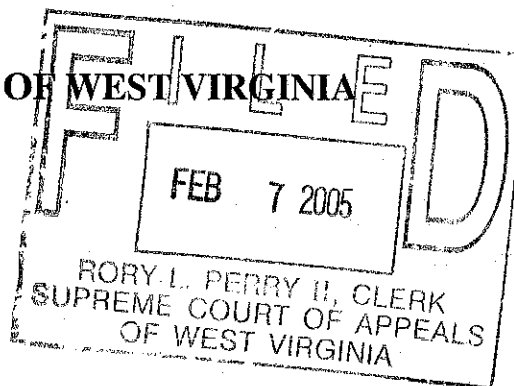


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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.

REPLY BRIEF ON BEHALF OF APPELLANTS

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ARGUMENT	2
A. The insurance policies must be construed in light of the “separation of insureds” provision contained therein.....	4
B. When the separation of insureds provision is applied, Aetna’s reasons for refusing coverage and a defense fail.....	6
1. The events alleged against the Yeagers constitute an “occurrence”	6
2. The “intentional acts” exclusion does not apply to the allegations asserted against the Yeagers in the underlying complaints.	8
3. The employee exclusion does not apply to the allegations asserted against the Yeagers in the underlying complaints.	9
4. The alleged conduct constitutes “bodily injury” or “personal injury” as contemplated by the policies.	11
5. The exclusion found in the General Liability Endorsement does not apply.....	12
C. The March 16, 1999 Order did not dispose of all of the claims or parties in the underlying action and, therefore, was not a final and appealable order pursuant to Rule 54(b).	14
III. CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<i>America Nat'l Gen. Ins. Co. v. Ryan</i> , 274 F.3d 319 (5 th Cir. 2001)	5
<i>American Nat'l Fire Ins. Co. v. Estate of Fournelle</i> , 472 N.W.2d 292, 294 (Minn. 1991).....	5
<i>Durm v. Heck's, Inc.</i> , 401 S.E.2d 908 (W. Va. 1991).....	15, 16
<i>Farmers and Mechanics Mutual Ins. Co. of West Virginia v. Cook</i> , 557 S.E.2d 801 (W. Va. 2001).....	8, 9
<i>Gulmire v. St. Paul Fire and Marine Ins. Co.</i> , 674 N.W.2d 629 (Wis. 2003).....	5
<i>Hanlon v. Chambers</i> , 464 S.E.2d 741, 749 (W. Va. 1995).....	12
<i>Hubbard v. State Farm Indemnity Co.</i> , 584 S.E.2d 176, 184 (W. Va. 2003).....	16
<i>King v. Dallas Fire Ins. Co.</i> , 85 S.W.3d 185, 188 (Tex. 2002).....	5, 6
<i>Save Mart Supermarkets v. Underwriters at Lloyd's London</i> , 843 F.Supp. 597 (N.D. Cal. 1994)	10
<i>Schmidt v. Smith</i> , 684 A.2d 66, (N.J. 1996).....	8, 13, 14
<i>Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.</i> , 842 F. Supp. 1151 (W.D. Ark. 1994).....	5
<i>Smith v. Animal Urgent Care, Inc.</i> , 542 S.E.2d 827 (W. Va. 2000).....	6, 7, 11
<i>St. Peter v. AMPAK-Division of Gatewood Products, Inc.</i> , 484 S.E.2d 481 (W. Va. 1997).....	15
<i>Tackett v. American Motorists Ins. Co.</i> , 584 S.E.2d 158, 163 (W. Va. 2003).....	4, 7, 11
<i>Wilcher v. Riverton Coal Co.</i> , 194 S.E.2d 660 (W. Va. 1973).....	15

Other Authorities

Rule 54(b), West Virginia Rules of Civil Procedure 16, 17

I. INTRODUCTION

Appellees, Aetna Casualty and Surety Company, Aetna Casualty & Surety Company of Illinois (“Aetna”) continue to ignore the policy language of their various policies and continue to avoid the contractual responsibility owed to their policyholders. Aetna’s response brief fails to address the arguments raised by Appellants, Glen Yeager and Anita Yeager (“Yeagers”) in their brief, particularly as to the express language found in the insurance policies at issue, which language provides that the insurance applies “a. [a]s if each Named Insured were the only Named Insured; and b. Separately to each ‘insured’ against whom claim is made or ‘suit’ is brought.” (Commercial General Liability Coverage Form at 12 (“general policy” or “CGL Policy”); Commercial Excess Liability (Umbrella) Insurance Policy at 8 (“excess policy” or “CEL Policy”)). In fact, Aetna offers no explanation for the purpose of including such a provision in its policies if not for the reasons advanced by the Yeagers. Apparently, Aetna would have the Court completely disregard the “separation of insureds” provisions found in the policies, as doing so is the only way Aetna can support its position that it rightly denied coverage and a defense to the Yeagers with regard to the underlying lawsuits.

Aetna has refused coverage, as well as a defense, to its policyholders despite the presence of language in their policies requiring both. Aetna, in so refusing, argues that West Virginia precedent dictates a result in favor of its position despite the fact that no case in West Virginia has addressed a “separation of insureds” provision in an insurance policy and the effect such provision has on determining coverage in a case such as that presently before this Court. 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.

Aetna's faulty 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 is a blatant disregard for policy language which required Aetna to construe the policies from the standpoint of each insured as if they were the only named insured. In this case, from the standpoint of the Yeagers, the exclusion would not operate to preclude coverage and/or a defense to the Yeagers.

II. ARGUMENT

Aetna, through its agents, sold two insurance policies to the Yeagers that were in effect during the applicable time period. The CGL Policy 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.

The CEL Policy provides:

“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.

Aetna continues to argue in its brief that the Yeagers are not entitled to coverage or a defense under the terms of these policies because: (1) the sexual harassment claims do not constitute an “occurrence” under the insurance policies; (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. These grounds advanced by Aetna for its denial of coverage and defense are without merit in light of the language found in the policies at

issue. Appellants were entitled to coverage and a defense to the underlying lawsuits under the specific terms of the insurance policies.

A. The insurance policies must be construed in light of the “separation of insureds” provision contained therein.

Aetna, in its brief, makes no attempt to explain the provision found in both the CGL and CEL policies that require the issues of coverage and defense to be determined from the standpoint of the Yeagers, as if they were the only named insureds. 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.”

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

This language, if ambiguous, must be “strictly construed against the insurance company and in favor of the insured.” *Tackett v. American Motorists Ins. Co.*, 584 S.E.2d 158, 163 (W. Va. 2003) (citations omitted). Aetna argues repeatedly throughout its brief that the separation of insureds provision does not change the result of this case, yet it offers no explanation for the provision. Aetna does not even attempt to explain the purpose of the provision in the policies if not for the purpose advanced by the Yeagers, most likely because the meaning of the provision is clear and requires that the policies be applied as if the Yeagers were

the only named insureds. When the policies are so applied, it is clear that the Yeagers were entitled to coverage and, at the very least, a defense.

Moreover, Aetna fails to address the case law cited in the Yeagers' brief in support of their position that a separation of insureds provision creates separate and distinct policies for the Yeagers and their employees. *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 . . .").

Aetna does little more in its response brief than cite to a case from the Fifth Circuit Court of Appeals which holds that, under Texas law, there is no duty to defend in circumstances such as those present here based upon a "related to and interdependent" rule. *See America Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319 (5th Cir. 2001). Just as Aetna argues in this case, the Fifth Circuit, in *Ryan*, reasoned that because the claims against the employer were derivative from the underlying intentional conduct at issue, there was no "occurrence" so as to invoke the policy at issue. The *Ryan* Court did not apply the policy at issue to the employer as if it were the only named insured as required by the terms of the policy.

The Supreme Court of Texas has stated that the decision in *Ryan* is an incorrect interpretation of Texas law. See *King v. Dallas Fire Co.*, 85 S.W.3d 185, 191 (Tex. 2002) (stating that the Fifth Circuit has relied on the “‘related and interdependent rule,’ *erroneously presuming* this reflects Texas law.”) (emphasis added). Rather, the Texas Supreme Court lends credence to separation of insureds provisions in insurance policies, as to do otherwise would render such provisions meaningless.

Moreover, Aetna’s reliance upon this Court’s decision in *Smith v. Animal Urgent Care, Inc.*, 542 S.E.2d 827 (W. Va. 2000), is misplaced. No discussion is made in *Smith* with regard to a separation of insureds provision. Actually, it is not evident from the opinion that such a provision was even included in the insurance policy at issue. It is the presence of such a provision in the policies issued to the Yeagers that places this case outside the scope of the *Smith* decision. *Smith* is not dispositive of the issues presented in this case, as such issues were not before the Court in *Smith*. When, however, this case is viewed in light of the separation of insureds provision found in the applicable policies, it is clear that Aetna owed both coverage and a defense to the Yeagers.

B. When the separation of insureds provision is applied, Aetna’s reasons for refusing coverage and a defense fail.

1. The events alleged against the Yeagers constitute an “occurrence.”

Aetna contends that the acts alleged in the underlying complaints do not constitute an “occurrence” as defined in each of the insurance policies.¹ 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 the policy language relevant here. The parties agree that an

¹ This issue was not addressed in Aetna’s motion for summary judgment or the circuit court’s March 16, 1999 Order.

occurrence is defined as an accident and something unintentional or unforeseen. The separation of insureds provision found in the subject policies, however, require that Aetna determine whether or not the acts complained of constitute an "occurrence" from the standpoint of the Yeagers.

Again, 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. Insurance companies should not be able to rely upon *Smith* to deny insurance coverage to employers who do not intend certain offenses committed by their employees. 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.

