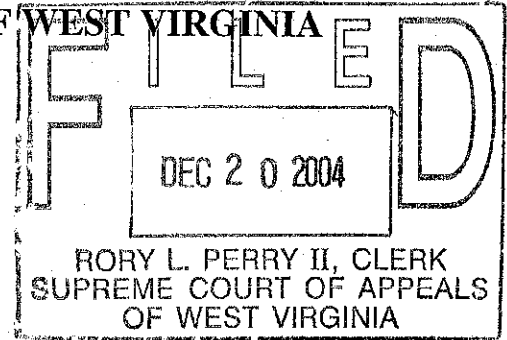


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**GLEN YEAGER and ANITA YEAGER,  
individually and GLEN YEAGER and  
ANITA YEAGER, d/b/a PONDEROSA  
OF KANAWHA CITY,**

**Appellants,**



**v.**

**Case No. 31939**

**AETNA CASUALTY AND SURETY  
COMPANY; AETNA CASUALTY &  
SURETY COMPANY OF ILLINOIS;  
NEELY R. ARTHUR, JR.; ALLAN  
L. McVEY; and PATTERSON, BELL  
& CRANE COMPANY,**

**Appellees.**

**BRIEF ON BEHALF OF APPELLANTS**

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## I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellees, Aetna Casualty and Surety Company, Aetna Casualty & Surety Company of Illinois (Aetna) seek to avoid the responsibility owed to their policyholders. Specifically, Aetna has refused coverage, as well as a defense, to policyholders despite the presence of clear and unambiguous language in their policies requiring both. Appellants, Glen Yeager and Anita Yeager (Yeagers), who did business under the trade name, "Ponderosa of Kanawha City" (Ponderosa), filed a lawsuit against Aetna and their agents and brokers, claiming that Aetna wrongfully denied coverage or a defense to the Yeagers when the Yeagers and their business, Ponderosa, were sued in the Circuit Court of Kanawha County for sexual harassment allegedly committed by employees of Ponderosa against other co-employees. The underlying complaints alleged that various employees and managers of Ponderosa sexually harassed other employees of Ponderosa. Significant to this case is that no act of sexual harassment was alleged against either Mr. or Mrs. Yeager. The liability of the Yeagers in the underlying cases was based solely on: (1) vicarious liability for the acts of their managers and employees; or, (2) on their alleged failure to take steps necessary to prevent the creation of a hostile working environment.

Upon being sued, the Yeagers notified each of their carriers and agents from whom they had purchased their general and excess liability insurance policies and, in response, were informed that none of the policies provided coverage and that none of the carriers would undertake to provide them a defense. The Yeagers were required, therefore, to retain their own counsel, at their own personal expense, and to defend the cases through discovery, trial and eventual settlement. The cost and expense to the Yeagers and Ponderosa has been significant.

Aetna's primary reasoning for refusing to defend Appellants was that the act of sexual harassment is intentional and thus excluded under the terms of the policies. Aetna,

however, failed to analyze the alleged acts from the standpoint of the Yeagers who clearly did not intend the sexual harassment or the resulting damages alleged by the underlying plaintiffs. This failure was a blatant disregard for clear policy language which required Aetna to construe the policies from the standpoint of each insured as if they were the only named insured. This Court has not addressed whether such policy language – specifically, what is known as a separation of insureds provision – requires that an intentional acts exclusion found in a policy be examined from the standpoint of each insured separately. In this case, from the standpoint of the Yeagers, the exclusion would not operate to preclude coverage and/or a defense to the Yeagers.

After filing suit against Aetna for failure to defend the harassment cases, the Yeagers moved for summary judgment and requested the circuit court to review the Aetna policies and enter partial summary judgment in their favor since Aetna had an obligation under the express language of the policies to: (1) defend the underlying suits; and, (2) provide coverage for any resultant verdict, settlement or other disposition of the underlying cases. Aetna also filed a cross-motion for summary judgment requesting that the circuit court find, as a matter of law, that Aetna had no obligation to extend coverage or a defense to the Yeagers under the express language of the applicable insurance policies.

On March 16, 1999, the circuit court entered an order denying the Yeagers' motion for summary judgment and granting Aetna's motion for summary judgment based upon its determination that the insurance contracts at issue were clear and unambiguous as a matter of

law and, thus, the Yeagers were not entitled to coverage as a matter of law. *See* March 16, 1999 Order, attached to Petition for Appeal as Exhibit 1.<sup>1</sup>

## II. BRIEF STATEMENT OF FACTS

Aetna, through its agents, sold two insurance policies to the Yeagers that were in effect during the applicable time period. The first policy is captioned "Commercial General Liability Coverage Form" ("general policy" or "CGL Policy") and was effective from July 1, 1995 to July 1996. This policy was issued to Glen Yeager and Anita Yeager dba Ponderosa of Kanawha City et al., and provided \$1,000,000 of coverage for claims falling within the policy terms. This policy specifically provides:

"We will pay those sums that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and *duty to defend* any 'suit' seeking those damages. We may at our discretion investigate any 'occurrence' and settle any claim or 'suit' that may result."

CGL Policy at 1.

Attached to the general policy is an endorsement captioned, "Employers Overhead Liability – West Virginia" ("Endorsement"). The Endorsement provides additional coverage for bodily injury that "arise[s] out of and in the course of the injured employee's employment by you." Endorsement at 1.

