IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SUSAN MCALLEY,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 09C-11-143 JRS
	)	
SELECTIVE INSURANCE COMPANY OF AMERICA, f/k/a Selective Risks Insurance Co., f/k/a Select Way Insurance Co.	)	
	)	
Defendant.	)	

Date Submitted: December 20, 2010
Date Decided: February 16, 2011

MEMORANDUM OPINION.
Upon Consideration of Plaintiff's Motion for Summary Judgment.
DENIED.
Upon Consideration of Defendants' Motion for Summary Judgment.
GRANTED.

R. Stokes Nolte, Esquire, REILLY, JANICZEK & MCDEVITT, P.C., Wilmington, Delaware. Attorney for Plaintiff.

Joshua M. Meyeroff, Esquire, CASARINO CHRISTMAN SHALK RANSOM & DOSS, P.A., Wilmington, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

Before the Court are cross-motions for Summary Judgment filed by the Plaintiff, Susan McAlley ("McAlley" or "Plaintiff"), and the Defendant, Selective Insurance Company ("Selective"). The Court confronts the issue of whether an insurance policy obtained by a School District obligates the carrier to provide a legal defense and indemnity for an employee/teacher accused of sexually abusing a student. Upon review of the motions and the responses thereto, the Court has determined that the insurance policy at issue does not provide indemnity or a defense obligation to a teacher confronting allegations that she sexually abused a student. Accordingly, Plaintiff's Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgment is **GRANTED**.

II.

This action arises from an underlying Complaint filed on June 17, 2009 (the "Complaint"), naming McAlley, among others, as a defendant.[1] McAlley, a fourth grade teacher employed by the Christina School District (the "District"), was named in her official and individual capacity for the alleged sexual abuse of a minor fourth-

[1]Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") at ¶ 2.

grade student.[2] The Complaint alleges that McAlley (known at the time as "Susan McKnew") raped and otherwise sexually abused the student more than ten times over a period of one year.[3] According to the Complaint, McAlley would drive the student to her apartment after school, under the pretense of helping the student with his homework, and rape him.[4] The Complaint contains one count of assault and battery, one count of negligence, one count of gross negligence, one count of breach of fiduciary duty, and one count of fraud.[5]

Selective provided a policy of liability insurance that was in place during the relevant time period implicated by the Complaint.[6] On October 27, 2009, McAlley directed a written demand to Selective that it provide her with a defense and indemnity as to all claims set forth in the Complaint. In her demand, McAlley stated that she is entitled to coverage under the Selective policy because she was an agent of the District (the insured) acting in the course of her employment at all times

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[2]Complaint, *John Doe #13 v. Christina Sch. District, et al*, C.A. No. 09C-06-037 (WLW), at ¶ 1.

[3]*Id.*

[4]*Id.* at ¶¶ 24-27.

[5]*Id.* at ¶¶ 44-86.

[6]Compl. at ¶ 5.

alleged in the Complaint.[7] Donna Webster, Litigation Specialist for Selective, responded to McAlley on January 6, 2010, denying her demand for a defense and/or indemnity in the underlying litigation on the basis that none of the allegations against her constituted an "occurrence" that would trigger coverage.[8]

The policy contains the following provisions relevant to the dispute:

> **1. Coverage A – Bodily Injury**: The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury. . . to which this insurance applies, caused by an *occurrence,* and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . .[9]
>
> **Definitions – "occurrence"** means an *accident*, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.[10]

III.

In support of her Motion, McAlley argues that the Complaint against her arises from actions in which she allegedly engaged during the normal course of her routine job duties while working within the scope of her authority as a teacher employed by

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[7] *Id.*

[8] Pl.'s Mot. at ¶ 3.

[9] Selective Policy at p. 37 (emphasis supplied).

