No. 30633 *Steven Tackett v. American Motorists Insurance Company, a foreign corporation*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, C. J., concurring, in part, and dissenting, in part:

I concur with the result in the majority's opinion: the tortfeasor in the underlying case, Mr. Tackett, is absolutely entitled to a defense and indemnification under his employer's commercial general liability policy.

I dissent, however, to that portion of the opinion that relies upon *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000) because I now question whether that case was correctly decided.

First, the Court in Syllabus Point 1 of *Smith v. Animal Urgent Care* reached the conclusion that "purely mental or emotional harm that arises from a claim of sexual harassment and lacks physical manifestation does not fall within a definition of 'bodily injury' which is limited to 'bodily injury, sickness, or disease.'" Frankly, this is an archaic conceptualization of human anatomy and physiology, based on a belief that there is a distinction between "mental" and "physical" injuries. The science of today establishes that the brain can be physically injured solely through an emotional disturbance. A traumatizing event can trigger severe chemical reactions in the brain, such that a tangible injury to the brain can occur. Ask any combat veteran about post-traumatic stress disorder, or any doctor

who treats that veteran – they will tell you that intense stress can cause the brain to be "rewired."[1]

In other words, in the past when we said someone was "emotionally scarred" by an event, it might have been closer to the truth than we knew.

So when this Court said in *Smith v. Animal Urgent Care* that psychological injuries caused by sexual harassment were not bodily injuries, that conclusion ignored modern science and ignored the physical, chemical aspects of psychological injuries. If a record of medical evidence were presented on this point to the Court, perhaps the folly of *Smith v. Animal Urgent Care* might be recognized.

Second, this Court held in Syllabus Point 2 of *Smith v. Animal Urgent Care* that a claim against a liability insurance policy that is based on sexual harassment is not an "occurrence" or an "accident." This holding is harmful to business owners, large and small, because it ignores the fact that sexual harassment by an *employee* is usually not an intentional or expected act by the *employer*. A business owner may do nothing to intentionally harm his or her customers, and should not expect his or her employees to cause bodily injury by

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[1]That "rewiring" manifests itself through emotional expressions, but is difficult to show with empirical evidence.

The structure of every person's body is different, particularly the complex, minute physiology of their brain. It would be difficult for a doctor to show how the structure and/or operation of a person's brain was changed by a traumatic event without having a complete analysis of the structure and operation of the person's brain done before the traumatic event. Frankly, since these tests are expensive, it is very unlikely doctors will have "pre-event" test results to use as a "base-line" for comparison.

sexually harassing customers, yet insurance companies will rely on *Smith v. Animal Urgent Care* to deny the business owner any liability insurance coverage.

The liability policy at issue in *Smith v. Animal Urgent Care* defined "occurrence" and "accident" in a way that excluded coverage for injuries "expected or intended from the standpoint of the insured." This is generally referred to as an "intentional acts exclusion." It is a well-settled principle of insurance law that such an exclusion

> . . . does not exclude liability for unintentional or unexpected *injury*. The mere act of doing an intentional act by the insured does not relieve the insurer where the resultant injuries were unintended.

"Coverage or exclusion of intentional injuries," 43 Am.Jur.2d § 708 (1982) (emphasis added). *See also*, *State ex rel. Davidson v. Hoke*, 207 W.Va. 332, 339-40, 532 S.E.2d 50, 57-58 (2000) (*per curiam*) (Starcher, J., concurring). In other words, for the "intentional acts" exclusion to operate, the insured must have both committed an intentional act, and intended or expected the consequential injury.

Under our holding in *Smith v. Animal Urgent Care*, if one bad employee gropes a customer, the purchaser of the liability insurance, the business owner, can be left holding the bag with no liability coverage. In these circumstances, there should be coverage because, *from the standpoint of the business owner*, the injury to the customer was not expected or intended.

I concur with the result reached by the majority opinion. However, I would overrule *Smith v. Animal Urgent Care*, and to the extent the majority opinion relies upon that case, I dissent.