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<sup>1</sup> After the entry of the Order granting summary judgment in favor of Aetna, the remaining defendants and Appellees were ultimately dismissed when, on January 9, 2004, the circuit court entered an order dismissing, without prejudice, Appellants' claims against the remaining defendants, thus allowing Appellants to seek appellate review of the circuit court's March 16, 1999 Order. *See* January 9, 2004 Order, attached to Petition for Appeal as Exhibit 2.

The second policy is captioned "Commercial Excess Liability (Umbrella) Insurance" ("excess policy" or "CEL Policy") and had the same effective date of July 1, 1995. The excess policy was also issued to Glen Yeager and Anita Yeager dba Ponderosa of Kanawha City et. al., and contained limits of \$1,000,000 per occurrence and \$2,000,000 general aggregate. In this policy, Aetna states:

"We will pay on behalf of the insured the 'ultimate net loss' in excess of the 'applicable underlying limit' which the insured becomes legally obligated to pay as damages because of 'bodily injury', 'property damages', 'personal injury' or 'advertising injury' to which this insurance applies."

CEL Policy at 1. The excess policy also states that:

"We will have the right and duty to defend any 'suit' for damages which are payable under Coverages A or B (including damages wholly or partly within the 'retained limit') but which are not payable by a policy of 'underlying insurance', or any other available insurance, because: (1) such damages are not covered; or (2) the underlying insurance has been exhausted by the payment of claims."

*Id.*

After purchasing these policies, the Yeagers were named in five (5) separate lawsuits filed in September and October 1995 in the Circuit Court of Kanawha County, bearing the following styles and civil action numbers:

*Robin Dick v. Glen Yeager et al.*, Civil Action No. 95-C-3320;

*Melissa Harper v. Glen Yeager, et al.*, Civil Action No. 95-C-3221;

*Tracy Schulte v. Glen Yeager, et al.*, Civil Action No. 95-C-3222;

*Kimberly Krase v. Glen Yeager, et al.*, Civil Action No. 95-C-3322; and,

*Janie Vallo v. Glen Yeager, et al.*, Civil Action No. 95-C-3358.

Typical of these suits is *Vallo v. Yeager*, attached to the Petition for Appeal as Exhibit 3.

Copies of these suits were furnished to Aetna and Aetna's agents who sold the policies to the Yeagers. Upon being notified of the suits, Aetna denied coverage and also refused to provide any defense to any of the claims. In refusing, Aetna stated, in part:

"As was discussed with you, since it is our belief that there is no coverage for these lawsuits, the insured must retain their own personal counsel, at their own expense, to respond to these lawsuits."

See Aetna Denial Letter, October 5, 1995, attached to Petition for Appeal as Exhibit 4.

At considerable expense, the Yeagers and Ponderosa retained their own personal counsel to defend, try and resolve the above-listed lawsuits. Having favorably resolved all of the underlying claims against them, the Yeagers filed the present matter against Aetna and, alternatively, against Aetna's agents asserting claims of breach of contract and negligent misrepresentation. Specifically, this suit was filed to recover defense costs, expenses and attorneys' fees incurred by the Yeagers in the defense of the five underlying lawsuits for which Aetna should have provided coverage under the terms of the policies.

### **III. ASSIGNMENTS OF ERROR**

The circuit court erred in denying the Yeagers' motion for summary judgment and granting Aetna's motion for summary judgment based upon the following grounds:

1. The circuit court erred in holding that Aetna did not owe a duty to provide coverage or a defense to Appellants under the policies based on the claims asserted by the underlying plaintiffs;

2. The circuit court erred in holding that Aetna did not owe a duty to provide coverage or a defense to Appellants under the Employers Overhead Liability Endorsement based on the claims asserted by the underlying plaintiffs; and,

3. The circuit court erred by failing to include in its March 16, 1999 Order findings of fact and conclusions of law sufficient for appellate review.

#### IV. STANDARD OF REVIEW

Typically, “[a] circuit court’s entry of summary judgment is reviewed de novo.” *Tackett v. American Motorists Ins. Co.*, 584 S.E.2d 158, 527 (W. Va. 2003) (citing *Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994)). This Court further stated in *Tackett* that “when review of a circuit court’s denial of summary judgment is properly before this Court, we examine anew the circuit court’s ruling.” *Id.*

Rule 56 of the West Virginia Rules of Civil Procedure states that a motion for summary judgment “. . . shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Thus, for a moving party to succeed on summary judgment, they must show that there is no material issue of fact in dispute as well as a legal entitlement to their position.

Because the instant appeal requires a review of the terms of an insurance policy, this Court has generally held that “determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” *Id.* at 528 (quoting Syl. pt. 1, *Tennant v. Smallwood*, 568 S.E.2d 10 (W. Va. 2002)). As a result, “[t]he 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.” *Id.* (quoting Syl. pt. 2, *Riffe v. Home Finders Assocs., Inc.*, 517 S.E.2d 313 (W. Va. 1999)).

## V. ARGUMENT

### A. Standards

#### 1. Standards applicable to interpretation of insurance contracts.

Language in an insurance contract should be afforded its plain and ordinary meaning. *See* Syl. pt. 1, *Soliva v. Shand, Morahan & Co.*, 345 S.E.2d 33 (W. Va. 1986). Upon reviewing the terms of an insurance contract to determine whether an insurer has a duty to defend and provide coverage, “it is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.” *Tackett*, 584 S.E.2d at 163 (citations omitted.) Likewise, this Court has “directed reviewing courts to liberally construe insurance policy exclusions in favor of the affected insured.” *Id.* This Court has previously held that:

“When an insurance company seeks to avoid its duty to defend, or its duty to provide coverage through the operation of a policy exclusion, the insurance company bears the burden of proving the facts necessary to trigger the operation of that exclusion.”

*State Auto Mut. Ins. Co. v. Alpha Engineering Services, Inc.*, 542 S.E.2d 876, 879 (W. Va. 2000) (citing Syl. pt. 7, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W. Va. 1987)).

**2. Standards applicable to duty to defend.**

“The duty to defend an insured may be broader than the obligation to pay under a particular policy.” *Farmers and Mechanics Mutual Ins. Co. of West Virginia v. Cook*, 557 S.E.2d 801 (W. Va. 2001). An “insurer’s duty to defend is normally tested by whether the allegations in the complaint against the insured are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy.” *Horace Mann Ins. Co. v. Leeber*, 376 S.E.2d 581, 584 (W. Va. 1988). “Concededly, an insurer must meet a rigorous standard to avoid its obligation to defend.” *Butts v. Royal Vendors, Inc.*, 504 S.E.2d 911, 914 (W. Va. 1998).

As a general rule, this Court has stated that “[w]hen a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party’s pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of coverage that the insurer is obligated to provide.” *Tackett*, 584 S.E.2d 158 n.6 (citations omitted.) “There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. . .” *Butts*, 504 S.E.2d at 914 (quoting *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986)). As a result, this Court has concluded that if “part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims, although it might eventually be required to pay only some of the claims.” *Id.* at 163 (quoting *Leeber*, 376 S.E.2d at 584.)

**B. The allegations of the underlying complaints are covered under the terms of the subject policies.**

The circuit court erred in granting Aetna's motion for summary judgment and ruling that the subject insurance contracts in this matter excluded claims of sexual harassment. In their Complaint, Appellants sought a declaratory judgment that Aetna owed the Yeagers coverage or, at the very least, a duty to defend the Yeagers in litigation of the underlying complaints. Specifically, the underlying complaints, for which the Yeagers requested coverage and/or a defense from Aetna, sought relief from the Yeagers on a theory of vicarious liability as the employer of the individuals who allegedly committed sexual harassment. It is undisputed that the allegations contained in the underlying complaints do not assert that the Yeagers committed any form of sexual misconduct, but were vicariously liable for the alleged wrongful acts of their employees. The underlying complaints also allege that the Yeagers are liable in their own right because they failed to take the steps necessary to prevent a hostile work environment.

Aetna contends that the Yeagers are not entitled to coverage or a defense because: (1) the sexual harassment claims do not constitute an "occurrence" under the insurance policy; (2) coverage was excluded on the basis that the alleged sexual harassment is intentional in nature; (3) coverage is excluded because the sexual harassment claims were asserted by employees of the Yeagers and Ponderosa; and, (4) the damages alleged by the underlying plaintiffs do not constitute bodily injury or personal injury so as to come within the purview of the subject policies. The grounds advanced by Aetna for its denial of coverage and defense are without merit. Appellants were entitled to coverage and a defense to the underlying lawsuits under the specific terms of the insurance policies.

**1. The events alleged against the Yeagers constitute an “occurrence” under the terms of the policies.**

Aetna contends that the acts alleged in the underlying complaints do not constitute an “occurrence” as defined in each of the insurance policies.<sup>2</sup> The general policy provides that the insurance applies to bodily injury if “[t]he ‘bodily injury’ . . . is caused by an ‘occurrence’ that takes place in the ‘coverage territory’ and” . . . occurs during the policy period.” CGL Policy at 1. “Occurrence” is defined in the policies as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *Id.* at 15; CEL Policy at 10. Aetna takes the unequivocal position that “sexual harassment is not an accident and thus does not fit the definition of ‘occurrence.’” *See* Aetna’s October 5, 1995 letter, attached to Petition for Appeal as Exhibit 4. In support of this position, Aetna relies upon prior decisions of this Court, all of which are distinguishable from this case, most notably because none address policy language relevant here.

Specifically, Aetna’s policies contain a “separation of insureds” provision, which states:

**“7. Separation of Insureds.**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Form to the first Named Insured, this insurance applies;

- a. As if each Named Insured *were the only Named Insured*; and
- b. *Separately* to each ‘insured’ against whom claim is made or ‘suit’ is brought.”

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<sup>2</sup> This issue was not addressed in Aetna’s motion for summary judgment or the circuit court’s March 16, 1999 Order.

CGL Policy at 12; CEL Policy at 8 (emphasis added).

Provisions such as these (sometimes referred to as “severability clauses”) are useful in determining whether or not an event is an accident or an occurrence because they effectively create separate insurance policies for each insured. See *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151 (W.D. Ark. 1994) (separation of insureds provision in policy required that the employer’s acts, not the employee’s, determine whether there is coverage and/or a duty to defend); see also, *American Nat’l Fire Ins. Co. v. Estate of Fournelle*, 472 N.W.2d 292, 294 (Minn. 1991) (“a reasonable interpretation” of a severability provision is that “each insured must be treated as if each were insured separately, applying exclusions individually as to the insured for whom coverage is sought.”); *Gulmire v. St. Paul Fire and Marine Ins. Co.*, 674 N.W.2d 629 (Wis. 2003) (“the separation provision applies the policy to each named insured as if that insured was the only named insured”); *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 188 (Tex. 2002) (“The separation-of-insureds provision expressly creates separate insurance policies for King and King’s employee. . .”).

In *Fournelle*, the Supreme Court of Minnesota explained that:

Severability is a widely recognized doctrine that acknowledges the separate and distinct obligations the insurer undertakes to the various insureds, named and unnamed.

\* \* \*

The intent of a severability clause is to provide each insured with separate coverage, as if each were separately insured with a distinct policy, subject to the liability limits of the policy.

\* \* \*

Thus, severability demands that policy exclusions be construed only with reference to the particular insured seeking coverage.

472 N.W.2d at 294.

In *King*, the Supreme Court of Texas was faced with an issue similar to the one presently before this Court. A plaintiff sued King, the employer, for injuries received as a result of an attack upon him by one of King's employees. King sought to enforce the duty to defend contained in a commercial liability policy issued by Dallas Fire. Dallas Fire argued that it had no duty to defend because the plaintiff's allegations did not constitute an "occurrence" within the meaning of the policy. Specifically, Dallas Fire argued that there was no occurrence because the actions of the employee were clearly intentional. Contained within the liability policy was a separation of insureds provision which, the Supreme Court of Texas held, created separate and distinct policies for King and his employee. Thus, the court looked at whether the plaintiff alleged an "occurrence" from the standpoint of King, as if he were the only named insured.

In analyzing the issue presented, the Texas court noted that the Fifth Circuit Court of Appeals has held there is no duty to defend in such circumstances based upon a "related to and interdependent" rule. *See King*, 85 S.W.3d at 190. This view reasons that because the claims against an employer are derivative from the underlying intentional conduct, there is no occurrence to invoke the policy at issue. *See American Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319 (5<sup>th</sup> Cir. 2001).<sup>3</sup> The Supreme Court of Texas has stated that the Fifth Circuit has relied on the "'related and interdependent rule,' *erroneously presuming* this reflects Texas law." *King*, 85 S.W.3d at 191 (emphasis added).

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<sup>3</sup> Appellees rely upon *Ryan* in their response to the Petition for Appeal.

Finding that the “related and interdependent rule” “improperly imputes the actor’s intent to the insured,” the court found that the better rule is that “the actor’s intent is not imputed to the insured in determining whether there was an occurrence.” *Id.* at 192. The Supreme Court of Texas found support for this holding in the evolution of the standard Commercial General Liability form. *Id.* The court noted that the definition of “occurrence” in CGL policies in 1966 required that “occurrence” be determined from the standpoint of the insured. *Id.* (citing 16 ERIC MILLS HOLMES, HOLMES’ APPLEMAN ON INSURANCE 2D §§ 117.5, at 390 (2000)). The CGL form was modified in 1986, this time with the language “from the standpoint of the insured” removed from the definition of “occurrence” and reinserted as a separate exclusion in such policies. *Id.* at 392. “The reason for the 1986 modification was so that courts would not be forced to construe the definition of ‘occurrence’ as if it were an exclusion.” *King*, 85 S.W.3d at 192.

Based on this analysis, the *King* court found that the employee’s intentional assault upon the plaintiff constituted an “occurrence” with respect to the employer who clearly did not intend for the assault to take place. Clearly, this is the better rule when analyzing such issues, especially when the insurer chooses to include a separation of insureds provision in the policy, as Aetna did in the Yeagers’ policies. Such a provision is rendered meaningless if it does not apply in situations such as that presently before the Court. The provision should be afforded its plain meaning, and if any ambiguity exists, the provision should be construed in accordance with the expectations of the insured, the Yeagers. Clearly, from the standpoint of the Yeagers, the sexual harassment of the plaintiffs was unintended and accidental and, thus, constitutes an “occurrence” within the meaning of the policies.

Appellees, erroneously relying upon this Court's decision in *Smith v. Animal Urgent Care, Inc.*, 542 S.E.2d 827 (W. Va. 2000), argue that the issues presented in this appeal have already been decided by this Court. This assertion is incorrect. It is true that, in *Smith*, this Court held that a claim of sexual harassment is not an "occurrence" because sexual harassment cannot be accidental. This case is outside the scope of the holding in *Smith*, as the Court in *Smith* did not distinguish between the employee who committed the act of sexual harassment and his employer. No discussion is made regarding the distinction between the two insureds, and there is no evidence that the policy at issue in *Smith* contained a separation of insureds provision. Presumably, the argument was not raised in *Smith*. It is the very presence of such a provision that requires the Court, in this case, to determine whether the acts alleged constitute an "occurrence" from the standpoint of the Yeagers rather than from the standpoint of their employees who allegedly committed the wrongful acts. When this is done, it is clear that the acts do constitute an "occurrence," thus triggering coverage and a duty to defend under the policy.

This analysis comports with sound public policy in addition to making logical sense based upon clear policy language. In *Tackett v. America Motorists Ins. Co.*, 584 S.E.2d 158 (W. Va. 2003), Justice Starcher, in a concurring and dissenting opinion, recognized the flawed logic of *Smith* when applied in situations such as that involved in this appeal. In that opinion, Justice Starcher wrote that *Smith's* holding that a claim based on sexual harassment is not an "occurrence" 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

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

*Id.* at 168-69 (emphasis in original). In this case, Aetna attempts to rely upon *Smith* for a proposition for which it was never intended. *Smith* did not address the distinction between an employee's intentional acts and an employer's vicarious liability, and a separation of insureds provision was not involved in that case. This case is outside the scope of *Smith*. This case presents an issue of first impression and requires an analysis not performed in *Smith*. When that analysis is undertaken, it is clear that the terms of the insurance contracts at issue provide coverage and/or a defense to the Yeagers.

Moreover, the other allegations of the complaint - that the Yeagers failed to take the steps necessary to prevent a hostile work environment - do not allege anything that could be considered "intentional." These allegations are asserted against the Yeagers in their own right and do not concern the intentional acts committed by the employees per se. Rather, these allegations sound in negligence. As to these allegations, Appellees cannot argue that they are intentional and not covered as an "occurrence" under the policy.

**2. The "intentional acts" exclusion does not apply to the allegations asserted against the Yeagers in the underlying complaints.**

In addition to arguing that the claims asserted against the Yeagers do not constitute an "occurrence," Aetna denied coverage based on an exclusion in the policy for "intentional" acts or conduct. As Aetna stated, "exclusion a. excludes bodily injury that is expected or intended" and "sexual harassment would be considered intentional . . ." See Aetna's October 5, 1995 letter, attached to Petition for Appeal as Exhibit 4. What Aetna neglected to state in their denial letter is that the exclusion specifically provides that the insurance does not

apply to bodily injury “expected or intended *from the standpoint of the ‘insured.’*” CGL Policy at 1 (emphasis added).

The analysis applied above applies with equal force to Aetna’s argument that the “intentional acts” exclusion precludes coverage in this case. Not only does the separation of insureds provision require Aetna to analyze whether the acts alleged in the underlying complaints were intentional from the standpoint of the Yeagers, but the very language of the exclusion requires this. A plain reading of the exclusion leads to the inescapable conclusion that, in order to be excluded from coverage, the act of sexual harassment by the employees must have been expected or intended from the standpoint of the Yeagers. Aetna cannot seriously argue that the Yeagers expected the sexual harassment or the resulting alleged injuries.

In *Farmers and Mechanics Mutual Ins. Co. of West Virginia v. Cook*, 557 S.E.2d 801 (W. Va. 2001), at issue was whether an intentional acts exclusion operated to deny coverage and the duty to defend. In *Cook*, this Court held that “a policyholder may be denied coverage. . . only if the policyholder (1) committed an intentional act *and* (2) expected or intended the specific resulting injury or damage.” *Id.* at 807 (emphasis in original); *see, also, Schmidt v. Smith*, 684 A.2d 66, (N.J. 1996) (The accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause the injury. If not, the injury is “accidental” even if the act that caused the injury was intentional.). This Court further held that “courts must use a subjective rather than objective standard for determining the policyholder’s intent.” *Cook*, 557 S.E.2d at 807. In so holding the Court noted,

Our holding today is fully supportive of the reasons behind the insurance industry’s adoption of the intentional acts exclusion. The rationale behind the intentional acts exclusion is obvious: insurance companies set their premiums based upon the random

occurrence of particular insured events. If a policyholder can consciously, deliberately control the occurrence of these events through the commission of intentional acts, the liability of the insurance company becomes impossible to define. The exclusion therefore prevents individuals from purchasing insurance as a shield for their *anticipated intentional misconduct*. Without such an exclusion, an insurance company's risk would be incalculable.

*Id.* at 810 (emphasis in original). There can be no doubt that, from the standpoint of the Yeagers, the acts alleged in the underlying complaints were unexpected and unintended. Such acts remain random from their standpoint. Certainly, the Yeagers did not intend the plaintiffs' alleged resulting injuries. Furthermore, as to the allegations that the Yeagers failed to take the necessary steps to prevent a hostile work environment, there can be no argument that such acts constitute an "intentional act" so as to be excluded under the terms of the policy. Such allegations clearly sound in negligence. Accordingly, the intentional acts exclusion should not operate to preclude coverage and/or a defense in this case.

Additionally, in *Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co.*, 675 F.Supp. 44 (D.NH 1987), the district court concluded that individual officers of the corporate defendant were not authorized to perform acts of sexual harassment, finding that such acts were outside the scope of their employment. The district court concluded that such "acts did not constitute an intentional act as to the corporation." *Id.* at 46. Furthermore, the court noted that the policy's intentional acts exclusion does not preclude coverage for a negligent insured. Therefore, the district court found that Aetna's policy provided coverage for the corporation's alleged negligence and Aetna was to proceed in its defense of the corporation. *Id.* at 47.

In further support of this contention, the United States District Court for the Southern District of Indiana held in *General Accident Ins. Co. of America v. Gastineau*, 990

F.Supp. 631, 638 (S.D. Ind. 1998), that allegations of a hostile work environment against an employer arising from sexual harassment equates as negligence and, therefore, coverage should not have been denied. In *Gastineau*, an employee filed a sexual harassment claim against its employer and several co-employees. *Id.* at 632. The employer's insurer filed a declaratory judgment action alleging that it did not owe the employer a duty to insure or defend. *Id.* Just as in the present matter, the insurance policy in *Gastineau* contained a separation of insureds provision. Thus, it was necessary to analyze the claims brought against the employer separately from the employee who allegedly committed the sexual harassment. The Court in *Gastineau* noted that although the plaintiff did not allege negligence in his complaint, the plaintiff made allegations of a hostile work environment. As such, the court held that the standard for hostile work environment claims is negligence when viewed from the standpoint of the employer and, therefore, the employer was entitled to coverage under the terms of its insurance policy. *Id.* at 638.

Likewise, in the present matter, the underlying plaintiffs' complaints contain allegations of a hostile work environment against the Yeagers. Because the applicable insurance policies contain a separation of insureds provision, it is apparent that the allegations against the Yeagers do not fall within the intentional acts exclusion because they sound in negligence. In the underlying complaints, the plaintiffs never alleged that Ponderosa or the Yeagers intentionally committed acts of sexual harassment, but instead alleged that Appellants "knew or should have known of defendant's Simms conduct" and Ponderosa "failed to take steps necessary to prevent defendant Simms from sexually harassing plaintiff." See Complaint at ¶¶ 20, 21 and 22, attached to Petition for Appeal as Exhibit 3. The plaintiffs also alleged that the Yeagers and Ponderosa "rendered Plaintiff's working conditions intolerable and compelled

Plaintiff's involuntary resignation." *See id.* at ¶ 39. This language sounds in negligence and not intentional misconduct, especially when viewed from the standpoint of the Yeagers. Aetna's representative narrowly interpreted the language in both the underlying complaints and the policies and clearly arrived at the wrong result. Where the allegations specifically asserted against the Yeagers are applied to the terms of the insurance policy, it is apparent that the Yeagers are entitled to coverage and a defense because the allegations against them assert only vicarious liability and negligence.

Furthermore, Aetna did not satisfy its burden that the intentional acts exclusion applied to all of the allegations asserted against the Yeagers in the underlying claims. It is well-settled in West Virginia that Aetna bears the burden of proving facts necessary to trigger the operation of each exclusion it relies upon in denying its duty to defend and provide coverage. *State Auto Mut. Ins. Co. v. Alpha Engineering Services, Inc.*, 542 S.E.2d 876, 879 (citing Syl. pt. 7, *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W. Va. 1987)). At the very least, if part of the claims against the Yeagers and Ponderosa fall within the coverage of Aetna's insurance policy, Aetna is required to provide a defense for these claims.

**3. The employee exclusion does not apply to the allegations asserted against the Yeagers in the underlying complaints.**

Aetna claims that the "employee" exclusion in the general policy precluded coverage under the facts in this case. This clause, which appears only in the general policy, seemingly excludes "bodily injury to an employee of the insured arising out of and in the course of employment by the insured." Courts have rejected similar arguments advanced in the past by carriers and have refused to apply this exclusion in similar circumstances. As stated by the Court in *Save Mart Supermarkets v. Underwriters at Lloyd's London*, 843 F.Supp. 597 (N.D. Cal.

1994), such a clause is “ambiguous” and “could be construed to bar only those claims which would otherwise arise under Worker’s Compensation Laws.” *Id.* at 604. According to the Court, “this interpretation finds support in the phrase ‘injured in the course of employment.’” *Id.* at 603. Moreover, following the reasoning in *Seminole, infra.*, (that such acts are outside of the scope of employment) it would appear that this ambiguous language would be construed against the insurer and in favor of the policyholder who expects coverage for non-intended acts that might create liability. It is a reasonable interpretation to conclude that this exclusion applies to work-related injuries that would fall within the realm of workers’ compensation.

Moreover, the exclusion was modified by the Endorsement attached to the general policy, and the excess policy contains no such exclusion. The Endorsement specifically provides coverage for bodily injury “aris[ing] out of and in the course of the injured employee’s employment. . .” Endorsement at 1. More importantly, under the terms of the excess policy, injury to an employee is not specifically excluded. Therefore, even if the Court should find that coverage was excluded under this language in the general policy, such coverage would not have been excluded under the terms of the excess policy. Therefore, Aetna would have been obligated, at a minimum, to provide a defense to the Yeagers under the excess policy’s separate duty to defend.

**4. The alleged conduct does constitute “bodily injury” or “personal injury” as contemplated by the policies.**

Aetna’s most recent argument in support of their denial to defend or provide insurance coverage to the Yeagers is that the damages alleged by the underlying plaintiffs do not constitute “bodily injury” or “personal injury” that would be covered by the policies. Both the general policy and the Endorsement define “bodily injury” as “bodily injury, sickness or disease

sustained by a person, including death resulting from any of these at any time.” CGL Policy at 13. Aetna argues that this policy language precludes coverage and a defense in this case because the underlying complaints do not allege physical injury. Aetna further argues that this Court has already held that mental or emotional injury that lacks physical symptoms caused by sexual harassment does not constitute “bodily injury,” and that such holding forecloses the application of the policies at issue in this case. See Syl. pt. 1, *Smith*, 542 S.E.2d 827 (W. Va. 2000).

First, the Yeagers disagree that this policy language applies to preclude coverage and/or a defense. ‘Bodily injury’ should include injuries such as those alleged by the underlying plaintiffs against the Yeagers. Justice Starcher would agree, as reflected in his dissenting and concurring opinion in *Tackett*, 584 S.E.2d at 168, wherein he notes that “a definition of ‘bodily injury’ which is limited to ‘bodily injury, sickness, or disease,’ is “an archaic conceptualization of human anatomy and physiology, based on a belief that there is a distinction between ‘mental’ and ‘physical’ injuries.” Justice Starcher recognized that “[t]he science of today establishes that the brain can be physically injured solely through an emotional disturbance. A traumatizing event can trigger sever chemical reactions in the brain, such that a tangible injury to the brain can occur.” *Id.* The Yeagers agree with Justice Starcher that when this Court held in *Smith* “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.” *Id.* Under such an interpretation, at the very least, Aetna owed the Yeagers a duty to defend the underlying litigation on their behalf.

Second, even if the general policy would not provide coverage on this basis, the excess policy would provide coverage. The excess policy provides coverage for damages because of “bodily injury” or “personal injury.” The excess policy defines “bodily injury” much

more broadly than does the general policy. The excess policy provides, "bodily injury" means "bodily injury, shock, fright, mental injury, disability, mental anguish, humiliation, sickness or disease sustained by a person, including death resulting from any of these at any time." CEL Policy at 9. Although there is an employment-related exclusion for bodily injury "consisting of humiliation, mental injury or mental anguish," this exclusion does not apply in this case, as the language is ambiguous as argued in section B.3. *supra*. Additionally, even if the exclusion did apply, there are other damages alleged in the underlying complaints which would fall under the broad definition of "bodily injury" found in the excess policy.

Moreover, the excess policy provides coverage for "personal injury" which is defined as "injury, other than 'bodily injury,' arising out of . . . [d]iscrimination because of . . . sex. . . ." CEL Policy at 10. This Court has defined sexual harassment as discrimination based on the sex of an employee with respect to privileges of employment. *See Hanlon v. Chambers*, 464 S.E.2d 741, 749 (W. Va. 1995). Again, the excess policy excludes coverage for personal injury "consisting of discrimination. . . related to the employment. . . of any person. . . by any insured. CEL Policy at 3. Again, however, this exclusion does not operate to exclude coverage in this case.

**5. The exclusion found in the Endorsement does not apply.**

The Endorsement expressly covers "bodily injury" by accident to employees of Ponderosa. Such an endorsement is often written in West Virginia and other states to provide coverage for deliberate intent claims and other torts that might arise within the scope of the employment relationship and which are not otherwise covered by workers' compensation for one reason or another. The Endorsement also contains an exclusion that seemingly applies to this case; however, a recent decision by the Superior Court of New Jersey is on point and holds that

such "stop-gap" policies provide coverage for sexual harassment claims vicariously imposed upon employers.

The Endorsement contains the following exclusionary language:

"This insurance does not apply to:

h. damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions."

In *Schmidt v. Smith*, 294 N.J. Super. 569, 684 A.2d 66 (Nov. 6, 1996), the New Jersey Superior Court held that an identical exclusion using the same language as quoted above did not exclude coverage for an employer who was vicariously liable for the sexual harassment of an employee by an officer of the corporation. In *Schmidt*, the employer, PAV, was the insured under both a comprehensive general liability policy and another policy which the New Jersey court characterized as a "gap-filler" which provided protection to the employer in those situations where the employee has a right to bring a tort action despite the provisions of the workers' compensation statute. The PAV "gap-filler" policy contained the exact same exclusionary language quoted above from the Aetna policy. In holding that the exclusionary language did not exclude coverage for sexual harassment claims, the New Jersey court reasoned:

"While USFG maintains that the language of Exclusion C7 is clear and unambiguously applies to sexual harassment claims under the LAD, it appears to us that the exclusion in this circumstance is all but clear. This is so in light of the fact that the amended C7 Exclusion does not specifically exclude coverage for vicarious liability resulting from hostile workplace sexual harassment.

\* \* \*

Here, under the employers liability section of the policy, it is reasonable for PAV to expect coverage for Smith's acts... The employers liability section of the policy provided for liability that may fall outside of typical workers compensation coverage. Thus, it is reasonable for PAV to expect coverage for its vicarious liability resulting from the intentional torts of an employee."

*Id.* at 73. This holding was later affirmed by the Supreme Court of New Jersey in *Schmidt v. Smith*, 713 A.2d 1014 (N.J. 1998).

Following the sound reasoning and the authority of the Supreme Court of New Jersey, this Court should likewise find that the exclusion in the Endorsement does not preclude coverage for sexual harassment vicariously imposed upon the Yeagers for the conduct of others or for the Yeagers' negligent conduct in allegedly allowing a hostile work environment to exist. Because the Yeagers' conduct was not intentional and because no allegation was ever made, nor any evidence introduced, against the Yeagers, the Endorsement provides full coverage and a defense to these claims. Thus, the circuit court erred in denying Appellants' motion for summary judgment and ruling that Aetna did not have a duty to provide coverage or a defense to Appellants under the Endorsement.