[10] Liability Policy Provisions Part One at p. 3 (emphasis supplied).

the District.[11] Further, according to McAlley, Selective has a duty to defend her if even one allegation in the Complaint fits within the policy's coverage.[12] Because Count two of the Complaint alleges negligence (which constitutes an "occurrence" under the policy), McAlley argues that Selective's duty to defend is triggered.[13]

In support of its Motion, Selective contends that the facts as alleged in the Complaint do not trigger its duty to defend or indemnify McAlley because the intentional sexual abuse of a minor plaintiff is not, as a matter of law, an "occurrence" for purposes of insurance coverage.[14] In this regard, Selective argues that the "rule of inferred intent" creates an irrebuttable presumption that, by sexually abusing her student, McAlley intended to cause bodily injury to the student. According to Selective, under these circumstances, there can be no "accident" that would constitute an "occurrence" and thereby trigger coverage.[15]

IV.

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material

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[11]Pl.'s Mot. at ¶ 2.

[12]*Id.* at ¶ 6.

[13]*Id.* at ¶ 7.

[14]Def.'s Mot. for Summ. J. ("Def.'s Mot.") at ¶ 6.

[15]*Id.* at ¶ 7.

fact exist.[16] Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[17] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment will not be granted.[18]

"Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[19] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[20] "The mere filing of a cross motion for summary judgment does not serve as a waiver of

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[16]*Oliver B. Cannon & Sons, Inc.* v. *Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973).

[17]*Id.*

[18]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[19]Del. Super. Ct. Civ. R. 56(h).

[20]*Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

the movant's right to assert the existence of a factual dispute as to the other party's motion." [21]

In this case, both parties submit that no material issues of fact exist and that the matter is ripe for "decision on the merits" per Rule 56(h). The Court agrees.

V.

The parties' motions implicate the following issues: (A) whether the factual allegations and legal claims set forth in the Complaint trigger coverage; and (B) if so, whether the "rule of inferred intent," i.e., an inference that all sexual assaults are intentional, applies in Delaware such that coverage should be denied notwithstanding the allegations in the Complaint. The Court will address the issues *seriatim*.

A. Sexual Abuse, As Alleged In The Complaint, Cannot Be An "Accident" Constituting "An Occurrence" Under The Policy

An insurer has a duty to defend and indemnify an insured if the allegations in the Complaint fall within the coverage of the insurance policy.[22] In determining whether coverage is triggered, Delaware courts "look to the allegations in the complaint" in accordance with three guiding principles: "(a) where there exists some doubt as to whether the complaint against the insured alleges a risk insured against,

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[21] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

[22] Def.'s Mot. at ¶ 5. *See Johnson v. Tally Ho., Inc.*, 303 A.2d 677, 679 (Del. Super. Ct. 1973); *Continental Cas. Co. v. Alexis I. duPont School Dist.*, 317 A.2d 101, 103 (Del. 1974).

that doubt should be resolved in favor of the insured; (b) any ambiguity in the pleadings should be resolved against the carrier; and (c) if even one count or theory of the plaintiff's complaint triggers coverage under the policy, the duty to defend arises."[23]

McAlley does not contest that Counts I, III, IV, and V of the underlying Complaint - - each alleging either intentional or reckless conduct - - do not trigger coverage.[24] Her claims for indemnity and defense here rise and fall on whether Count II of the Complaint (for negligence) implicates coverage pursuant to the policy. According to McAlley, the underlying Complaint's claim of negligence would constitute an "occurrence" under the policy and thereby trigger Selective's duty to defend on all counts because, as she correctly observes, "if even one theory of the plaintiff's complaint triggers coverage under the policy, the duty to defend arises."[25]

An "occurrence," as defined in the policy, means an "accident." McAlley, in effect, asks the Court to find that the allegations in the Complaint support the conclusion that she could have accidently engaged in sexually abusive conduct with her minor student. Not surprisingly, however, the underlying claim of negligence

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[23]*Continental Cas. Co.*, 317 A.2d at 105.

[24]Pl.'s Mot. at ¶ 7.

