UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DAYLE JOHNSON,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	
	)	
ALLSTATE INSURANCE CO.,	)	
	)	**Civil No. 95-151-P-H**
DEFENDANT	)	
	)	
v.	)	
	)	
PETER J. McMANUS, et al.,	)	
	)	
THIRD-PARTY DEFENDANTS	)	

ORDER ON CROSS-MOTIONS ON THE STIPULATED RECORD

Does a standard homeowner's insurance policy cover liability for sexual abuse of a child? The Maine Law Court has held that there is no coverage for the abuser's liability. But what about the abuser's spouse who negligently permits the abuse to occur? I conclude that there is likewise no coverage for her. The case is submitted on a stipulated record.[1]

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[1] The plaintiff refers to her motion for "summary judgment." It is clear, however, from the Magistrate Judge's Report of Telephone Conference and Order, No. 95-151-P-H (D. Me. June 28, 1995), that the parties agreed to a stipulated record. See also Endorsement, Motion to Extend Time

(continued...)

BACKGROUND

Peter McManus was convicted of the crime of gross sexual contact with his minor grandchild. The grandchild brought a civil action against the abuser and his wife. In addition to alleging intentional tortious conduct by her grandfather over an eleven-year period, the grandchild's complaint alleged negligent supervision and negligent infliction of emotional distress on the part of her grandmother, based on her failure to take reasonable steps to supervise and protect the grandchild.[2] Both McManuses stipulated to liability in the civil action, and the state court entered judgment against them after a hearing on damages.

In this action, the grandchild seeks to collect her judgment against the McManuses from their homeowners liability insurance carrier, Allstate, under Maine's "Reach and Apply" statute, 24-A M.R.S.A. §§ 2903, 2904; see Order on Plaintiff's Motion to Remand, No. 95-151-P-H (D. Me. Aug. 4, 1995).

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[1] (...continued)
and Incorporated Memorandum, No. 95-151-P-H (D. Me. Aug. 18, 1995). In fact, that is what was filed, although the plaintiff refers to it as her "Statement of Material Facts." The terminology can make a difference. See Boston Five Cents Sav. Bank v. Secretary of Dep't Hous. & Urban Dev., 768 F.2d 5, 11-12 (1st Cir. 1985).

[2] There are some intimations in the plaintiff's brief that she claims damages flowing from statements her grandmother made to her, accusing her of being responsible for the grandfather's acts of abuse. The complaint in state court made several allegations and an order in that action presumably prepared by the parties had stipulated that "damages flowing from defendant Agnes McManus's liability are deemed as arising from the entirety of the Amended Complaint." Plaintiff's Statement of Material Facts Submitted in Support of Her Summary Judgment Motion ("Pl.'s Stmt."), Ex. E at 1. The Superior Court judgment, however, Pl.'s Stmt, Ex. F at 1, refers only to the allegations of physical and sexual abuse and molestation as the basis on which the computation of damages was arrived at. The parties' arguments do not address this theoretically separate basis of liability and damage, and I therefore do not address it.

Allstate issued two different forms of homeowners liability insurance to the McManuses during the eleven-year period in which the sexual abuse of their grandchild occurred, but the only one relevant to this action is the policy in force from 1983-85, Policy AU 418. Plaintiff's Statement of Material Facts Submitted in Support of Her Summary Judgment Motion ("Pl.'s Stmt."), Ex. G; see Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment ("Pl.'s Mem.") at 4; Allstate's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Reply Memorandum in Support of Its Motion for Judgment on the Stipulated Record ("Def.'s Mem.") at 2, 7. The McManuses purchased "Family Liability Protection" covering "all sums arising from the same loss which an insured person becomes legally obligated to pay as damages because of bodily injury . . . covered by this part of the policy." Pl.'s Stmt., Ex. G at 17. Both McManuses are named as insureds in the policy. The policy provisions in controversy are the intentional act exclusion providing, "We do not cover bodily injury . . . intentionally caused by an insured person," id., and the "Limits of Liability" section, which begins, "This insurance applies separately to each insured person. Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability protection coverage for damages resulting from one loss will not exceed the limit shown on the declarations page." Id. at 22.

