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66337-2

No. 66337-2-1

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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MUTUAL OF ENUMCLAW INSURANCE COMPANY  
Plaintiffs/Respondents

v.

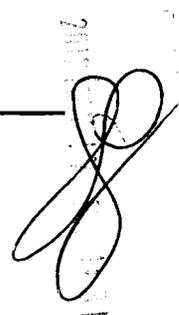
CATHERINE ANDERSON and DONALD ANDERSON, individually  
and as partners in a former marital community, KENDALL DUNN and  
THERESA DUNN, individually, as partners in a marital community, and  
as guardians of A.D., a minor child,  
Defendants/Appellants

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**BRIEF OF APPELLANT**

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A handwritten signature in black ink, appearing to be 'M. Leemon', is written over a faint, vertically oriented stamp that is partially obscured.

ORIGINAL

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## I. INTRODUCTION

This case arises from a declaratory judgment action. Mutual of Enumclaw Insurance Company (MOE) brought the action to avoid defending and/or indemnifying their insured Catherine Anderson (Anderson) under an umbrella liability policy for a negligence claim brought against her in Snohomish County Superior Court by Defendants/ Appellants Dunn (the Dunns). Snohomish County Superior Court Judge Gerald L. Knight, finding that the policy provision in question was ambiguous, denied MOE's motion for summary judgment, and further granted Anderson's cross motion for summary judgment that she was entitled to defense in the suit brought by the Dunns.

Judge Knight was also the trial judge, and the parties submitted the matter on written exhibits and stipulations. Although there were still no issues of material fact, Judge Knight apparently reversed himself, ruling that the policy was unambiguous and did not provide coverage. Anderson and the Dunns filed this Appeal.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial Court erred in entering Conclusion of Law No.3 that the Mutual of Enumclaw Umbrella policy in question here did not provide coverage for Catherine Anderson for claims of negligence brought against her in Snohomish County Superior court Cause Number 07-2-05741-1. (CP I, 13).

2. The trial Court erred in entering that part of its declaratory judgment ruling that umbrella policy H299754 provided no coverage for Catherine Anderson for claims of negligence brought against her in Snohomish County Superior court Cause Number 07-2-05741-1. (CP I, 10).

### B. Issues pertaining to assignments of error

1. Does an umbrella liability insurance policy that **grants coverage** for injuries “neither expected nor intended by **any** insured” provide coverage for an insured who neither expected nor intended the injury alleged in a negligence claim against her?

2. If an exclusion from coverage for injuries expected or intended by “any insured”

broadens the exclusion so that it applies even to innocent insureds if any one insured expects or intended the result, does a **grant** of coverage for injuries **not** expected or intended “from the standpoint of **any** insured” provide coverage for an insured from whose standpoint the result was neither expected nor intended?

3. Where language of an insurance policy is ambiguous, must it be construed against the insurer?

4. Is an insurance company bound by the language of its policy even if the effect is not the one it intended?

5. Does a separability clause in an insurance policy require viewing the policy separately from the point of view of each insured?

## **II. STATEMENT OF FACTS**

### **A. Nature of the Case.**

This action was brought by Plaintiff/Respondent Mutual of Enumclaw (MOE) for declaratory judgment establishing no coverage

under MOE umbrella policy H299754<sup>1</sup> for damages alleged against defendant Catherine Anderson by Defendants Dunn for negligence claims brought against her in Snohomish County cause No. 07-2-05741-1. CP II 364-368. Since there were no issues of material fact for the trial court to determine as trier of fact, the question of coverage was therefore decided by the Court as a matter of law. The trial Court found no coverage, and Defendants appeal.

**B. Statement of Procedural Facts**

On July 10, 2007, Defendants herein Kendall and Theresa Dunn filed a lawsuit on behalf of themselves and their minor daughter A.D. under Snohomish County Superior Court Cause No. 07-2-05741-1. Defendants herein, Donald Anderson and Catherine Anderson and their marital community were named as Defendants. Claims were filed against Donald Anderson for negligence and violation of the sexual exploitation of children act. Claims were filed against Catherine Anderson for her negligence as a property owner in failing to provide safe premises for guests on the property.<sup>2</sup> Supp. CP, Ex. 3.

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<sup>1</sup> The complaint herein was originally filed against both Catherine Anderson and her ex-husband Donald Anderson, and concerned both the umbrella policy and a homeowners policy. All defendants have conceded that neither policy provided coverage for Donald Anderson, and that the homeowners policy provided no coverage for Catherine Anderson.

<sup>2</sup> The claims against Donald Anderson were subsequently dismissed pursuant to a voluntary nonsuit under CR 41.

At the time of the occurrences in the personal injury suit, Donald and Catherine Anderson were covered under two insurance policies issued by Mutual of Enumclaw. The first was a homeowner's policy; the second was an umbrella policy. On November 2, 2007, Mutual of Enumclaw filed this declaratory judgment action seeking a declaration that neither Donald nor Catherine Anderson was entitled to defense or coverage under either the homeowners or umbrella policy for damages alleged to have been caused in the personal injury action. CP II 364-368.

On June 30, 2008, Mutual of Enumclaw filed a Motion for Summary Judgment seeking a ruling that neither Donald nor Catherine Anderson were entitled to defense or indemnity under either Mutual of Enumclaw policy for damages alleged to have been caused in the personal injury action. CP II 293-304. Defendant Catherine Anderson filed a Cross Motion for partial Summary Judgment, asserting Mutual of Enumclaw's duty to defend under the umbrella policy. CP II 277-292. Both defendants conceded in response to Mutual of Enumclaw's Motion for Summary Judgment that neither policy provided for defense or coverage of Donald Anderson. CP II 277-8, CP I 184-5. Both the Dunns and Catherine Anderson conceded that the homeowners policy, which had an

explicit exclusion for claims arising out of alleged sexual abuse, which exclusion expressly applied to all insureds, provided no coverage for Catherine Anderson. CP I, 184; CII 277.

However, both Catherine Anderson and the Dunns asserted that the umbrella policy provided for both defense of and indemnity for claims brought under the personal injury lawsuit. The cross Motions for Summary Judgment were heard by Judge Gerald Knight on August 26, 2008. Judge Knight found that the umbrella policy was ambiguous, and that the ambiguity was created by the insurer. He further ruled that the interpretation urged by the Dunns and Anderson was not unreasonable and so the umbrella policy applied to the claims against Catherine Anderson brought against her in the personal injury lawsuit. CP I 164. Accordingly, he denied Mutual of Enumclaw's Motion for Summary Judgment both as to defense and to coverage. CP I 53-4. Likewise, he granted Catherine Anderson's Motion for Summary Judgment that she was entitled to defense of the personal injury lawsuit under the umbrella policy. CP I 163-4. Subsequently, the Dunns moved on the same basis as Judge Knight's Summary Judgment order to grant them summary judgment on the issue of whether Catherine Anderson is entitled to indemnity under the Mutual of Enumclaw Umbrella policy. MOE moved for

reconsideration, and Judge Knight denied this motion. CP I 157-60, 155-6.

Defendants Dunns' Summary Judgment motion was heard On June 2, 2009. Because the question of coverage appeared to be one of law, other than the complaint therein facts of the underlying lawsuit were not submitted to the Court. CP I 133-47. MOE countered by arguing that there were issues of material fact as to whether the damages to the plaintiffs were caused intentionally by Ms. Anderson (of which there is no evidence) or in the alternative, that MOE should be granted summary judgment as a matter of law. CPI 107-123. Judge Appel ruled against summary judgment for all parties. CP I 53-4.

Both parties' motions for summary judgment having been denied, the matter was therefore set for trial. At trial, MOE conceded that Ms Anderson neither expected nor intended the molestation by Mr. Anderson. CP I 12. Accordingly, the Court decided the question of coverage as a matter of law. Judge Knight also was the trial judge, and reversed his earlier position, concluding that the umbrella policy provided no coverage for the negligence claim brought against Catherine Anderson. CP I 13. Judgment was

entered accordingly in favor of Plaintiff MOE. CP I 9-10.

Defendants the Dunns and Anderson then filed this appeal. CP I 1.

**C. Statement of Facts Re Policy Provisions**

MOE issued homeowners and umbrella insurance policies to both Mr. Anderson and Ms. Anderson as co-insureds. The Dunns do not contend, and have never contended, that the *homeowners* policy provides insurance coverage for Mrs. Anderson in the Dunns' lawsuit. This is because the MOE homeowners policy specifically excludes coverage for claims against *all* insureds where *any* insured is alleged to have committed sexual molestation:

**1. Coverage E - Personal Liability ...**  
do[es] not apply to **bodily injury...**

\* \* \*

J.arising out of, or resulting  
from, actual, alleged or  
threatened:

(1.) **sexual**

**molestation**

\*\*\*

*We do not provide coverage for any  
of the above listed acts to any  
person by any person.*

Supp. CP. Ex. 1, at 16-17; CP II, 333-4. (Italics added).

The MOE umbrella policy is fundamentally different.<sup>3</sup> The umbrella policy provides the following coverage grant:

We will pay the **insured's ultimate net loss** in excess of the retained limit for **personal injury** ... caused by an **occurrence** ....

Supp. CP, Ex. 2, at 4; CP II 351. (Emphasis in original). In setting out the scope of coverage, MOE defines "occurrence" to mean:

an accident ... whose effects are neither expected nor intended from the standpoint of *any insured*, which results in ... **personal injury** ....

Supp. CP, Ex. 2, at 3; CP II 350. (Bold in original; italics added). The MOE umbrella policy further makes clear that its

"coverage applies *separately* to each **insured**." Supp. CP, Ex. 2 at 4, CP II 351. (bold in original; italics added).

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<sup>3</sup> Umbrella policies (otherwise known as excess or catastrophe policies) come in two varieties. First, they may "follow the form" of the corresponding primary-layer policy in all respects (scope of coverage, exclusions, conditions, etc.) except for the limit of liability, such that the umbrella policy always "sits on top" of the primary policy providing an extra layer of insurance coverage when the primary policy limits are exhausted. Second, an umbrella policy may be a "stand alone" insurance policy with its own scope of coverage, exclusions, conditions, etc. Harris, *Washington Insurance Law* § 31.3 (2d ed. 2006). The latter form of umbrella policy has been termed a "gap filler," because it may "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." *Prudential Prop. & Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 119 (1986) (citations omitted). The MOE umbrella policy is a "stand alone" or "gap filler" umbrella policy. It has its own terms regarding scope of coverage, exclusions, conditions, etc., which differ from the underlying homeowner policy. Compare Leemon Decl., Ex. 2 (homeowners) with Ex. 3 (umbrella).

The MOE umbrella policy contains 15 policy exclusions. Supp. CP, Ex. 2, at 5-7; CP II 352-4. Unlike the homeowners policy, however, none of 15 exclusions in the umbrella policy excludes claims for negligent supervision of a co-insured's sexual abuse/molestation of another (or any form of assault or battery from a co-insured) – or anything remotely close to such claims. *Id.*

### III. AUTHORITY AND ARGUMENT

#### A. **Standard of Review and Rules of Construction.**

In Washington, “[c]onstruction of an insurance policy is a question of law for the courts, the policy is construed as a whole, and the policy ‘should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.’ ”

*Kitsap County v. Allstate Insurance Company*, 136 Wash.2d 567, 575, 964 P.2d 1173 (1998). Because construction of an insurance policy is a question of law, appellate courts construe the policy *de novo*. *Sprague v. Safeco Ins. Co.*, 158 Wash.App. 336, 340, 241 P.3d 1276; *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wash.2d 398, 404, 229 P.3d 693 (2010).

Where a clause in the policy is ambiguous, meaning it is fairly susceptible to two different interpretations, both of which are reasonable, a meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning. *Morgan v. Prudential Insurance* 86 Wash.2d 432, 435, 545 P.2d 1193 (1976). Courts liberally construe inclusionary clauses, providing coverage whenever possible. *Moeller v. Farmers Ins.*, 155 Wash.App.133, 141, 229 P.3d 857 (2010).

**B. The Umbrella Policy Provides Coverage for The Negligence Lawsuit**

**1. Claims Brought Against Catherine Anderson in the Negligence Lawsuit Involve Simple Common Law Negligence Claims**

The Court has before it the complaint filed in the negligence lawsuit. The claims against Catherine Anderson arise out of her duties as a property owner/occupier. Under Washington law, owners of property owe duties to those on the land. The nature of the duty owed depends on the legal classification of the visitor. *Younce v. Ferguson*, 106 Wash. 2d 658, 724 P.2d 991 (1986). The highest of these duties is owed to invitees. *Johnson v. State*, 77 Wash. App.934, 940, 894 P.2d 1366 (1995). A

landowner also owes duties to licensees to make them safe from or warn them of known dangerous conditions. *Memel v. Reimer*, 85 Wash.2d 685, 638 P.2d 517 (1975); *Tincani v. Inland Empire Zoological Society*, 124 Wash.2d 121, 133-4, 875 P.2d 621 (1994).

As alleged in the Complaint, for reasons not relevant here the Dunns assert that they were invitees at the time A.D. was molested. However, even if there is a jury question as to whether they were licensees (See, e.g., *Beebe v. Moses*, 113 Wash.App. 464, 54 P.3d 188 (2002)), it is plain that Catherine Anderson owed them a duty of care, and that violation of that duty is negligence for which she would be liable. There is nothing about plaintiffs' complaint that alleges or requires any intentional action or misconduct on Ms. Anderson's part. Our Supreme Court has held that it is the theory underlying the claim against the insured, rather than the nature of the alleged injury, that determines whether a liability policy's personal injury coverage applies to claims against the insured. *Kitsap County v. Allstate Insurance Company*, 136 Wash.2d 567, 580, 964 P.2d 1173 (1998). The only question here is whether Catherine Anderson's umbrella coverage provides her with a defense and coverage to a claim solely involving her own negligence. The Appellants urge this Court that Ms. Anderson

paid a premium for just such coverage, and that the clear language of the policy gives it to her.

## **2. The Umbrella Policy Grants Coverage for the Claims in the Negligence Lawsuit**

The only issue for the Court to decide in this case is the construction of the umbrella policy insuring agreement granting coverage to Ms. Anderson.:

We will pay the Insured's ultimate net loss in excess of the retained limit for personal injury or property damage caused by an occurrence during the policy period.

CP II 351.

Specifically, it is the meaning of “occurrence” that is in question. The contract 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**, which results in:

- a. **personal injury**; or
- b. **property damage**.

CP II 350.

If the incident resulting in the claims against Catherine Anderson was an occurrence, there is no question that MOE must indemnify Ms. Anderson for the negligence lawsuit. By analyzing the plain grammatical English used in the insuring agreement along with a simple analysis of the purpose and function of clauses in insuring policies granting and excluding coverage, the court should conclude that MOE has a duty to indemnify Ms. Anderson. Such an analysis plainly show that use of the term “any insured” in the grant of coverage herein has the opposite effect as would use of this term in an exclusion clause.

**a. The incident leading to the negligence lawsuit was an “accident” as to Catherine Anderson.**

The issue of whether the molestation of A.D. was an accident must be taken from the point of view of Catherine Anderson. This is because the umbrella policy in question contains a separability clause in the insuring agreement:

**This coverage applies separately to each insured.**

The plain meaning of this clause is that the policy must be construed as the terms are applied separately to each person involved, as if each had a separate policy. See, e.g., *American*

*Employers Ins. Co. v. Doe* 3B, 165 F.3d 1209, 1211 (8<sup>th</sup> Cir. 1999). Construed from the point of view of the insured, numerous courts have held that sexual molestation can be an accident in the context of a negligent supervision claim. The Supreme Court of Iowa recently reviewed such cases in *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 654 (Iowa, 2002). After noting that Iowa (like Washington) holds that sexual molestation can never be an insurable accident for the molester, the court continued:

But a negligent supervision claim addresses the negligent acts and omissions of the employer--not the intentional acts of the employee. *Godar v. Edwards*, 588 N.W.2d 701, 708 (Iowa 1999); see *Mork Clinic v. Fireman's Fund Ins. Co.*, 575 N.W.2d 598, 600 (Minn.Ct.App.1998) (recognizing negligent hiring and supervision as additional and actionable cause of injuries suffered when clinic employee abused patients). In contrast to the cases cited by United Fire, other courts faced with similar facts and the identical "occurrence" and intentional act provisions before us have found coverage for negligent hiring and supervision. For example, where an insured corporation's employee sexually molested a minor child on the business premises, one federal court stated:  
[I]f an injury occurs without the agency of the insured, it may be logically termed "accidental," even though it may be brought about designedly by another person.... The test of whether an injury is a result of an accident is to be determined from the viewpoint of the insured and not from the viewpoint of the one that committed the act causing the injury.

(Quoting from *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F.Supp. 1151, 1157-58 (W.D.Ark.), *aff'd*, 33 F.3d 1476 (8th Cir.1994) (citations omitted).)

**b. Use of the term “any insured” in the definition of “occurrence” in the context of a *grant of coverage* broadens, rather than restricts coverage.**

Washington courts have interpreted the phrase "any insured" versus "the insured" and hold that the phrase "any insured" creates a broadening effect. *See, e.g., Truck Ins. Exch. v. BRE Props., Inc.*, 119 Wn. App. 582(2003); *MOE v. Cross*, 103 Wn. App. 53 (2000); *Caroff v. Farmers Ins. Co.*, 98 Wn. App. 565 (1999). In each of the above cases (and all others of which we are aware), the issue arose in the context of applying a policy **exclusion**. As a result, the carrier's insertion of "any insured" (or "an insured"), as opposed "the insured," resulted in the innocent insured being ousted of coverage where a co-insured committed an intentional act or an act of sexual abuse. The rationale from these cases is that use of "any insured" operates to *broaden* the exclusion; so long as **any one insured** falls within the exclusion, all insureds—even innocent ones—lose coverage because of the broad effect of the **exclusion**.

MOE's use of "any insured" in the umbrella policy has a similar broadening effect, but unlike in the above cases, MOE used the phrase as part of the *coverage grant*, not as part of any policy exclusion. This difference *supports* coverage for Ms. Anderson, because it is the scope of coverage, not the scope of an exclusion, that is being broadened by MOE's use of "any insured." *See also State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718 (1998) (holding "courts must liberally construe inclusionary clauses in insurance policies in favor of coverage for those who can reasonably be embraced within the terms of the clause").

When dealing with an exclusionary clause that states that coverage will be excluded for any acts expected or intended by **any** insured, the process is one of looking to see if there is a condition exists that would justify exclusion. If the clause excludes coverage for damages expected or intended by **any** insured, and the damages were in fact expected or intended by **any** insured the answer is yes, no matter who the defendant is.

When construing the *grant* of insurance, the process is the same, but the result is necessarily the opposite. Here, there is coverage for all "occurrences". An "occurrence" in turn is defined as an accident (see above) "whose effects are **neither** expected **nor**

intended from the standpoint of any **insured**". Again, the task is to determine whether conditions exist that would in this case establish coverage. The question to be asked here is, do we have a situation in which the effects of the accident were "neither expected nor intended from the standpoint of **any insured**"? Again the answer is yes, since the allegations of the complaint in the negligence lawsuit allege negligence, not intentional misconduct. The Plaintiff MOE stipulated, and the trial Court found as a fact that the effects of the accident were neither expected nor intended by Catherine Anderson. CP I, 6. The negligence lawsuit therefore alleges a covered occurrence.

The exclusionary clauses in the cases exemplified above **exclude** coverage if the damages **are expected or intended** by any insured. The insuring clause here grants coverage if the damages were **neither expected nor intended** by any insured, and says so in clear language. Because of the inclusion of the words "neither" and "nor", in order to have the effect urged by MOE, the coverage clause would have to say that to be an occurrence the effects were neither expected nor intended by "each" or "every" or "all" insureds. It could have done so. However, it did not. It makes basic elementary sense that the same word, "any" cannot have an

opposite effect and meaning when used in a grant of coverage and an exclusion.

It is entirely likely that the effect of the language in the coverage grant was not intended by MOE. Being aware of the holdings on the effect of the words “any insured” in the exclusion clause cases, MOE well may have thought that the same result could be obtained by use of the words “any insured” in a grant of coverage would have the same effect. However, even where language is ambiguous, the insurance company is bound by the language of the policy, even if the effect is not what was intended.

*Morgan v. Prudential Insurance, supra; Safeco Ins. Co of America v. McManemy*, 72 Wash.2d 211, 212, 432 P.2d 537 (1967).

Insurance policies are construed against the insurer as the drafter of the contract. *Professional Marine Co. v. Those Certain Underwriters at Lloyd’s*, 118 Wash.App. 694, 707, 77 P.3d 658 (2003).

Defendants urge this Court that the language of the policy is not even ambiguous, as originally found by Judge Knight. It clearly grants coverage. The grant of insurance is an operation opposite from its exclusion. In this instance the effect must also be opposite. If there is “any insured” who neither expected nor

intended the injury caused, insurance is granted to that insured. However, under the cases cited above, if this Court finds that the language is reasonably susceptible to two different meanings, nonetheless it must be construed in favor of Anderson and the Dunns.

- c. **If MOE intended to exclude Ms. Anderson's alleged negligent supervision of her ex-husband under the umbrella policy, MOE could have included the same sexual abuse/molestation exclusion it attached to the homeowners policy.**

Had MOE wished to exclude coverage for Ms. Anderson's alleged negligent supervision of her ex-husband (or any assault or battery by a co-insured), no matter which insured engaged in that conduct, MOE knew *exactly* how to do so. *See Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 887 (1990) ("The [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions."). Indeed, MOE did just that through the specific sexual abuse/molestation exclusion it included with the homeowners policy it issued to the Andersons. The exclusion excludes liability coverage for *all* insureds when a plaintiff asserts a claim against *any* insured concerning alleged sexual molestation. *See* Supp CP., Ex. 1 at 16-17; CP II 333-4 at ¶

II.1.J. (*italics added*). This exclusion meets the insurer's obligation to draft clear policy language, and this and similar exclusions (e.g., assault and battery exclusions) have been enforced in Washington. *See, e.g., McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 109 (2000).

Given the presence of this exclusion, neither Ms. Anderson nor the Dunns have pursued a coverage claim against MOE under the homeowner policy. Significantly, however, MOE failed to include such an exclusion, or anything remotely similar in its *umbrella* policy-despite having written 15 other exclusions into the policy. 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 also Prudential Prop. & Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 119 (1986) ("Had [insurer] intended to restrict the scope of the 'property damage' definition [in the umbrella policy] it easily could have done so by adopting the same definition contained in the Homeowner's policy."); *see also Boeing*, 113 Wn.2d at 877 (holding the coverage grant that includes the term "accident" is "an odd place to look for exclusions of coverage").

Judge Quackenbush in the Catholic *Bishop of Spokane* case rejected the insurers' argument for lack of coverage for this very reason among others, in an insurance dispute stemming from alleged negligent supervision by the Diocese over priests who committed acts of sexual abuse:

As the Washington Supreme Court has noted concerning insurance policies and exclusions, "The insurance industry knows how to protect itself and it knows how to write exclusions and conditions." *Boeing Co. v Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990); *Panorama Village Condo. Owners Ass 'n Bd. Of Directors v. Allstate*, 14Wn.2d 130, 141, 26 P.3d 910 (2001). It appears that after the nationwide carriers became aware of the numerous claims against Dioceses, and after the claims at issue herein, the carriers changed their comprehensive liability policies to exclude any such claims, be that of negligent or intentional conduct, and whether the intentional wrongful or negligent acts were by the insured or by a person also insured under the policy.

*Pacific Ins. Co. v. Catholic Bishop of Spokane*, 450 F. Supp. 2d 1186, 1202-03 (E.D. Wash. 2006); *see id.* at 1204 (policy exclusions available to the carriers, as here, "would have no purpose" if "accident" and "occurrence" are read as narrowly as the insurers want) (discussing *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 193 (Tex. 2002)).

The result is not unusual. When construed this way, Catherine Anderson is covered for her negligent actions, as one might well expect from an umbrella negligence policy. Had MOE instead wanted to exclude Ms. Anderson's negligent conduct which was a proximate cause of intentional misconduct of her husband, the Homeowners Policy is proof enough that it knew how to do so.

**d. The "inferred intent" cases are inapposite to this negligence claim against a co-insured of the intentional tortfeasor**

MOE argued in the trial Court that acts of sexual abuse or assault are never "accidents," as that term is used in occurrence-based liability policies. Many Washington cases support this unremarkable proposition; however, they all are from the standpoint of the perpetrator (*Mr. Anderson*). *See, e.g., Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99 (1988); *Rodriguez v. Williams*, 107 Wn.2d 381 (1986); *Grange Ins. Ass'n v. Authier*, 45 Wn.2d App. 383 (1986); *Western Nat'l Assur. Co. v. Hecker*, 43 Wn. App. 816 (1986). The result of this line of cases is the Washington "inferred-intent" rule that ousts coverage for the perpetrator-insured in sexual abuse cases-regardless of the policy language or the perpetrator's subjective intention of harm. *See*

*Rodriguez*, 107 Wn.2d at 387-88. The *Detweiler* court explained

"inferred-intent":

There are many definitions of the word "accident." Judging from the plethora of law on the subject, not one of them seems to be perfectly satisfactory to everyone. The definition of "accident" applied in the cases just discussed is founded on the elemental proposition that injuries will not be deemed caused by an accident where *the injuries are intentionally inflicted*, this generally being considered a risk which it would be against public policy to insure. *Thus, for example, the law will not countenance one intentionally shooting someone and then saying that since he or she did not intend to hurt the person shot, what happened was an "accident" covered by liability insurance.*

110 Wn.2d at 105-06 (emphasis added) (citations omitted).

Applying the holdings of these cases here, coverage is not available to *Mr. Anderson* for *his* alleged acts of sexual abuse. The *Dunns* have never disputed this. But these cases have no bearing whatsoever on whether *Ms. Anderson* is covered for the claims against her for *her alleged negligence*. These cases simply hold, as a matter of law and public policy, that a perpetrator will not be

heard to claim he did not "expect or intend" bodily injury when he intentionally and improperly assaulted or touched a victim.

Cases more analogous to Ms. Anderson's independent coverage claim are *Pacific Ins. Co. v. Catholic Bishop of Spokane*, 450 F. Supp. 2d 1186, 1202 (E.D. Wash. 2006) and *Unigard Mut. Ins. Co. v. Spokane Sch. Dist. No. 81,20* Wn. App. 261 (1978). The *Catholic Bishop of Spokane* case addressed whether Washington law afforded coverage to a co-insured against whom a claim for negligent supervision had been asserted. Judge Quackenbush detailed Washington and foreign authorities on the issue and held squarely in favor of coverage, reasoning: (a) the claims asserted against the Diocese were claims of negligent supervision; (b) these claims were "conceptual[ly] separate[]" from the claims against the intentional tortfeasors the priests); (c) from the Diocese's standpoint, the alleged negligence and resulting harm was an "accident" and thus an "occurrence"; and (d) if the carrier wished to exclude negligent supervision claims, it could have done so through using one or more forms of the insurers' own policy exclusions. *Catholic Bishop*, 450 F. Supp. 2d at 1199-1209,

*Unigard* came to a similar result. In *Unigard*, the Washington Court of Appeals found coverage for a negligent

supervision claim against one set of insureds despite also denying coverage for another insured on the grounds that his acts did not constitute an "accident." The court found coverage for a claim against policyholder-parents for negligent supervision of their child who started a fire at a school. In the underlying lawsuit, the school made at least two separate claims: one against the boy for carelessly starting the fire and one against the parents for negligent supervision. *Id.* at 261. The court held that, because the boy intentionally set the fire, and the resulting amount of damage was only a difference in degree, his acts could not be said to be an "accident." *Id.* at 264.

As to the negligence claim against the parents, however, the court stressed:

*[T]he liability of the [parents], if any, is grounded in their negligent failure to supervise the boy which is not an excluded intentional act. ... We agree with Unigard that public policy prevents an insured from benefiting from his wrongful acts; but here ... it is not the intentional act of the parents which has caused the damage.*

*Unigard*, 20 Wn. App. at 265 (emphasis added).

As with the alleged negligent tortfeasors in *Catholic Bishop* and *Unigard*, the liability for which the Dunns seek coverage is grounded in Catherine Anderson's alleged negligence, and not in

any intentional act on the part of her or her ex-husband. There is no reason that such negligence cannot be an accident and thus an occurrence under the umbrella policy.

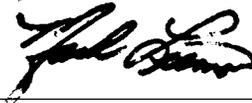
#### IV. CONCLUSION

MOE's umbrella policy language is clear, and the claim asserted against Ms. Anderson sounds in negligence – the very exposure liability insurance is designed to cover. Catherine Anderson is “any insured” from whose standpoint the sexual molestation that occurred was neither expected nor intended. Coverage was provided by the umbrella policy for “any insured” from whose standpoint the resulting occurrence was neither expected nor intended. This Court should find in favor of Ms. Anderson and the Dunns and reverse the trial Court’s ruling and declare that MOE umbrella policy H299754 provides coverage for Catherine Anderson for the claims brought against her in

Snohomish County cause No. 07-2-05741-1.

Respectfully submitted this 13<sup>th</sup> day of May, 2010,

LEEMON + ROYER, PLLC

A handwritten signature in black ink, appearing to read "Mark Leemon", written over a horizontal line.

Mark Leemon, WSBA #5005  
Attorney for Appellants

**DECLARATION OF SERVICE**

I, Emily Dion, certify under penalty of perjury under the laws of the State of Washington that, on 5-17-11 I caused the following documents to be served on the person listed below in the manner shown:

1. Brief of Appellant

Patrick Trompeter  
David Collins  
James Beecher  
Hackett, Beecher & Hart  
1601 Fifth Avenue, Suite 2200  
Seattle, WA

**VIA LEGAL MESSENGER**

Signed at Seattle, Washington, this 17 day of May, 2010

  
Emily Dion