[25]*Continental Cas. Co.*, 317 A.2d at 103.

does not allege accidental conduct.[26] Rather, Count II alleges that McAlley was negligent because she owed a duty of care to the student, she breached that duty by raping and sexually abusing the student, and thereby directly and proximately caused injury to the student.[27] Rape is intentional conduct.[28] Apparently, the plaintiffs in the underlying action sought to trigger coverage by *claiming* negligence even though they alleged not a single *fact* to support this claim.[29] The coverage determination must be made based on the facts alleged in the Complaint, not the manufactured claims of a plaintiff seeking to implicate coverage by clever pleading.[30] According to the express provisions of the Selective policy, in the absence of allegations of accidental conduct

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[26]Compl. at ¶¶ 51-58 ("[McAlley] breached her duty to plaintiff by raping and sexually abusing him . . . and her actions were willful, wanton or oppressive.").

[27]*See* Compl., *John Doe #13 v. Christina Sch. District, et al*, C.A. No. 09C-06-037 (WLW), at ¶¶ 51-58.

[28]*See* 11 *Del. C.* §§ 770-773.

[29]It should be noted that the Court looked for some indication in the Complaint that the student alleges that McAlley had contact with him either in the classroom or in her apartment in a manner that could be interpreted by the student as sexual even though it was actually accidental contact. No such circumstances are alleged. If those facts existed the Plaintiff had a duty to plead them with particularity and failed to do so. *See* Super. Ct. Civ. R. 9 (b).

[30]*See Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) ("Conclusory allegations unsupported by facts contained in a complaint, however, will not be accepted as true."); *Continental Cas. Co.*, 317 A.2d at 103 (The Court must ascertain whether "the complaint allege[s] any personal injury arising out of the offense. . ."); *Fremont Mut. Ins. Co. v. Wieschowski*, 451 N.W. 3d 523, 524 (Mich. Ct. App. 1989) ("There arises no duty to defend or provide coverage where the complaint is merely an attempt to trigger insurance coverage by characterizing allegations of tortious conduct as negligent activity.").

in the Complaint, the duty to defend is not triggered. Decisions from other jurisdictions are in accord with this conclusion.[31]

B. The Court Need Not Determine Whether The Inferred Intent Rule Applies

Selective argues that allegations of sexual abuse create an irrebuttable presumption that an adult intended to harm a child pursuant to the so-called "rule of inferred intent."[32] McAlley correctly notes that Delaware has not yet adopted the rule of inferred intent.[33] The resolution of the question of whether Delaware law *should* adopt the rule must await another day. Coverage under the policy is triggered by an event that constitutes an "occurrence" – unambiguously defined in the policy as an "accident." The Court already has determined that the Complaint does not allege an "occurrence" under the policy. The Court is satisfied that the duty to indemnify

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[31] *Accord, Foremost Ins. Co. v. Weetman*, 726 F. Supp. 618, 622 (W.D. Pa. 1989) ("A person who sexually abuses a minor cannot expect his insurer to cover his misconduct. . ."); *Teti v. Huron Ins. Co.*, 914 F. Supp. 1132, 1142 (E.D. Pa. 1996) (quoting *Mamlin v. Genoe,* 17 A.2d 407, 409 (Sup. Ct. Pa. 1941) ("The Court concludes that there is 'a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public [],' which repudiates the notion of indemnifying a public school teacher for damages resulting from sexual intercourse between him and a student."); *Nationwide Mut. Fire Ins. Co. v. Overstreet*, 568 F. Supp. 638, 651-52 (E.D. Va. 2008) (finding no duty to defend for allegations that someone negligently molested another because "[o]ne does not accidentally or negligently sexually molest another."); *Serecky v. Nat'l Grange Mut. Ins.*, 857 A.2d 775, 781 (Vt. 2004) ("[W]e do not consider this claim [a negligence] claim because the facts alleged in the complaint are inconsistent with unintentional conduct or injury.").

[32] Def.'s Mot. at ¶ 7.

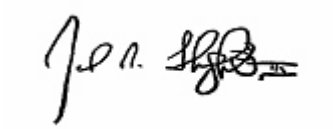
[33] Pl.'s Resp. to Def.'s Mot. at ¶ 3.

and/or defend has not been triggered under the express terms of the Selective policy and the clear factual allegations in the Complaint. It need not rely upon the rule of inferred intent to reach this conclusion.

VI.

Based on the foregoing, Defendants' Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III