In addition to the foregoing, it is undisputed that the underlying complaints alleged that defendant Simms (a Ponderosa supervisor) "intentionally inflicted emotional distress upon Plaintiff." Under the Endorsement, such an allegation would be covered. According to the court in *Lawson v. Straus*, 673 So.2d 223 (La. 1996), despite the same exclusions as contained in the Endorsement in this case, a sexual harassment claim is covered. Therefore, under two separate theories, (both dealing with the same exclusion as set out in the Employer's Overhead Liability Endorsement) courts have found coverage for sexual harassment claims. Therefore, the

circuit court clearly erred by holding that Aetna did not owe Appellants a duty to defend or provide coverage under the Endorsement.

**C. The circuit court's March 16, 1999 Order failed to include findings of fact and conclusions of law that were sufficient for meaningful appellate review.**

In its March 16, 1999 Order, the circuit court failed to address the issues set forth in the Yeagers' motion for summary judgment. Specifically, the Yeagers contended that they were entitled to coverage and a defense because: (1) as the alleged tortfeasor's employer, the underlying claims were an occurrence under the terms of the general liability policy; (2) the intentional acts exclusion did not apply to the Yeagers because the allegations raised against them arose out of negligence; (3) the employee exclusion did not apply to the Yeagers because the provision was ambiguous as applied to an employer; and, (4) the harassment exclusion contained in Aetna's Employers Overhead Liability Endorsement was not applicable to the Yeagers because it did not exclude vicarious liability for sexual harassment claims.

In its Order, the circuit court made only two specific findings with regard to the issues raised in the Yeagers' motion for summary judgment:

“3. This Court finds and concludes that the insurance contracts in this matter clearly exclude coverage for claims of sexual harassment such as were made in plaintiffs' complaint.

4. This Court finds and concludes that the insurance contracts in this matter are not *unclear* and *ambiguous* and that therefore, this Court will apply, and not interpret, the plain and ordinary meaning of the insurance contracts at issue.”

See Exhibit 1.

Clearly, the circuit court failed to address whether the claims asserted against the Yeagers constitute an occurrence under the general liability policy, as well as the applicability of the two exclusions which Aetna asserted were applicable to the underlying claims. Further, the circuit court failed to address whether or not the Endorsement afforded the Yeagers coverage or a duty to defend separately from the general liability policy.

This Court held in *Hively v. Merrifield*, 575 S.E.2d 414, 418 (W. Va. 2002) that:

“Appellate courts, on review, rely heavily on the trial judge’s order; the order is extremely important. The order often assists appellate courts in understanding what the trial court did and why, and good orders often rebut allegations made by appealing parties in briefs and arguments. If the lower tribunal is interested in having its decision affirmed, then the lower court should assist the appellate courts by providing comprehensive, well-reasoned orders. Submission of a comprehensive order assists an appellate court in finding a way to affirm the lower court’s order.”

*Id.* (citing *P.T.P., IV by P.T.P. v. Bd. of Educ.*, 488 S.E.2d 61, 65 (W. Va. 1997)). Accordingly, this Court held that it was reversible error for the circuit court to grant summary judgment without including findings of fact and conclusions of law sufficient for meaningful appellate review. Likewise, in the present matter, the circuit court’s Order failed to make sufficient findings of fact and conclusions of law which would allow for a meaningful appellate review because the Order fails to address any of the specific issues raised by the parties.

It is also significant that the circuit court’s March 16, 1999 Order was entered two years after the parties submitted their cross-motions for summary judgment. It is apparent from the findings of fact and opinions set forth in the Order that the circuit court did not take into consideration the specific issues presented in the parties’ motions. As a result, this Court should

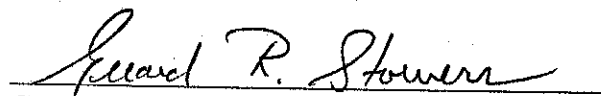
find that the circuit court committed reversible error by granting summary judgment without setting forth sufficient findings of fact and conclusions of law.

## VI. RELIEF REQUESTED

For the foregoing reasons set forth herein, Appellants respectfully request that this Court reverse the lower court's March 16, 1999 Order and find that the circuit court erred in denying Appellants' motion for summary judgment and granting Aetna's motion for summary judgment.

GLEN YEAGER and ANITA YEAGER,  
individually and GLEN YEAGER and  
ANITA YEAGER, d/b/a PONDEROSA  
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**CERTIFICATE OF SERVICE**

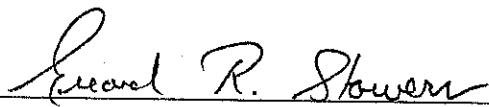
I, Gerard R. Stowers, do hereby certify that I have caused copies of the hereto attached **Brief on Behalf of Appellants** to be served upon:

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by placing the same in the regular United States Mail, postage prepaid, on this 20<sup>th</sup> day of December, 2004.

  
\_\_\_\_\_  
Gerard R. Stowers (WVSB 3633)