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66337-2

No. 66337-2-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY

Plaintiffs/Respondents

v.

CATHERINE ANDERSON and DONALD ANDERSON, individually
and as partners in a former marital community, KENDALL DUNN and
THERESA DUNN, individually, as partners in a marital community, and
as guardians of A.D., a minor child,

Defendants/Appellants

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. THE HARM ALLEGED BY THE PLAINTIFF HEREIN WAS AN ACCIDENT UNDER CATHERINE ANDERSON'S UMBRELLA POLICY.....	2
A. <u>Catherine Anderson Was Sued For Her Own Negligence</u>	2
B. <u>The Separability Clause Requires Deciding the Presence of an "Accident" from the Point of View of Ms. Anderson</u>	6
III. THE HARM ALLEGED BY THE PLAINTIFFS IS AN OCCURRENCE AS TO CATHERINE ANDERSON.....	8
A. <u>"Any Insured" is a Broader Category than "The Insured", Whether Used in the Exclusion or in a Grant of Coverage</u>	8
B. <u>Any Ambiguity Created by MOE's Use of "Any Insured" in the Coverage Grant Must be Resolved in Favor of Providing Coverage for Ms. Anderson</u>	11
C. <u>Under No Circumstances Could Donald Anderson be Covered Under the Umbrella Policy</u>	13
D. <u>The Construction of the "Occurrence" Cause Urged by MOE Would Render the Seperability Clause Meaningless and Ineffective</u>	15

IV. MOE COULD HAVE EXCLUDED COVERAGE UNDER THE UMBRELLA POLICY FOR MS. ANDERSON’S ALLEGED NEGLIGENCE BY INCLUSION OF THE SAME ABUSE/MOLESTATION EXCLUSION FOUND IN THE HOMEOWNER’S POLICY..... 18

V. CONCLUSION..... 21

TABLE OF AUTHORITIES

WASHINGTON CASES:

<i>Allstate Ins. Co. v. Peasley</i> , 131 Wn.2d 420, 423–24, 932 P.2d 1244 (1997).....	14
<i>Ames v. Baker</i> , 68 Wn.2d 713, 717, 415 P.2d 74 (1966).....	13
<i>Boeing Co. v. Aetna Cas. & Sur. Co.</i> , 113 Wn. 2d 869, 887, 784 P. 2d 507 (1990).....	18, 19
<i>Caroff v. Farmers Ins. Co.</i> , 98 Wash. App. 565, 573, 989 P.2d 1233(1999).....	16, 17, 18, 19
<i>Johnson v. State</i> , 77 Wash. App.934, 940, 894 P.2d 1366 (1995).....	4
<i>Kitsap County v. All State Ins. Co.</i> , 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).....	12, 13
<i>M.H. v. Corporation of the Catholic Archbishop of Seattle</i> , ___ Wash. App. ___, 252 P.3d 914 (2011).....	4, 7
<i>Phil Schroeder, Inc. v. Royal Globe Ins. Co.</i> , 99 Wn.2d 65, 69, 659 P.2d 509 (1983).....	12
<i>Prudential Prop. & Cas. Ins. Co. v. Lawrence</i> , 45 Wash.App. 111, 119, 724 P. 2d 418 (1986).....	19, 20 21
<i>Queen City Farms, Inc. v. Central Nat'l Ins. Co.</i> , 126 Wn.2d 50, 83, 882 P.2d 703.....	13
<i>Rodriguez v. Williams</i> , 107 Wn.2d 381, 387, 729 P.2d 627 (1986).....	14
<i>Range Ins. Ass'n v. Authier</i> , 45 Wash. App. 383, 385, 725 P.2d 642 (1986).....	14
<i>The Standard Fire Ins. Co. v. Blakeslee</i> , 54 Wash.App. 1, 5, 771 P.2d 1172 (1989).....	15, 16

<i>Unigard Mut. Ins. Co. v. Argonaut Ins. Co.</i> , 20 Wash.App. 261, 265-6.....	9
<i>Unigard Mut. Ins. Co. v. Spokane School Dist. No. 81</i> , 21 Wash. App. 261, 266, 579 P. 2d 1015 (1978).....	15, 16
<i>Wellbrock v. Assurance Co. of America</i> , 90 Wash. App. 234, 242, 951 P.2d 367 (1998).....	5

FOREIGN CITATIONS:

<i>American Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc.</i> , 756 F. Supp. 1287 (1991).....	4
<i>Columbia Ins. Co. v. Fiesta Mart, Inc.</i> , 987 F.2d 1124 (5 th Cir. 1993).....	4
<i>Mutual of Enumclaw v. Wilcox</i> , 123 Idaho 4 (1992).....	2, 3
<i>Pacific Ins. Co. v. Catholic Bishop of Spokane</i> , 40 F. Supp. 2d 1186 (2006).....	7, 20
<i>United Fire & Cas. Co. v. Shelly Funeral Home, Inc.</i> , 642 M.W. 2d 648, 654 (Iowa, 2002).....	7

I. INTRODUCTION

MOE consistently fails to recognize that Catherine Anderson was sued for her own negligence on a tort theory it never denies is viable in Washington. By insisting that she is entitled to no more coverage under her umbrella liability policy than her child molester husband, MOE seeks to deprive her of the benefit of the separability clause in her umbrella insurance which MOE drafted, and which Catherine Anderson paid for.

In its attempt to deprive Ms. Anderson of coverage, MOE misapplies several cases, and misstates the holdings of others to suit its argument. Finally, MOE describes erroneously the function of the separability clause, asserting in effect that the coverage for Catherine Anderson can be no different than the coverage for her husband, thus rendering the separability clause superfluous and meaningless.

Catherine Anderson did not molest any children. She was sued for her own negligence in failing to protect guests on her property. She paid premiums for coverage for this type of negligence, and it should not be defeated by MOE's specious arguments.

**II. THE HARM ALLEGED BY THE PLAINTIFF
HEREIN WAS AN ACCIDENT UNDER CATHERINE
ANDERSON'S UMBRELLA POLICY**

Two factors distinguish the case here from the cases cited by respondent for the proposition that the consequences of Catherine Anderson's negligence were and accident as to her. First, the separability clause in her umbrella policy requires that the terms defining coverage be determined as if she had a separate policy. Thus, the coverage terms must be construed as they are applied separately to each person involved.

Secondly unlike the cases cited by MOE, Catherine Anderson was sued under an accepted Washington cause of action for her own negligence. The allegation against her is that she breached a separate duty she owed to the plaintiff. This fact immediately distinguishes this case from those in which an insured seeks coverage for harm caused by the intentional conduct of others without any allegation of causal negligence against the insured.

A. Catherine Anderson was Sued for Her Own
Negligent Conduct

A prime example of a case similar to this one is the Idaho case cited by MOE *Mutual of Enumclaw v. Wilcox*, 123 Idaho 4

(1992). In that case, the insured had been sued by minors alleging that the insured's wife had been negligent in failing to report to various parties what she knew about her ex-husband's sexual misconduct with children. The insured's ex-husband provided respite or foster care through the State of Idaho and was claimed to have repeatedly molested several children.

MOE claims that the Idaho Supreme Court held that there was no accident, and because of that denied coverage. MOE Br. at 10, Paragraph 2. However, this is the opposite of what the case actually held. The court's discussion of the question of accident directly supports the position of appellants herein.

With this definition in mind, we turned to the alleged acts of Wilcox. It is *her conduct* that we must look to and not to her ex-husband's conduct, because she is the only one whose acts could be covered by the policy in question. Twelve anonymous plaintiffs in the underlying action have alleged that Wilcox was negligent in failing to report or warn the proper authorities of the child molestation perpetrated upon minors by her ex-husband. Her alleged conduct is the failing to report or warn, while her ex-husband's conduct is the child molestation, which is intentional conduct and, thus, clearly not an "occurrence."

Wilcox *Supra* at 9. (Emphasis in original).

Notwithstanding the fact that the insured's conduct was an "accident" within the meaning of the policy, the Supreme Court of

Idaho held that there was no coverage, as there was no occurrence. However, the reason given was that the negligence of the insured was not the cause of the harm to the plaintiffs. *Columbia Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124 (5th Cir. 1993) likewise holds that the action of the insured in leasing a business location to a financial services company that was operating a Ponzi scheme defrauding its customers was not the cause of injury to the plaintiffs. *American Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc.*, 756 F. Supp. 1287 (1991) is to the same effect.

In none of these cases is the court's holding based on the fact that the acts of a non-intentional tortfeasor were not an "accident". Rather, in each case the court held that the acts of the insured were not the cause of the harm to the plaintiffs.

Respondent MOE has never argued, nor could it under Washington Law, that the acts of Catherine Anderson were not the cause of harm to the plaintiff's herein. Plaintiffs alleged a recognized negligence cause of action against her, and under Washington law negligence such as Ms. Anderson's can be the proximate cause even of a criminal act. See, e.g. *M.H. v. Corporation of the Catholic Archbishop of Seattle*, ___ Wash. App. ___, 252 P.3d 914 (2011); *Johnson v. State*, 77 Wash. App.934,

940, 894 P.2d 1366 (1995).

Mutual of Enumclaw also cites *Wellbrock v. Assurance Co. of America*, 90 Wash. App. 234, 242, 951 P.2d 367 (1998) for the proposition that the "occurrence" is the injury producing event, not earlier negligence. Once again, this case stands for no such proposition. This case was concerned with the coverage period of an insurance policy. The insured, during a construction project, negligently damaged trees on a property adjacent to the plaintiffs'. This damage eventually caused one of the trees to fall onto the plaintiff's property, killing the plaintiffs' decedent. The insurance policy was in force during the time of the construction when the trees were damaged, but had lapsed by the time the tree fell.

Among the provisions of the policy was one that read:

(2) This insurance applies only to bodily injury and property damage which occurs during the policy period. The bodily injury or property damage must be caused by an occurrence.

Wellbrock at 238, n. 2.

The only question to be decided in that case was whether the insurance policy covered bodily injury which had not yet occurred when the policy lapsed. Not surprisingly, in light of the clause quoted above, the court held that the covered occurrence did

not happen until the tree fell on the plaintiff's decedent. At the time the policy lapsed, the initial negligence had not caused any damage. The court certainly did not say that the act of damaging the tree roots could not be the cause of the later death of the plaintiffs' decedent. Indeed, from the court's discussion, it is plain that if the tree fell on the plaintiffs' decedent before the policy lapsed, there would be coverage for that injury. Here, of course, no such question arises. The negligence of Catherine Anderson and the harm to the plaintiffs all occurred within 24 hours of each other.

B. The Separability Clause Requires Deciding the Presence of an "Accident" from the Point of View of Ms. Anderson

The separability clause in the umbrella policy also requires that the question of accident be determined from the point of view of Ms. Anderson. This clause provides, "This coverage applies separately to each **insured**." To use MOE's metaphor, the effect of this clause is to "clone" the policy so it is construed as if each insured has an identical policy. Thus, because the policy is Ms. Anderson's policy, the question of whether the damage producing event is an accident must be seen from her point of view. Seen in this way, the molestation was certainly accidental as

to her. This is precisely the holding of *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 M.W. 2d 648, 654 (Iowa, 2002). The Iowa Supreme Court there gathered cases all of which hold that a negligent act which leads to an intentional act can still be an accident when taken from the point of view of the negligent actor. That this is the function of the separability clause is emphasized by the court's holding in *Pacific Ins. Co. v. Catholic Bishop of Spokane*, 40 F. Supp. 2d 1186 (2006). As discussed by MOE, one of the insurance policies in question there had a definition of occurrence including that such was not "expected or intended from the standpoint of the insured." *Id.* at 1191. Contrary to MOE's claim, there is no discussion in that case of a severability clause. Rather, what the court said was as follows:

Although this issue has resulted in a split of authorities among states, this court is persuaded by the jurisdictions that maintain a conceptual separation between the intent of the employee and the intent of the employer, especially because diocese's alleged policy's coverage language is defined in terms of "*the* insured," rather than "*an* insured" or "*any* insured." Washington courts read, "*the* insured" to act **like a separability clause**, directing that the policy be construed as applying to each insured.

Catholic Bishop, supra, at 1205. (Italics in original, boldface added.)

What the court is saying in this passage is that the use of the phrase "the insured" and a separability clause have the same effect. Both direct that the governing language, whether in a coverage clause or an exclusion clause, be determined from the point of view of the alleged tortfeasor whose liability is being considered. Because of this severability clause, the question with regard to whether or not the injury-producing event was an "accident" must be determined from the point of view of Catherine Anderson.

III. THE HARM ALLEGED BY THE PLAINTIFFS IS AN OCCURRENCE AS TO CATHERINE ANDERSON

A. "Any Insured" is a Broader Category than "The Insured", Whether Used in an Exclusion or in a Grant of Coverage

MOE twists its arguments into pretzels trying to avoid a result that is both a logical and grammatical truism and the accepted insurance law in Washington. In a universe in which there is more than one of anything (insured, baseball card, flat screen TV, etc.) "any" is a broader category than "the". "The" can only apply to a specific individual person or thing. "Any" on the other hand, can apply to each of all persons or things in that category.

MOE attempts to avoid this self-evident truth by somehow linking the decision of the courts on cases involving policy exclusions to the functioning of severability clauses. Thus, MOE argues:

Policies that exclude the intentional acts of "the insured," or limit occurrences with the intention or expectation of "the insured" avoid coverage for the intentional actor, but provide coverage for an innocent insured. This is because the policy severability clause creates a separate policy for each insured. In each cloned policy if the term is "the insured," and the insured seeking coverage didn't commit the intentional act, then there is coverage.

Resp. Br. at 13, Paragraph 3.

With all due respect, this is frankly nonsense. None of the cases mentioned by MOE rely for their holdings on the existence of a severability clause. Rather, it is the simple use of the phrase "the insured" or "an insured" or "any insured" which determines the focus of the relevant portion of the policy. Thus, in *Uniguard Mut. Ins. Co. v. Argonaut Ins. Co.*, 20 Wash. App. 261, 265-6, the court explains that it is use of the term "the insured" that has the effect of focusing the analysis on the negligent insured, and not imputing to him the intent or knowledge of the intentional actor.

In such instances where coverage and exclusion is defined in terms of "the insured," the courts have uniformly considered the

contract between the insurer and several insureds to be separable, rather than joint, i.e., there are separate contracts with each of the insureds. The result is that an excluded act of one insured does not bar coverage for additional insureds who have not engaged in the excluded conduct.

Id. at 266.¹

MOE simply does not confront the central issue here. Use of the term “any insured” in an exclusionary clause necessarily broadens the category of persons for whom coverage is excluded. Thus, if the question, “Is there any insured who intended the relevant conduct?” is answered in the affirmative, coverage for all is excluded.

In precisely the same way here, if the question “is there any insured who neither expected nor intended the relevant conduct?” and the answer is yes, taking the matter from that insured’s standpoint coverage is extended. As stated in appellants’ opening brief, if MOE wished the policy to have the effect it is now urging, the clause in question should have read that an occurrence is limited to actions which are neither expected nor intended from the

¹ Of course, the necessary implication here, where there is an explicit separability contract, is that the excluded act of Mr. Anderson should not bar coverage for Mrs. Anderson, who has not engaged in the excluded conduct.

standpoint of “all insureds” or “every insured” or “each insured”. The choice to indicate that an occurrence relates to results neither expected nor intended from the standpoint of any insured was MOE's choice. By making this choice, in a policy with a separability clause, it broadened the category of innocent persons for whom coverage might be available.

B. Any Ambiguity Created by MOE's Use of "Any Insured" in the Coverage Grant Must be Resolved in Favor of Providing Coverage for Ms. Anderson

As stated previously, Judge Knight ruled in opposition to MOE's summary judgment motion, finding that the language of the policy defining an occurrence as an accident "whose effects are neither expected nor intended from the standpoint of any insured" was ambiguous. MOE's explanation that Judge Knight ruled this way because of the standard on summary judgment is clearly wrong. There are no factual issues in this matter requiring a judge to view them most favorably to the non-moving party. Indeed, none of the facts in this matter have ever been contested. There is no evidence whatsoever that Ms. Anderson expected or intended the harm caused to the plaintiffs herein, and indeed MOE stipulated to this at trial. It is plain from the record that the reason for Judge Knight's denial of MOE's summary judgment motion

was his finding that the policy was ambiguous, that MOE created the ambiguity, and that the interpretation offered by the Defendants/Appellants was not unreasonable. CP 164.

The parties to this matter clearly interpret the phrase "neither expected nor intended from the standpoint of any insured" differently. MOE believes that it means there is no insured from whose standpoint the effects of the accident are either expected or intended. The Dunns and Ms. Anderson believe that it means that coverage exists for any insured who neither expected nor intended the results of the accident. Both could be possible, although appellants urge this court that their interpretation is more grammatically correct.

Thus, a court could determine that this clause is ambiguous. If the Court so considers this language, any ambiguity should be resolved in favor of Ms. Anderson. Washington law is uniform that "any doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in [the policy holder's] favor." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wash.2d 65, 69, 659 P.2d 509 (1983). The term is ambiguous if it is susceptible to two different but reasonable interpretations. *Kitsap County v. All State Ins. Co.*, 136 Wash.2d 567, 576, 964

P.2d 1173 (1998). Finally, when "a policy is fairly susceptible to two different interpretations, that interpretation most favorable to the insured must be applied, even though a different meaning may have been intended by the insurer." *Ames v. Baker*, 68 Wash.2d 713, 717, 415 P.2d 74 (1966). It is not enough for MOE to show that its coverage-defeating interpretation of the phrase is plausible, or even the preferred reading of the policy. Ms. Anderson's interpretation of the "any insured" clause is at least "rational" and thus, must be applied. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wash.2d 50, 83, 882 P.2d 703, as amended 891 P.2d 718 (1995).

C. Under No Circumstances Could Donald Anderson be Covered Under the Umbrella Policy

Though stated in several different ways, MOE's argument that appellants' interpretation of the "any insured" clause is unreasonable centers on its assertion that interpreting it this way would provide coverage for Donald Anderson. This is absolutely false. It must be remembered that this clause is just a part of a sentence defining an occurrence. The insurance policy defines this term in pertinent part as follows:

Occurrence means an accident, which happens anywhere during the policy period, whose effects

are neither expected nor intended from the standpoint of any insured ...

CT II 350.

In Mr. Anderson's case, a claim for coverage would never get to the "neither expected nor intended" part of the definition. As a matter of law in Washington, child molestation cannot be an accident from the point of view of the molester. *Rodriguez v. Williams*, 107 Wash.2d 381, 387, 729 P.2d 627 (1986); *Grange Ins. Ass'n v. Authier*, 45 Wash. App. 383, 385, 725 P.2d 642 (1986).

Ordinary rules of construction require that the different parts of the occurrence definition be read together. When interpreting a policy's terms, we do not analyze words and phrases in isolation. Rather, we read the policy in its entirety, giving effect to each provision. Insurance policies are construed so that no part is superfluous. *Allstate Ins. Co. v. Peasley*, 131 Wash.2d 420, 423–24, 932 P.2d 1244 (1997). It is simply wrong to allege that Donald Anderson could ever obtain insurance coverage under this homeowner's policy. Interpreting the policy as MOE does would render the separability clause a nullity.

D. The Construction of the “Occurrence” Clause Urged by MOE Would Render the Separability Clause Meaningless and Ineffective

Perhaps without recognizing it, MOE argues way too much. It says that because the injury-producing event was not an accident as to Mr. Anderson, it cannot be an accident as to Mrs. Anderson. It says that because Mr. Anderson expected and/or intended the result of his acts, if Mrs. Anderson is sued for different acts of negligence that are also a proximate cause of the harm caused by Mr. Anderson’s action, the results of which she admittedly did not expect or intend, coverage is not extended to her. It is thus MOE’s argument that, under the basic grant of coverage, the extent of coverage is precisely the same for all insureds, and that it extends only so far as the coverage for, and seen from the point of view of, the least covered insured. This is precisely the opposite result as should follow from the existence of a separability clause.

The result of separable as opposed to joint insurance is “that an act which excludes one insured from coverage does not bar coverage for additional insureds who have not engaged in the same conduct.” *The Standard Fire Ins. Co. v. Blakeslee*, 54 Wash.App. 1, 5, 771 P.2d 1172 (1989), quoting *Unigard Mut. Ins. Co. v. Spokane School Dist. No. 81*, 21 Wash. App. 261, 266, 579

P. 2d 1015 (1978). MOE, of course, argues that its policy should have the precise opposite construction, notwithstanding the presence of the separability clause, the effect of which it never explains. If the separability clause in this policy does not allow an examination of the nature of Ms. Anderson's own conduct, as opposed to the conduct of her ex-husband, what exactly does it do?

Caroff v. Farmers Ins. Co., 98 Wash. App. 565, 573, 989 P.2d 1233 (1999), cited by MOE for its position, in fact supports that of appellants. MOE cites *Caroff* for the proposition that the separability clause "clones the policy for each insured importing precisely the same language into each policy." Resp. Br. at 21. While *Caroff* was factually similar to this case, the insurance policies at issue were not. The plaintiff in that case sued the parents of a teenager for negligently supervising their son, who sexually molested the minor child of the plaintiffs. However, in that case, both the homeowners' policy and the umbrella policy had explicit exclusions of coverage for sexual molestation committed by any insured. The issue was not, therefore, whether the separability clause provided different results for the "innocent" and "guilty" insureds in applying the grant of coverage. Rather, the question in that case was the effect of a severability clause in

the presence of an express exclusion for injury arising out of actual, alleged, or threatened child molestation by any insured. There was, of course, no such exclusion in the umbrella policy at issue here, a matter that will be discussed further below.

The court nowhere indicated that a severability clause would not produce different results with respect to coverage as opposed to exclusion with respect to various insureds, and, in fact, implied directly to the contrary.

We agree with a recent decision from the Supreme Court of North Dakota which distinguished between the specific nature of an exclusion for injury from sexual molestation and the more general severability provision.

[A] provision such as the exclusion dealing specifically with sexual molestation of children prevails over the more general severability clause. Moreover, “[t]he purpose of severability clauses is to spread protection, to the limits of coverage, among all of the ... insureds. The purpose is not to negate bargained-for exclusions which are plainly worded.”

Caroff at 572 (internal citations omitted.)

A severability clause requires that the insurance policy be construed as if there were a separate policy for each insured. In the situation present in *Caroff*, each such policy contained a clear exclusion for acts of sexual molestation committed by any insured.

It is a far cry from saying that “cloned policies” each of which contains a clear exclusion produce identical results with regard to the exclusion, to saying that the very grant of coverage under such policies will be the same regardless of the difference in the character of the actions of the insureds. As stated in the quote cited in *Caroff*, the purpose of severability clauses is to spread protection, to the limits of coverage among all of the insureds.

IV. MOE COULD HAVE EXCLUDED COVERAGE UNDER THE UMBRELLA POLICY FOR MS. ANDERSON’S ALLEGED NEGLIGENCE BY INCLUSION OF THE SAME ABUSE/MOLESTATION EXCLUSION FOUND IN THE HOMEOWNERS’ POLICY.

MOE’s argument is that the court should construe policy provisions granting coverage so as to exclude sexual molestation on the part of any insured. However, it is plain that had MOE wished to exclude this coverage regardless of which insured engaged in the prohibited conduct, it knew *exactly* how to do so. *See Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn. 2d 869, 887, 784 P. 2d 507 (1990). (“The [insurance] industry knows how to protect itself and knows how to write exclusions and conditions.”) MOE did just that through the specific sexual abuse/molestation exclusion it included with the homeowners’ policy it issued to the

Andersons. This provision excludes liability coverage for *all* insureds when a plaintiff asserts a claim against *any* insured concerning alleged sexual molestation. CP 334, ¶j. This exclusion meets the insurer’s obligation to draft clear policy language and this exclusion is of the kind that was specifically enforced in *Caroff, supra.*² Significantly, however, MOE failed to include such an exclusion, or anything remotely similar, in its umbrella policy – despite having written 16 other exclusions into the policy. CP 352-54, 362. This court should not read a sexual abuse exclusion into the umbrella policy where MOE had the means and opportunity to include the exclusion (as it did with the homeowners’ policy), but chose not to do so. *See Prudential Prop. & Cas. Ins. Co. v. Lawrence*, 45 Wash.App. 111, 119, 724 P. 2d 418 (1986). (“Had [insurer] intended to restrict the scope of the ‘property damage’ definition [in the insurance umbrella policy], it easily could have done so by adopting the same definition contained in the homeowners’ policy.” *See also, Boeing v. Aetna*,

² In the homeowner’s policy, the “expected or intended” language was also in an exclusion. Phrasing it this way avoids the ambiguity created by the use of multiple negatives. It also might lead to a different result than the language actually used in the umbrella policy. However, it is not surprising, in light of the purpose of the separability clause in the umbrella policy, to extend coverage to non “guilty” insureds.

supra, at 877 (holding that the coverage grant including the term “accident” is “an odd place to look for exclusions of coverage”).

The absence of such an exclusion was commented on by Judge Quackenbush in the *Catholic Bishop of Spokane* case, *supra*.

The judge noted:

It appears that after the nationwide carriers became aware of the numerous claims against The Dioceses, and after the claims at issue here, the carriers changed their comprehensive liability policies to exclude any such claims, by that of negligent or intentional conduct, and whether the intentional wrongful or negligent acts were insured were by the insured or by a person also insured under the policy.

Pacific Ins. Co. v. Catholic Bishop of Spokane, supra, 1102-3.

Judge Quackenbush also noted that policy exclusions available to the carriers, as here, “would have no purpose” if ‘accident’ and ‘occurrence’ were interpreted as narrowly as urged by the insurers. *Id.* at 1204.

It is reasonable to assume that MOE considered that the homeowners’ coverage, which likewise defined an occurrence as an accident, would not exclude all such conduct without an express exclusion. The umbrella policy, which contains no such exclusion, should not be read as if it did.

The result that Mrs. Anderson, innocent of any intentional conduct, should be covered under the umbrella policy even though not under the homeowners' policy is understandable considering the nature of such policies. As this court stated in *Lawrence*, *supra*,

The very nomenclature chosen to designate umbrella or catastrophe policies suggests an intent to protect against gaps in the underlying policy. ... As stated by one authority:

It should be noted that [catastrophe and umbrella] policies often provide a primary coverage in areas which might not be included in the basic coverage, since it is the intent of the company to afford a comprehensive protection in order that such peace of mind may truly be enjoyed. In those areas, such coverage will, in fact be primary.

8AJ. Appleman, Insurance § 4909.85, at 452-53 (1981). Moreover, in the instant case, Prudential drafted both the Catastrophe and the underlying policies. Had it intended to restrict the scope of the "property damage" definition it easily could have done so by adopting the same definition contained in the Homeowners' policy.

45 Wash.App. at 119.

V. CONCLUSION

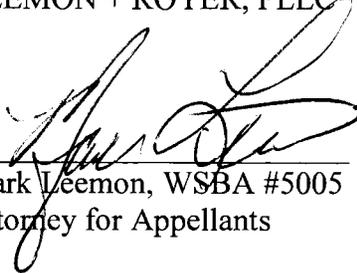
Catherine Anderson was an insured under an umbrella liability policy containing a severability clause. The very purpose

of such a policy is to comprehensively cover the insured from the results of her own negligence. The purpose of such a clause is to allow coverage for an insured whose culpable actions were not intentional while denying it to the intentional actor, thus reading the policy as if there were a separate one for each insured.

MOE asks this court to hold that, notwithstanding the separability clause, “both” policies provide only the precisely same coverage. Thus the severability clause serves no function and is precisely meaningless. This makes no sense, and is not the law. The trial Court herein should be reversed and the case remanded to Superior Court with directions to enter judgment establishing under the umbrella policy coverage for Catherine Anderson form the claims brought against her by the Dunns.

Respectfully submitted this 20 day of July, 2011.

LEEMON + ROYER, PLLC



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Attorney for Appellants

DECLARATION OF SERVICE

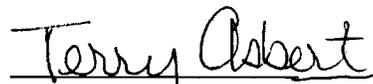
I, Terry Asbert, certify under penalty of perjury under the laws of the State of Washington that, on this 20th day of July, 2011, I caused the following documents to be filed with the court and served on counsel listed below in the manner shown:

1. Appellant's Reply Brief

Patrick Trompeter
David Collins
James Beecher
Hackett, Beecher & Hart
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VIA US MAIL

Signed at Seattle, Washington, this 20th day of July, 2011.


Terry Asbert