

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Kami F.,
Defendant below, Petitioner**

vs) No.11-0463 (Greenbrier County No. 08-C-296)

**Farmers Mutual Insurance Co.,
Plaintiff below, Respondent**

FILED

September 23, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kami F. appeals the circuit court's entry of summary judgment in favor of Respondent Farmers Mutual Insurance Company and the circuit court's order denying her motion for reconsideration of the summary judgment order.¹ Respondent has filed a response.

Pursuant to Revised Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

This appeal arises from a declaratory judgment action instituted by Farmers Mutual Insurance Co. to determine whether it was required to provide indemnification and a defense to its insureds, Tedda and Charles Berry, in a separate lawsuit instituted by petitioner. Petitioner's lawsuit alleges that insured Charles Berry molested her while she attended Tedda's Day Care Center and that Tedda Berry was negligent in allowing the molestation to occur at the day care center. Petitioner alleges causes of action arising from negligence, as well as intentional infliction of emotional distress and negligence. The circuit court granted summary judgment to Farmers Mutual Insurance Co. finding that it had no duty to either

¹ In this case, the Court will follow its practice of not utilizing a litigant's last name in cases involving sensitive matters. *See State ex rel. W.VA. Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 689, 356 S.E. 2d 181, 182 n.1 (1987) (citations omitted.)

defend or indemnify the Berrys. Petitioner's motion for reconsideration was denied by the circuit court, which held, *inter alia*, that the policy's definition of "bodily injury" does not include any injury which results from "the actual, alleged or threatened sexual molestation of a person." The circuit court stayed petitioner's separate civil suit against the Berrys pending the outcome of her appeal in the instant declaratory judgment action.

"The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt.1, *Wickland v. American Travellers Life Insurance Company*, 204 W.Va. 430, 513 S.E. 2d 657 (1998). "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va.189, 451 S.E. 2d 755 (1994). Similarly, "[a] circuit court's entry of a declaratory judgment is reviewed *de novo*." Syl. Pt. 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E. 2d 459 (1995). "The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." Syl. Pt. 2, *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216, 517 S.E. 2d 313 (1999).

The circuit court concluded, *inter alia*, that the specific policy language defining "bodily injury" barred coverage in this case. The insurance policy in question provides that the insurer will pay up to coverage limits "all sums for which an insured is liable by law because of bodily injury or property damage caused by an occurrence to which this coverage applies." "Bodily injury" is defined in the insurance policy as "bodily harm to a person and includes sickness, disease or death. This also includes required care and loss of services. Bodily Injury does not mean bodily harm, sickness, disease or death that arises out of . . . (b) the actual, alleged or threatened sexual molestation of a person." The Court finds no ambiguity in this policy language. "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl. Pt. 1, *Christopher v. United States Life Insurance Company in the City of New York*, 145 W.Va. 707, 116 S.E. 2d 864 (1960).

Regarding petitioner's argument that this Court's decision in *J.H. v. West Virginia Division of Rehabilitation Services*, 224 W.Va. 147, 680 S.E. 2d 392 (2009)(per curiam), requires reversal of the denial of coverage, the Court disagrees as the bodily injury language specifically negates coverage for sexual molestation. As *J.H.* does not address a "bodily injury" provision such as the one in the present case, it does not mandate reversal of the circuit court's ruling as set forth in its order denying petitioner's motion for reconsideration.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 23, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh