No. 31230 – West Virginia Fire & Casualty Company v. Cass-Sandra Marko Gene Stanley, Sandra Stanley, Roxanna Holcomb, Glen Stanley, Helen Stanley and Jesse Stanley

No. 31532 – West Virginia Fire & Casualty Company v. Cass-Sandra Marko Gene Stanley, Sandra Stanley, Roxanna Holcomb, Glen Stanley, Helen Stanley and Jesse Stanley

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Starcher, J., concurring:

I join the majority's opinion with some fear and trepidation for what future litigation might bring. Whenever some sexual misconduct occurs, and a person is harmed by that misconduct, insurance companies are likely to wave the instant case and our holding in *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 376 S.E.2d 581 (1988) for the proposition that there can *never* be liability insurance coverage for sexual misconduct. That interpretation of the instant case and *Leeber* is wrong.

Under an intentional acts exclusion in a liability insurance policy, an insured can be denied coverage only if the insured "(1) committed an intentional act *and* (2) expected or intended the specific resulting damage." Syllabus Point 7, *Farmers and Mechanics Mut. Ins. Co. v. Cook*, 210 W.Va. 394, 557 S.E.2d 801 (2001). Both the instant case and the *Leeber* case demonstrate circumstances where an insured intentionally assaulted a plaintiff, and by inference, expected or intended physical and psychological harm. In the *Leeber* case, the insured was a junior high school teacher who admitted to sexually abusing a student; in the case at bar, Jesse Stanley is alleged to have deliberately sexually assaulted his niece.

There is no way on God's green earth that either of these tortfeasors should have been permitted to shift the cost of their conduct onto an insurance company.

As for Jesse's parents, the same analysis applies, but a different result might have been had – if the plaintiff's complaint been drafted differently. If Jesse's parents had not intentionally sent their granddaughter into harm's way, or had not expected that their son would physically and emotionally harm their granddaughter, then they might have been entitled to indemnity and a defense from their liability insurance company. In other words, if the plaintiffs had alleged that these parents had acted with innocence – for instance, not knowing of their son's violent, abusive tendencies, or not expecting that their son would inflict those tendencies on a younger family member – then the parents could not have been acting "intentionally," and they would be entitled to liability insurance coverage and/or a legal defense.

When a liability insurance company receives a copy of a complaint against an insured, the insurance company decides whether it must provide liability coverage and/or a defense to the insured based upon two documents: the complaint, and the insurance policy. As we stated in *State Auto Mutual Ins. Co. v. Alpha Engineering Services, Inc.*, 208 W.Va. 713, 716, 542 S.E.2d 876, 879 (2000) (*per curiam*) (citations omitted):

> In other words, an insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. If the causes of action alleged in the plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy.

See also, Lee R. Russ, 14 *Couch on Insurance* § 200:20 (1999) ("Although there are exceptions, as a general rule, an insurer's duty to defend the insured is determined primarily by the pleadings in the underlying lawsuit, without regard to their veracity, what the parties know or believe the alleged facts to be, the outcome of the underlying case, or the merits of the claim."). This rule has variously been called the "four corners" rule (because the insurance company's duty is defined by the allegations in the "four corners" of the complaint); the "eight corners" rule (that is, the insurance company or trial court compares the "four corners" of the complaint with the "four corners" of the insurance policy); the complaint rule; the exclusive pleading rule; and the scope of the allegations test. *See* Susan Randall, *Redefining the Insurer's Duty to Defend*, 3 Conn.Ins.L.J. 221, 226 (1996/1997).

The obvious rule for plaintiff's lawyers to take away from this case is to carefully plead any case involving sexual misconduct or other intentional tort. If a defendant is likely to be held vicariously or secondarily liable for someone else's intentional misconduct, the plaintiff should artfully draft the complaint to make clear that the defendant did not act with intent or intend an injury. For instance, if the plaintiff merely alleges that a defendant is liable for failing to supervise another person – be it a child, an agent, or an employee – and that other person committed an intentional tort, there would still be liability insurance coverage for the insured defendant's negligence in supervision. The end result of this rule is that an insured innocent parent, or employer, or school board, will still have insurance coverage for his, her or its negligence if a child, agent or employee commits an intentional tort.

As the majority opinion makes clear, the complaint in the instant case makes repeated assertions that Jesse's parents, Glen and Helen Stanley, knew of their son's deviant sexual propensities, and deliberately and repeatedly sent their granddaughter Cass-Sandra into secluded areas with Jesse with knowledge she would be harmed. The knowledge and intent of Glen and Helen Stanley can be inferred from the general allegations in the complaint that they concealed the sexual assaults from Cass-Sandra's parents and from law enforcement authorities, and the allegation that the Stanleys used threats, intimidation and violence to conceal the crimes of their son.

In sum, West Virginia Fire & Casualty had no duty to indemnify or defend Glen and Helen Stanley in this case because of the way the complaint was drafted. Neither we nor any other court could reasonably construe this complaint to allege anything but deliberate misconduct with an intent to cause harm on the part of the insureds.

Frankly, I am not certain why counsel for the plaintiffs chose to draft the complaint in this way, unless there was simply no doubt in counsel's mind that the evidence will show that Glen and Helen Stanley acted intentionally with an intent to cause harm. The record does suggest that the Stanleys have significant financial resources, and it is possible counsel deliberately drafted the complaint in this manner so as to deprive the Stanleys of an insurance-company-provided defense, and to make them personally liable for all costs. Whether this is the case, I simply do not know.

I agree with the result in the instant case, though, because the facts alleged in the complaint plainly deprived Jesse, Glen and Helen Stanley of any entitlement to

indemnification or a defense under their liability insurance policy. I therefore respectfully concur.