apply to potentially innocent negligent insured's, 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 to defend under the policy.
>
> * * *
>
> ***As it relates to his parents, Jeremy's unexpected act was clearly an "occurrence" as defined in the Grange policy.*** 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.

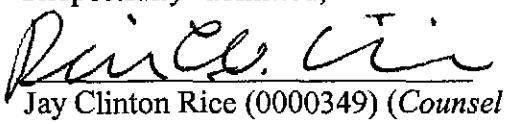
(Emphasis added.) Accord *Allstate Ins. Co. v. Dolman*, Lucas App. No. L-07-1113, 2007-Ohio-6361; *Owners Ins. Co. v. Reyes* (Sept. 30, 1999), Ottawa App. No. OT-99-017, 1999 Ohio App. LEXIS 4557.

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 the subsequent *Doe* decision, 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 molestation. Safeco sets forth no basis under the criteria set forth in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d, to revisit the *Doe* or *Auto Club* decisions. Safeco's proffered change in Ohio law would exclude coverage for Ohio employers, parents, teachers, clergy, and many others when sued for negligent hiring or supervision. There is no reason in logic or law to limit coverage and leave Ohioans exposed to ruinous damage verdicts based on negligence. That is, as this Court correctly stated in *Doe*, the reason Ohioans buy insurance.

CONCLUSION

Benjamin White committed an intentional act; his parents did not. Lance and Diane White were found to have been only negligent. They were insured under Safeco's Homeowner's policy and Umbrella policy, both of which expressly provide that "[t]his insurance applies separately to each insured."[53] Lance and Diane White sought coverage from Safeco because they "no doubt [found] such coverage to be the purpose for which [they] obtained insurance." *Doe v. Shaffer* (2000), 90 Ohio St. 3d 388, 395. Lance and Diane White are entitled to that coverage. The trial court's judgment entry against Safeco in the amount of $728,636.36, plus post-judgment interest at the statutory rate of 8% per annum, should be affirmed.[54]

Respectfully submitted,



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[53] DJ, T.d., 2, at Exs. 1 & 2, Supp. 30, 54.

[54] If Federal and Pacific are correct, then no remand is needed because Benjamin White's mental state has no bearing on coverage for the separate negligence claims against his parents, Lance and Diane White. If, as Safeco argues, Benjamin White's mental state is determinative of coverage for his parents, then this case will have to be remanded for evidentiary hearing on that issue. Accord *Nationwide Ins. Co. v. Estate of Kollstedt* (1995), 71 Ohio St. 3d 624, syllabus; *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.

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellees Federal Insurance Company and Pacific Indemnity Company was mailed by regular U.S. mail, postage pre-paid, this 17th day of October, 2008, to:

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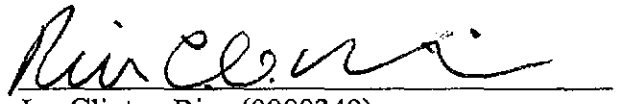

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[Cite as *Safeco Ins. Co. v. Fed. Ins. Co.*, 2007-Ohio-7068.]

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
Plaintiff-Appellant,	:	*OPINION.*
vs.	:	
FEDERAL INSURANCE COMPANY	:	
and	:	
PACIFIC INDEMNITY COMPANY,	:	
Defendants-Appellees,	:	
and	:	
BENJAMIN WHITE, et al.,	:	
Defendants.	:	

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

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[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, ¶61 ("We find the decision of the Supreme Court in *Doe v. Shaffer* * * * 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.

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[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."

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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

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[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.

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[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."

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[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

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[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.

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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.

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because it is under seal

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

JUDGE ROBERT P. RUEHLMAN
Court of Common Pleas
Hamilton County, Ohio

STEVE AND MEGEN HILMER, INDIVIDUALLY AND ON BEHALF OF CASEY HILMER, A MINOR,	Consolidated Case Nos. A0403452 and A0408943
Plaintiffs,	(Judge Ruehlman)
-v-	ENTRY
BENJAMIN WHITE, ET AL.,	
Defendants.	
SAFECO INSURANCE COMPANY OF AMERICA,	
Plaintiff,	
-v-	
BENJAMIN WHITE, ET AL.,	
Defendants.	

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ENTERED
MAR 27 2006

This matter came before the Court on the following motions:

1. Safeco Insurance Company of America's ("Safeco") Motion for Summary Judgment against Lance and Diane White (the "Whites") and Benjamin White;

2. Federal Insurance Company ("Federal") and Pacific Insurance Company's ("Pacific") Motion for Summary Judgment against Benjamin White; and

3. Lance and Diane White's Motion for Summary Judgment against Safeco.

Federal and Pacific filed a motion for summary judgment against the Whites, but withdrew their motion and acknowledged that they are required to provide the Whites a defense and coverage for the judgment in the underlying case brought by the Hilmers since the jury found that the Whites had act negligently.

Having considered the motions and legal memoranda submitted by all parties hereto, the record and judgment in the underlying case against the Whites and Ben White, and the arguments of counsel in Court on February 9, 2006, the Court finds:

1. That the motion of Safeco against the Whites is not well taken and should be denied; and

2. That the motion of the Whites against Safeco is well taken and should be granted. In rendering judgment for the Whites, the Court declares the rights and obligations of the parties as follows.

Safeco has argued that its homeowner's policy and personal umbrella policy do not provide coverage to the Whites because their son, Benjamin White, allegedly committed an intentional tort excluded from coverage. Safeco argues that an intentional tort or criminal act committed by Benjamin White (i.e. "an insured" or "any insured") negate coverage for the Whites even though they have been found by a jury to have acted negligent but, not intentionally, with respect to their supervision of Ben White proximately causing a percentage of Plaintiffs' compensatory damages.

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 Court finds that the arguments of the Whites are persuasive in light of *Doe v. Shaffer* (2000), 90 Ohio St.3d 388. Therefore, as to the Whites' motion, reasonable minds can come to but one conclusion, which is that there are no genuine issues of material fact and that the Whites are entitled to judgment as a matter of law.

Therefore, this Court finds that Safeco was and is obligated to provide for the defense of the Whites in the case captioned *Steve and Megen Hilmer, individually, and on behalf of Casey White, a minor v. Lance White, Diane White and Benjamin White*, Hamilton County Common Please Court Case No. A0403452, and that there should be pro-rata sharing of the judgment against Lance and Diane White under the Safeco and Pacific Indemnity Homeowners' policies and under the Safeco and Federal umbrella policies in proportion to their respective policy limits; and

3. That, as to motions of Safeco, Federal and Pacific against Benjamin White, there are genuine issues of material fact that, under the precedent of *Nationwide Ins Co v Estate of Kollstedt*, 71 Ohio St 3d 624,1995-Ohio-245, preclude summary judgment.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED as follows:

1. Safeco's Motion for Summary Judgment against Lance and Diane White and Benjamin White is hereby DENIED; and

2. Federal and Pacific's Motion for Summary Judgment against Benjamin White is hereby DENIED; and

3. Lance and Diane White's Motion for Summary Judgment against Safeco is hereby GRANTED.

SO ORDERED this 21 day of March, 2006.

JUDGE RUEHLMAN

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