Certainly, it cannot be disputed that "sexual harassment by an employee is usually not an intentional or expected act by the employer." *Tackett v. America Motorists Ins. Co.*, 584 S.E.2d 158, 168 (W. Va. 2003) (Justice Starcher, dissenting and concurring). 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.

Aetna next bases its decision to deny coverage on an exclusion in the policy for “intentional” acts or conduct. This exclusion, however, 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). Yet again, Aetna relies upon West Virginia case law, none of which addresses the applicability of a separation of insureds provision to an employer who has been accused of vicarious liability for the intentional acts of an employee.

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. 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.

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 liability policy precludes coverage under the facts in this case. This clause, which appears only in the general

liability 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, this ambiguous language should 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 constitutes “bodily injury” or “personal injury” as contemplated by the policies.**

Next, Aetna argues 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 liability 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. *See Tackett*, 584 S.E.2d at 168 (Justice Starcher dissenting and concurring) (“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.”).

Second, even if the general liability 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 above. 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 General Liability 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*, 684 A.2d 66 (N.J. Sup. 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).²

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.

C. The March 16, 1999 Order did not dispose of all of the claims or parties in the underlying action and, therefore, was not a final and appealable order pursuant to Rule 54(b).

Finally, Aetna argues that a procedural defect renders this appeal moot. Aetna cites no West Virginia cases in support of its position. Actually, West Virginia case law, as well as the Rules of Civil Procedure, supports the Yeagers’ position that this appeal was properly taken after the circuit court dismissed the remaining claims and parties on January 9, 2004.

² Contrary to Aetna’s assertions, the Supreme Court of New Jersey did not reverse any portion of the Superior Court’s ruling. Rather, the Supreme Court noted its agreement with the Superior Court that “an employer would reasonably expect the employer’s liability section to provide coverage for the types of injuries” the plaintiff suffered. See *Schmidt v. Smith*, 713 A.2d 1014, 1018 (N.J. 1998).

Rule 54(b) of the West Virginia Rules of Civil Procedure provides:

“When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

The March 16, 1999 Order does not contain the language contemplated by Rule 54(b) that would direct final judgment as to Aetna and the claims alleged against Aetna. In Syllabus, *Wilcher v. Riverton Coal Co.*, 194 S.E.2d 660 (W. Va. 1973), this Court held that an order granting partial summary judgment is not a final and appealable order unless there is an “express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” Later, in *St. Peter v. AMPAK-Division of Gatewood Products, Inc.*, 484 S.E.2d 481 (W. Va. 1997), the Court was faced with an issue like the one presented in this case. In *St. Peter*, the Court was asked to decide whether the plaintiff’s appeal was timely where one defendant was dismissed by partial summary judgment entered on June 19, 1995 and the final summary judgment order was entered on January 12, 1996. The Court held that, although an immediate appeal of a partial summary judgment order may be taken if the order “approximates a final order in its nature and effect,” see *Durm v. Heck’s, Inc.*, 401 S.E.2d 908 (W. Va. 1991), “*Durm* does not require that the aggrieved party immediately appeal.” *St. Peter*, 484 S.E.2d at 488. “Entry of a *Durm*-type order, while allowing an aggrieved party to take an immediate

appeal, does not require that such an appeal be taken at that time, and an aggrieved party may take an appeal at any time until the final appeal time in the case expires.” *Id.* (citation omitted). Finding that the June 19, 1995 order did not contain the “express determination” language of Rule 54(b), the Court held that the appeal of the order dismissing the first defendant was timely. *See id.*; *see, also, Hubbard v. State Farm Indemnity Co.*, 584 S.E.2d 176, 184 (W. Va. 2003) (“although we have *permitted* a party to take a petition for appeal from a *Durm*-type order, we have never *required* such an appeal.”) (emphasis in original).

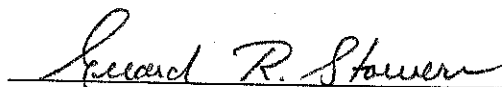
The law in West Virginia is clear. The Yeagers could not have appealed the March 16, 1999 Order since the Order granted summary judgment on fewer than all claims against fewer than all parties, and the “express determination” language of Rule 54(b) is not included in the Order. Thus, the appeal time with regard to that Order did not begin to run until the remaining parties and claims were dismissed on January 9, 2004. Accordingly, the appeal is timely.

III. CONCLUSION

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,
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CERTIFICATE OF SERVICE

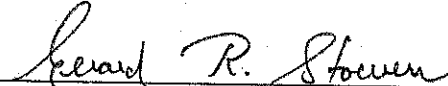
I, Gerard R. Stowers, do hereby certify that I have caused copies of the hereto attached **Reply Brief on Behalf of Appellants** to be served upon:

Ancil G. Ramey, Esquire
STEPTOE & JOHNSON
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William R. Slicer, Esquire
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by placing the same in the regular United States Mail, postage prepaid, on this 7th day of February, 2005.


Gerard R. Stowers (WVSB 3633)