[Cite as *Doe v. Sherwin*, 2015-Ohio-2451.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

JANE DOE, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF SALLY DOE, A MINOR, et al.,	:	**O P I N I O N**
Plaintiffs,	:	**CASE NO. 2013-P-0058**
- vs -	:	
SHELLEY SHERWIN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF B.D., A MINOR, et al.,	:	
Defendant/ Third Party Plaintiff-Appellant,	:	
- vs -	:	
LIBERTY MUTUAL FIRE INSURANCE COMPANY,	:	
Third Party Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas.
Case No. 2012 CV 1025.

Judgment: Affirmed.

Nicholas Swyrydenko, 137 South Main Street, Suite 206, Akron, OH 44308 (For Third Party Plaintiff-Appellant).

William M. Harter and *Katherine Klingelhafer*, Frost Brown Todd LLC, 10 West Broad Street, Suite 2300, Columbus, OH 43215 (For Third Party Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant Shelley Sherwin, individually and as parent and natural guardian of B.D., a minor, appeals from the June 6, 2013 order and journal entry of the Portage

County Court of Common Pleas. The trial court's entry granted the motion for summary judgment filed against Sherwin by appellee, Liberty Mutual Fire Insurance Company, and dismissed Sherwin's claim for declaratory relief against Liberty Mutual.

{¶2} On September 4, 2012, plaintiffs, Jane and John Doe, individually and as parents and natural guardians of Sally Doe, a minor, filed suit against Sherwin and B.D., alleging that B.D. committed sexual assaults against Sally Doe and that Sherwin, as B.D.'s parent and natural guardian, was required to pay compensatory damages. Liberty Mutual refused to provide a defense and indemnification to plaintiffs' claim under Sherwin's homeowner's policy because the allegations in the complaint involved injuries arising out of sexual molestation. Sherwin and B.D. brought a third party complaint for declaratory judgment against Liberty Mutual.

{¶3} On January 29, 2013, Liberty Mutual filed a motion to dismiss pursuant to Civ.R. 12(B)(6). On March 5, 2013, the trial court granted Liberty Mutual's motion to dismiss B.D.'s third party claim against Liberty Mutual. The trial court subsequently granted Liberty Mutual's motion for summary judgment on June 6, 2013, and dismissed Sherwin's remaining third party claim. It is from that entry that appellant filed the instant appeal. As B.D.'s third party claim had already been dismissed, we note that the granting of summary judgment and, thus, the instant appeal only pertain to Sherwin's third party claim against Liberty Mutual.

{¶4} Liberty Mutual filed a motion to dismiss the instant appeal, alleging the June 6, 2013 order from which Sherwin appeals is not a final, appealable order. Liberty Mutual argued that not all of the claims had been resolved and that the judgment entry did not include Civ.R. 54(B) language stating, "no just reason for delay." Sherwin filed a response in opposition to the motion to dismiss, emphasizing that although the

underlying claims against defendants remain pending before the trial court, there are no issues left to resolve with regard to the third party claim for declaratory relief. In short, Liberty Mutual is not a party to any of the claims that remain pending in the trial court.

{¶5} On March 24, 2014, this court issued a judgment entry noting that "it is unclear whether the trial court intended for its June 6, 2013 judgment to be final, since no Civ.R. 54(B) language was present." The case was remanded to the trial court with instructions to include Civ.R. 54(B) language "only if it deems such language appropriate." The trial court did not issue a new judgment entry or take any action to include Civ.R. 54(B) language, and the record was refiled on April 22, 2014.

{¶6} Subsequently, this court issued a judgment entry stating the June 6, 2013 order was final and appealable for the following reasons: pursuant to R.C. 2505.02(B)(2), the order is final; the requirement of "no just reason for delay" language under Civ.R. 54(B) was not necessary to render the final order immediately appealable; any conflict between the rule and statute should be resolved in favor of the statute, as the issue affects a substantive right; and prohibiting an appeal at this time would result in immediate harm to Sherwin.

{¶7} Accordingly, as this court has jurisdiction to consider this appeal, we proceed to the merits. Sherwin has assigned one error for our review:

{¶8} "The trial court erred as a matter of law in granting summary judgment."

{¶9} On appeal, a summary judgment order is reviewed de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). Thus, this court conducts an independent review of the evidence that was before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993).

{¶10} Summary judgment is appropriate under Civ.R. 56(C) when (1) there is no genuine issue of material fact remaining to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion and, viewing the evidence in favor of the nonmoving party, that conclusion favors the moving party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

{¶11} Unlike questions of fact, which must be construed in favor of the non-moving party, a decision granting or denying summary judgment based on interpretation of an insurance contract is a question of law. *Nationwide*, *supra*, at 108. When confronted with an issue of contractual interpretation, the court must examine the contract as a whole, presume the parties' intent is reflected in the contract language, and give effect to that intent. *Currier v. Penn-Ohio Logistics*, 186 Ohio App.3d 249, 2010-Ohio-195, ¶14 (11th Dist.), citing *Kelly v. Med. Life Ins. Co*., 31 Ohio St.3d 130 (1987), paragraph one of the syllabus, and *Hamilton Ins. Servs. Inc. v. Nationwide Ins. Cos*., 86 Ohio St.3d 270, 273 (1999).

> When the language of a written contract is clear, a court determines the intent of the parties from the writing itself and does not construe or interpret the contract. [* * *] It is well-settled that a court may only construe an insurance contract when it is ambiguous, i.e., where its terms are reasonably susceptible of more than one interpretation. A court has the duty to enforce an insurance contract as made by the parties, and not to rewrite contract terms which are unambiguous under the guise of judicial construction.

Currier, *supra*, at ¶14-15 (internal citations omitted).

{¶12} Where the "scope of the allegations of the complaint * * * brings the action within the coverage of the policy[,] the insurer is required to make [a] defense, regardless of the ultimate outcome of the action or its liability to the insured." *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St.2d 41 (1973), paragraph two of the syllabus.

{¶13} In the case sub judice, Sherwin contends the trial court erred when it found, as a matter of law, that Liberty Mutual does not have a contractual obligation to defend and indemnify Sherwin against plaintiffs' claims for statutory parental liability and negligent supervision. The insurance policy issued by Liberty Mutual states, in relevant part:

> **SECTION II – LIABILITY COVERAGES**
>
> **COVERAGE E – Personal Liability**
> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured"; and
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the "occurrence" equals our limit of liability.
>
> **COVERAGE F – Medical Payments to Others**
> We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing "bodily injury."
>
> * * *
>
> **SECTION II -- EXCLUSIONS**
>
> **Coverage E – Personal Liability and Coverage F – Medical Payments to Others** do not apply to "bodily injury" or "property damage":
>
> *** * ***
>
> k. Arising out of sexual molestation, corporal punishment or physical or mental abuse[.]

{¶14} According to the policy language, Liberty Mutual is contractually bound to defend and indemnify Sherwin for the claims against her if the alleged negligence is (1) an "occurrence" under Coverage E and (2) not precluded from coverage by Exclusion 1.k. The parties do not dispute that the claims against Sherwin constitute an "occurrence"; rather, the dispute on appeal is whether the claims are precluded from coverage by the exclusion.

{¶15} Sherwin contends that Liberty Mutual has a duty to indemnify her based on the Supreme Court of Ohio's holding in *Doe v. Shaffer*, 90 Ohio St.3d 388 (2000). The *Shaffer* Court held: "Ohio public policy *permits* a party to obtain liability insurance coverage for negligence related to sexual molestation when that party has not committed the act of sexual molestation." *Id.* at 395 (citations omitted and emphasis added). The *Shaffer* Court did not hold, however, that every insurance policy necessarily provides such coverage. *Westfield Ins. Co. v. Porchervina*, 11th Dist. Lake No. 2008-L-025, 2008-Ohio-6558, ¶13; *Lehrner v. Safeco Ins.*, 171 Ohio App.3d 570, 2007-Ohio-795, ¶46 (2d Dist.). "An insurance policy is a contract." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶9. Therefore, in any given insurance policy, the parties are free to contract for the coverage at issue. The public policy at issue in *Shaffer* is not at issue here. The parties do not dispute whether they have the freedom to contract for coverage related to sexual molestation; they dispute whether they did, in fact, contract for such coverage.

{¶16} Initially, we find that the plain language of the exclusion in the policy at issue is unambiguous. *See Porchervina*, *supra*, at ¶32. The exclusion simply states that coverage will not apply to any bodily injuries that arise out of sexual molestation; it does not distinguish between coverage for an insured who intentionally committed the

act of sexual molestation and coverage for an insured whose negligence contributed to the act. *Id*.; *see also Crow v. Dooley*, 3d Dist. Allen No. 1-11-59, 2012-Ohio-2565, ¶15 (holding "the policy excludes coverage for all bodily injury arising out of acts of sexual molestation, irrespective of the mental state of the defendant").

{¶17} In *Crow*, the Third District also explained that "[t]he Supreme Court of Ohio has adopted a narrow interpretation of the term 'arising out of' to mean 'caus[ing] or contribut[ing] to the bodily injury for which coverage is sought.' 'Arising out of' connotes the need for a direct consequence or a responsible condition." *Id.* at ¶16, quoting *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, ¶16-17, ¶20. Although *Hunter* is factually distinguishable from *Crow* and the case at hand, the reasoning and interpretation are instructive to our application of the term "arising out of."

{¶18} All of the injuries alleged in plaintiffs' complaint, including those attributed to the negligence of Sherwin, arose out of B.D.'s alleged sexual molestation of plaintiffs' minor child. In Count II, plaintiffs allege their child's injuries were "a direct and proximate result of Defendant Sherwin's negligence and other conduct"; in Count IV, plaintiffs allege they have incurred and will continue to incur medical expenses for their child "[a]s a direct and proximate result of the negligence and other conduct of Defendants Sherwin and [B.D.]." Accordingly, based on the plain language of the insurance contract and because it is alleged that Sherwin's negligence caused or contributed to and was a responsible condition for the minor child's bodily injury, we hold that Liberty Mutual has no duty to defend or to indemnify Sherwin.

{¶19} This conclusion has been reached in other cases, in this district and other districts, with similar fact patterns and nearly identical policy language. *See Porchervina*, *supra*; *United Ohio Ins. Co. v. Myers*, 3d Dist. Paulding No. 11-02-08,

2002-Ohio-6596; *World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 13AP-290, 2013-Ohio-5707; and *Crow*, *supra*.

{¶20} In *Porchervina*, Dale Porchervina was accused of sexually assaulting the plaintiffs' minor child. *Porchervina*, *supra*, at ¶3-4. The plaintiffs filed a lawsuit for statutory parental liability and negligent infliction of emotional distress against Dale's parents. *Id*. at ¶4. The language of the relevant exclusion in the Porchervina's homeowners' insurance policy was identical to that at hand: "Arising out of sexual molestation, corporal punishment or physical or mental abuse." *Id*. at ¶31. This court held the insurance company had no duty to defend or indemnify the Porchervinas because the language was unambiguous and did "not differentiate as to who committed the act of sexual molestation." *Id*. at ¶32.

{¶21} In *Myers*, Jeremy was accused of sexually molesting the plaintiffs' two minor children. *Myers*, *supra*, at ¶3. The plaintiffs filed a lawsuit for negligent supervision against Jeremy's grandmother, his legal guardian. *Id*. at ¶3-4. The language of the relevant exclusion in Ms. Myers' homeowners' insurance policy read as follows:

> [A]rising out of the actual or threatened physical or mental abuse, corporal punishment, or sexual molestation by anyone of any person while in the care, custody or control of an insured, or by the negligent * * * supervision * * * of any person for who the insured is or ever was legally responsible[.]

Id. at ¶27. The Third District held the insurance company had no duty to defend or indemnify Ms. Myers for her negligent acts and omissions because the language specifically excluded such coverage. *Id*. at ¶28.

{¶22} In *World Harvest Church*, Richard Vaughan was accused of physically abusing the plaintiffs' minor son while at the daycare where Richard was employed.

World Harvest Church, *supra*, at ¶2. The plaintiffs filed a lawsuit for negligent supervision against Richard's employer, World Harvest Church ("WHC"). *Id*. The language of the relevant exclusion in WHC's commercial insurance policy was nearly identical to that in *Myers*:

> [A]rising out of: 1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or 2. The negligent * * * supervision * * * of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by 1. above.

Id. at ¶43. The Tenth District held the insurance company had no duty to defend or indemnify WHC because the language was unambiguous, *id*. at ¶47, and "specifically precluded coverage based on WHC's negligent supervision." *Id*. at ¶50.

{¶23} In *Crow*, Joshua Dooley was convicted and sentenced for raping and photographing the plaintiffs' minor child. *Crow*, *supra*, at ¶2. The plaintiffs filed a lawsuit for negligence, negligent supervision/failure to protect, and many other claims against Joshua's mother. *Id*. at ¶3. The language of the relevant exclusion in Mrs. Dooley's homeowners' insurance policy was identical to that at hand: "[A]rising out of sexual molestation, corporal punishment or physical or mental abuse." *Id*. at ¶12. The Third District held the insurance company had no duty to defend or indemnify Mrs. Dooley because the language was unambiguous and "excludes coverage for all bodily injury arising out of acts of sexual molestation, irrespective of the mental state of the defendant." *Id*. at ¶15.

{¶24} In *Crow*, the Third District also noted that "the Ohio Supreme Court has announced that public policy favors insurance coverage for negligence relating to sexual molestation and has set forth the analytical framework to address coverage for negligence of a non-molester." *Id*. at ¶25 (referring to *Safeco Ins. Co. of Am. v. White*,

122 Ohio St.3d 562 (2009)). However, as the *Crow* court also recognized, there was an important distinction between the exclusion language in *Crow* and that in *White*:

> Both of the exclusions in *White* included specific language regarding the expected or intended act, consent, knowledge, foreseeable result, etc. Such insurance provisions, on their face, do not preclude coverage for injuries predicated upon an allegation of negligence. In the instant case, any language regarding the necessary knowledge or intent of the insured is remarkably absent from the Sexual Molestation exclusion. Therefore, the Sexual Molestation exclusion precludes coverage for any bodily injury arising out of sexual molestation *without regard* to the specific causal connection to the molester or the requisite mental state of the alleged tortfeasor. Because of the difference in the language of the operative exclusions in *White* and the present case, the holding in *White* is inapplicable to the instant case.

Id. at ¶20. The same distinction is found here. Accordingly, although we acknowledge and appreciate the public policy advanced by the Ohio Supreme Court in *White*, the analysis in *White* is inapplicable to the case at hand. *See id.* at ¶20, fn. 4; *see also World Harvest Church*, *supra*, at ¶49-50 (distinguishing *White* based on the specific exclusion provisions involved in each case).

{¶25} The Ohio Supreme Court has not held that every insurance policy must provide coverage for the negligence of an insured non-molester. "[T]he parties retain their freedom to contract for the same. We will not alter the contractual language agreed to by the parties by imparting an ambiguity which otherwise would not exist in furtherance of public policy." *Crow*, *supra*, at ¶25, citing *Porchervina*, *supra*, at ¶13-14; *see also Galatis*, *supra*, at ¶12 (stating that courts are "not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties").

{¶26} Sherwin also cites to this court's own holding in *Havel v. Chapek*, 11th Dist. Geauga No. 2004-G-2609, 2006-Ohio-7014 as support for her assigned error. However, we note that *Havel* was decided before the Ohio Supreme Court further

clarified this issue in its *White* decision and was tacitly overruled by this court's subsequent decision in *Porchervina*. Additionally, because the insureds in *Havel* were "found not to have been negligent, the issue of [the insurer's] liability under the policy [was] rendered moot and need not have been considered by the majority." *Id.* at ¶64 (Grendell, J., dissenting). Because the *Havel* holding cited by Sherwin is dicta, and in view of the *White* decision and the distinctions that were set forth in *Crow* above, we expressly decline to follow *Havel*.

{¶27} For all of the foregoing reasons, we hold that Liberty Mutual is not contractually obligated to defend or indemnify Sherwin in the action brought by plaintiffs. The judgment of the Portage County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶28} I concur in the judgment of this court, upholding the trial court's determination that Liberty Mutual was not required to defend or indemnify Sherwin. For the reasons stated below, this case should have been dismissed due to the lack of a final appealable order. However, the other judges on the panel have addressed the merits of the case, but with divergent opinions. Under these circumstances, judicial efficiency and expediency necessitate a ruling on the merits.

{¶29} The writing judge states that this court found the trial court's judgment to be final and appealable, since Civ.R. 54(B) "no just reason for delay" language was

unnecessary and prohibiting the appeal would result in harm to Sherwin. *Supra* at ¶ 6. The judgment in this case, however, was not final.

{¶30} It is clear from a review of the record that, while the trial court disposed of the third party complaint against the insurer, the original cause of action between the plaintiffs and Sherwin and B.D. still remains pending, and the court did not include Civ.R. 54(B) language that "there is no just reason for delay." A review of the law and facts of this case strongly supports a conclusion that such language was necessary.

{¶31} Generally, where there are multiple claims and/or parties involved, an entry that enters final judgment as to one or more but fewer than all of the claims is not a final appealable order in the absence of Civ.R. 54(B) language stating that "there is no just reason for delay." *Montello v. Ackerman*, 11th Dist. Lake No. 2009-L-111, 2009-Ohio-6383, ¶ 6; *Kessler v. Totus Tuus, L.L.C.*, 11th Dist. Ashtabula No. 2007-A-0028, 2007-Ohio-3019, ¶ 7. This case is no exception.

{¶32} While declaratory judgment actions *can* be immediately appealable, Ohio appellate courts have held that, in such actions, Civ.R. 54(B) language is necessary when additional claims remain pending. *State ex rel. Gloria H. Baker Living Trust v. Lordstown*, 11th Dist. Trumbull No. 2013-T-0068, 2014-Ohio-3005, ¶ 11; *Knox Cty. Commrs. v. Knox Cty. Engineer*, 5th Dist. Knox No. 09 CA 00041, 2010-Ohio-4099, ¶ 16; *Bath Twp. v. Raymond C. Firestone Co.*, 9th Dist. Summit No. 19159, 1998 Ohio App. LEXIS 4408, 2 (Sept. 14, 1998).

{¶33} More importantly, the requirement that Civ.R. 54(B) language must be included has been recognized in cases specifically involving an insurer's duty to defend and indemnify the insured, such as is the case here. For example, in *Braelinn Green Condominium Unit Owner's Assn. v. Italia Homes, Inc.*, 10th Dist. Franklin No. 09AP-

1144, 2010-Ohio-2371, the court held that, although the appellant "suggested at oral argument that a trial court's decision regarding an insurer's duty to defend and/or indemnify its insured is immediately appealable, even in the absence of Civ.R. 54(B) language, Ohio case law does not support [this] argument." *Id.* at ¶ 12. *See also Allstate Ins. Co. v. Soto*, 8th Dist. Cuyahoga Nos. 78114 and 78115, 2000 Ohio App. LEXIS 5607, 9-10 (Nov. 30, 2000) (denial of the third party defendant insurance company's request for declaratory judgment on its duty to defend was not a final order in the absence of 54(B) language, even though this would potentially harm the insurer by requiring the expenditure of resources in the defense); *Roberts v. Reyes*, 9th Dist. Lorain No. 09CA009576, 2010-Ohio-1086, ¶ 17-18 (no final order existed when the trial court ruled that the insurer was not required to indemnify or defend, but the underlying tort claim remained). Thus, this appeal should have been dismissed for lack of a final order.

{¶34} Accordingly, I concur in judgment only.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶35} The majority reasons that all of the injuries claimed in the complaint "arise out of" B.D.'s sexual molestation of Sally Doe, including count II (negligent supervision), and count IV (loss of consortium and medical expenses). It then applies the sexual molestation exclusion, which, admittedly, excludes any coverage for B.D.'s acts, whether negligent or intentional, since the exclusion makes no differentiation between negligent or intentional acts. In determining that all of the injuries complained of arise out of B.D.'s molestation, the majority relies on the decision in *Westfield Ins. Co. v.*

Hunter, 128 Ohio St.3d 540, 2011-Ohio-1818. I respectfully believe the majority is misapplying the reasoning in *Hunter*.

{¶36} *Hunter* involves the interpretation of an exclusion excluding coverage for claims arising out of premises owned by an insured that are not an insured location. *Id.* at ¶3. The Hunters, residents of Hamilton, Ohio, owned a farm in Indiana which was not an insured location under their homeowners policy with Westfield. *Id.* at ¶4. Their minor grandson was injured on the farm when another youngster drove her all terrain vehicle into him. *Id.* at ¶5. The grandson and his parents sued the Hunters, the girl, and her parents. *Id.* at ¶6. Westfield brought a declaratory judgment action, seeking a declaration that the subject exclusion relieved it of any duty to defend or indemnify the Hunters. *Id.* at ¶7. The trial court granted summary judgment in favor of Westfield, and the Twelfth Appellate District affirmed. *Id.* at ¶8-9.

{¶37} The Twelfth Appellate District certified a conflict. *Hunter* at ¶9. The Supreme Court accepted the certified conflict, and reversed the judgment of the court of appeals. *Id.* In relevant part it held:

{¶38} "We therefore hold that an exclusion in a homeowner's insurance policy for claims 'arising out of' premises owned by the insured other than the insured location excludes coverage for premises-based liability claims, such as those that arise from the quality or condition of the premises. Moreover, *although the exclusion does not bar coverage of claims that arise from the insured's alleged negligence if that negligence is unrelated to the quality or condition of the premises*, it does exclude coverage for claims based upon the insured's ownership of the property upon which the injury occurred." (Emphasis added.) *Hunter* at ¶25.

{¶39} Consequently, the Supreme Court held that the negligent supervision claims brought against the Hunters might fall within the parameters of the Westfield policy, despite the other owned premises exclusion. *Hunter* at ¶27.

{¶40} Similarly, in this case, any of the counts in the complaint arising out of B.D.'s sexual molestation of Sally Doe are clearly excluded from coverage. However, the count for negligent supervision against Shelley Sherwin, and that for loss of consortium, potentially state claims for separate tortious acts than the molestation. Failure by a parent to supervise a minor child is distinct from the tortious, unsupervised acts of that child. On that basis, I would find that Liberty Mutual had, at the least, a duty to defend the claims for negligent supervision and loss of consortium.

{¶41} As I would reverse and remand, I respectfully dissent.