LEGAL ANALYSIS

In 1990, Maine's Law Court held "as a matter of law that any injury produced by a criminal act of sexual abuse against a child is 'injury—expected or intended by the insured' within the meaning of the homeowner's exclusion." Perreault v. Maine Bonding & Casualty Co., 568 A.2d 1100, 1101 (Me. 1990). As a result, the grandchild here wisely has chosen not to argue that her

grandfather's actions are insured. The Law Court went farther in Perreault, however. It stated: "Homeowner's coverage for criminal sexual abuse of children is undoubtedly outside the contemplation of the parties to the insurance contract; indeed, "'[t]he average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [the person] would not want to share that type of risk with other homeowner's policyholders."'" Perreault, 568 A.2d at 1102 (citations omitted). This language concerning the expectations of insurance purchasers about insurance coverage for sexual abuse of children is broader than the facts of Perreault. Perreault required only a decision that the insured perpetrator, the person with criminal intent to commit sexual abuse, be excluded from coverage. 568 A.2d at 1101. The rationale of contractual expectations about risk-sharing, however, extends to the coverage asserted here for the negligent supervision by a co-insured that permitted the other insured's criminal act.

The plaintiff grandchild seeks to escape the scope of Perreault under the language contained in Allstate's section on "Limits of Liability." Because that section begins, "This insurance applies separately to each insured person," the grandchild argues that her grandmother has separate coverage from her grandfather and that the intentional act exclusion that Perreault used to exclude coverage for the perpetrator does not extend to her grandmother who was only negligent.[3]

This reading of the "Limits of Liability" section makes no sense. The "Limits of Liability" section is concerned with calculating the amounts of coverage. The sentence on separate application

[3] I am assuming, of course, that the grandmother actually violated a duty of care to the grandchild. Because the McManuses consented to entry of judgment against them, there was no determination in the state court that the grandchild actually had a cause of action against her grandmother.

makes clear that co-insureds are not limited to a pro rata share of the total policy proceeds, but can claim up to the total amount; the sentences that follow provide that the insured's total liability will not exceed that total, regardless of the number of co-insureds.

More persuasive for the plaintiff's interpretation is Hildebrand v. Holyoke Mut. Fire Ins. Co., 386 A.2d 329 (Me. 1978). There, the husband intentionally burned the insured house down. The wife was blameless and sued to recover the policy proceeds. The Law Court ordered that she be allowed to recover even though both spouses were included in the definition of "insured." Specifically, the Court held: "We construe the term 'insured' . . . to mean . . . the insured who (1) is responsible for causing the loss and (2) is seeking to recover under the policy. We therefore conclude that the instant policy allows recovery by the 'Named Insured' for the loss despite the fact that it resulted from the intentional act of another 'insured.'" 386 A.2d at 331 (citation omitted). Under Hildebrand's reasoning, each co-insured is considered separately with regard to conditions of coverage. The language of the Hildebrand policy, however, dealt with "the" insured. In the Allstate policy here, on the other hand, the intentional act exclusion precludes coverage for any injury intentionally caused by "an" insured person. The damage here was caused by the intentional criminal acts of "an" insured, the grandfather. Caselaw from other jurisdictions indicates that the choice of articles "an" vs. "the" makes a difference. See, e.g., Allstate Ins. Co. v. Gilbert, 852 F.2d 449, 454 (9th Cir. 1988); Allstate Ins. Co. v. McCranie, 716 F. Supp. 1440, 1447-49 (S.D. Fla. 1989), aff'd without op., 904 F.2d 713 (11th Cir. 1990); Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 822 (D. Alaska 1987); Allstate Ins. Co. v. Foster, 693 F. Supp. 886, 889 (D. Nev. 1988); State Farm & Fire Cas. Co. v. Davis, 612 So.2d 458, 466 (Ala. 1993); Allstate Ins. Co. v. Freeman, 443 N.W.2d 734, 754 (Mich. 1989); and Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 371-72 (N.Y.

1992). The plaintiff has not addressed the significance of the choice of articles because she contends that the first sentence of the "Limits of Liability" section makes it moot, Pl.'s Stmt. at 6, a position that I have rejected above.

I conclude that the Maine Law Court would rule that the exclusionary language here prohibiting coverage for injury "intentionally caused by an insured person" would preclude coverage for Mrs. McManus's negligent supervision of her grandchild which resulted in her co-insured husband's ability to cause injury intentionally to their grandchild. Judgment shall therefore be entered for the defendant on the plaintiff's complaint. I recognize, however, that the question is very close under Maine precedents. I would therefore entertain a request for certification of the issue to the Maine Law Court. Any such request shall be filed within ten (10) days.

SO ORDERED.

DATED AT PORTLAND, MAINE THIS 26TH DAY OF JANUARY, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE