UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY Plaintiff, v. ROBIN C. SPAYD, *formerly known as* ROBIN C. BAJKOWSKI; and MICHELLE DIGUGLIELMO *INIDIVIDUALLY AND AS PARENT AND LEGAL GUARDIAN OF V.P., A MINOR CHILD, and J.P., A MINOR CHILD* Defendants	:	No. 5:16-cv-04693

O P I N I O N

Plaintiff's Motion for Summary Judgment, ECF No. 10 – Granted in Part

Joseph F. Leeson, Jr. **July 24, 2017**
United States District Judge

I. INTRODUCTION

Plaintiff Metropolitan Property and Casualty Insurance Company ("MetLife") filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(a) requesting that this Court find as a matter of law that the homeowners policy it maintained with Defendant Robin Spayd does not obligate MetLife to defend or indemnify her with regard to separate legal proceedings instituted by Defendant Michelle DiGuglielmo in the Berks County Court of Common Pleas. For the reasons set forth herein, because the claims arise out of conduct that is not covered by the policy, MetLife does not have a duty to defend Spayd.

II. BACKGROUND[1]

From September 14, 2002, until September 14, 2008, Spayd (then Robin Bajkowski) and her now deceased husband Edward Bajkowski ("the deceased") maintained a Homeowners Insurance Policy with MetLife for their residence at 225 Fairway Drive, Reading, Pennsylvania. DiGuglielmo is the mother of two minor children, V.P. and J.P., and the daughter of Spayd and the deceased. From 2003 to 2007, V.P. and J.P. lived with Spayd and the deceased at their home

[1] Except as otherwise noted, background material is supplied from MetLife's Complaint. Compl., ECF No. 1.

in Reading, Pennsylvania. Compl. Ex. 1-2, ECF. No. 1. During this time, the deceased sexually assaulted V.P. and J.P., and, in late 2008, the deceased was convicted of two (2) counts of involuntary deviate sexual intercourse with a child.[2] His death followed shortly thereafter in 2009.

In September 2015, DiGuglielmo notified MetLife of the sexual assaults on her minor children and thereafter asserted a claim against Spayd for negligent supervision, for which coverage is sought under the policy. Following the claim, MetLife issued two Reservation of Rights letters to Spayd in February and March 2016, stating that her policy may not extend to all the claims DiGuglielmo asserted against her. In the letters, MetLife stated that it had been contacted by an attorney for DiGuglielmo. *See* Exs. 1-1 and 1-2, ECF No. 1. Although Spayd maintained continuous coverage during the 2002-2008 period, her policy contained slightly different language at distinct points in time.[3] The policy, during all periods, covered Spayd against "occurrences" of "bodily injury" that occurred on her property. At all times, the policy disclaimed any coverage for "the actual, alleged, or threatened sexual molestation of a person," stating that this conduct does not constitute "bodily injury."

On October 24, 2016, DiGuglielmo filed a complaint in the Berks County Court of Common Pleas, followed by an amended complaint on November 1, 2016, which contains two counts of negligence against Spayd. *See DiGuglielmo v. Spayd*, No. 16-19541 (Berks Cty. Ct. Com. Pl. filed Oct. 25, 2016); ECF No. 13. Count I asserts a cause of action for negligence on behalf of J.P. and Count II asserts a cause of action for negligence on behalf of V.P. The complaints allege that from September 2003 through September 2007, J.P. and V.P. lived with Spayd and her now-deceased husband at their home in Reading, Pennsylvania. DiGuglielmo alleges that during this time, the deceased sexually assaulted J.P. and V.P. at their home. The complaints further allege that Spayd was aware of the deceased's sexual perversions, schizoid tendencies, consumption of alcohol, and use of Viagra, but she nevertheless left the children alone with him. DiGuglielmo alleges, *inter alia*, that Spayd was negligent in failing to monitor the deceased's behavior and in failing to investigate claims by V.P. and J.P. that they did not want to be alone with the deceased and sustained physical injuries caused by him. That case remains pending.[4]

III. PROCEDURAL HISTORY

On August 26, 2016, MetLife filed a complaint for declaratory judgment, requesting that this Court find that there is no liability coverage under the policy with respect to the claims raised by DiGuglielmo against Spayd. Compl. 8. Both defendants were properly served, but Spayd did not respond. Accordingly, default was entered against Spayd on December 2, 2016, for failure to appear, plead, or otherwise defend. MetLife then filed a motion for summary judgment in April 2017 seeking a declaration that it is not obligated by the policy to indemnify or defend Spayd against claims made by DiGuglielmo. DiGuglielmo responded to MetLife's

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[2] The offense is listed under 18 Pa. Cons. Stat. Ann. § 3123(b).

[3] In its Complaint and Motion for Summary Judgment, MetLife provides text from three policies from the periods 9/14/2002-9/14/2003, 9/14/2003-9/14/2006, and 9/14/2006-9/14/2008.

[4] MetLife asserts in its summary judgment brief that service has not been perfected in the underlying state-court action such that the pleading holds no legal significance. However, the action has not been dismissed and there is nothing to suggest that DiGuglielmo might not seek additional time to make service or otherwise reinstate a claim.

Motion for Summary Judgment by stating that she did not oppose the Motion. The Court now considers whether MetLife is entitled to summary judgment.

IV. JURISDICTION

"The Declaratory Judgment Act provides that, '[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (quoting 28 U.S.C. § 2201(a)). A case and controversy must exist through all stages of review, including when the complaint is initially filed, but "a plaintiff need not suffer a completed harm to establish adversity of interest between the parties" in a declaratory judgment context. *See Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992). Rather, a plaintiff may protect against a feared future event that "is real and substantial." *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 192 (3d Cir. 1990).

At the time the instant Complaint was filed, no civil action had been initiated yet in the state court. Despite this fact, MetLife established that the probability of a suit being filed was both real and substantial by alleging in the Complaint that it had already been contacted by an attorney for DiGuglielmo who asserted a claim for negligent supervision "for which liability coverage is sought under the MetLife Policy." Compl. ¶¶ 16-18; Exs. 1-2, ECF Nos. 1-1 and 1-2. Since initiating this action, DiGuglielmo has filed a suit in state court. Accordingly, this Court has jurisdiction to consider whether MetLife has a duty to defend any claims against its insured.

The question of whether MetLife has a duty to indemnify, however, is "not ripe for adjudication until the insured is in fact held liable in the underlying suit." *Knightbrook Ins. Co. v. DNA Ambulance, Inc.*, No. 13-2961, 2013 U.S. Dist. LEXIS 176592, at *19-20 (E.D. Pa. Dec. 16, 2013) (citing *Heffernan & Co. v. Hartford Ins. Co.*, 614 A.2d 295, 298 (Pa. Super. 1992)). *See also C. H. Heist Caribe Corp. v. Am. Home Assurance Co.*, 640 F.2d 479, 483 (3d Cir. 1981) (holding that because "[a]ctual indemnification depends upon the existence or nonexistence of facts not yet established . . . a decision on [the insurance company's] obligation to indemnify [the insured] is premature" when no judgment has been issued). The Court therefore dismisses, without prejudice, MetLife's claim for declaratory judgment on indemnity. *See Medical Assur. Co. v. Hellman*, 610 F.3d 371, 375 (7th Cir. 2010) (concluding that where a duty-to-indemnify claim is not ripe, the proper disposition is dismissal rather than a stay). The remainder of this Opinion is therefore limited to addressing whether MetLife has a duty to defend.

V. STANDARD OF REVIEW

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine dispute of material fact" such that a reasonable jury could find in favor of the nonmoving party. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When, as in this case, the party moving for summary judgment bears the burden of proof at trial, it must demonstrate "that it has produced enough evidence to support

findings of fact necessary to win." *El v. Se. Pa. Transp. Auth. ("SEPTA")*, 479 F.3d 232, 237 (3d Cir. 2007) (citing *Marzano v. Comput. Sci. Corp.*, 91 F.3d 497, 502 (3d Cir. 1996)).

Although DiGuglielmo supports, and Spayd has not responded to, MetLife's motion for summary judgment, this Court may not automatically grant summary judgment by default on those bases. *See* Fed. R. Civ. P. 56(e)(3) advisory committee's note to 2010 amendment (recognizing that "summary judgment cannot be granted by default even if there is a complete failure to respond to the motion"). Rather, the Court must still determine if MetLife's Motion and supporting documents demonstrate that MetLife is entitled to summary judgment on the merits. Fed. R. Civ. P. 56(e)(3). "'[T]his means that the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law.'" *Zurich Am. Ins. Co. of Illinois v. All Cty. Employment Servs., Inc.*, No. 5:16-CV-01764, 2016 WL 7404519, at *2 (E.D. Pa. Dec. 21, 2016) (quoting *Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990)).

VI. ANALYSIS

Interpreting insurance contracts is undertaken by the court to determine the intent of the parties as manifested by the written agreement. *Gen. Acc. Ins. Co. of Am. v. Allen*, 692 A.2d 1089, 1093 (Pa. 1997). In the Commonwealth of Pennsylvania, an insurance company's obligation to defend an insured covered by its policy is analyzed under a two-part framework. *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 350 F. Supp. 2d 624, 640 (E.D. Pa. 2004). In a declaratory judgment action, as here, the court is first required to ascertain the scope of the policy's coverage. *Id*. Following that determination, "the court must examine the complaint in the underlying action to ascertain if it triggers coverage." *Id*. (citing *Allen*, 692 A.2d 1089). The duty to defend is broad and remains with the insurer until it can isolate the underlying action to a recovery that is outside the scope of the written instrument. *Id*. For the reasons explained herein, MetLife does not have a duty to defend Spayd because the underlying action is outside the scope of the policy maintained by Spayd.

A. MetLife does not have a duty to defend because the acts underlying DiGuglielmo's claim against Spayd constitute neither an "occurrence" nor "bodily injury" as defined under the policy.

MetLife maintains that it has no duty to indemnify or defend Spayd with respect to claims arising out of the deceased's molestation of V.P. and J.V. from 2003 through 2007. It points to provisions in its three policies over the relevant time period that state that "occurrence[s]" of "bodily injury" that it does not cover include "the actual, alleged or threatened sexual molestation of a person." Ex. 1, ECF No. 1. As such, MetLife contends that any bodily injury, if it arose from sexual molestation, does not constitute "bodily injury" as defined under the policies. This Court agrees.

As previously mentioned, MetLife's policy covered Spayd against "occurrences" of "bodily injury" that occurred on her property. However, V.P. and J.P.'s "sexual molestation . . . does not constitute a 'bodily injury'. The plain language of the policies exclude coverage for injury in the form of sexual molestation . . . ." *Metro. Cas. Ins. Co. v. Sutherby*, No. 3:09-CV-05387, 2010 WL 715491, at *3 (W.D. Wash. Feb. 24, 2010). Indeed, the facts of this case are remarkably similar to those in *Sutherby*. In *Sutherby*, a grandfather was alleged to have sexually abused his granddaughter on multiple occasions between 2003 and 2007. *Id*. at *1. Her mother

sued both the grandfather for the abuse itself and the grandmother for failing to protect her granddaughter from the grandfather's predatory behavior. *Id*. The grandparents maintained a homeowners insurance policy with MetLife, which also excluded "the actual, alleged or threatened sexual molestation of a person" from its coverage of "bodily injury." *Id*. at *2. There, MetLife asserted that its policy did not cover the allegations against the grandparents because the underlying action did not seek damages for "bodily injury" as defined in the policy. *Id*. The court agreed with MetLife, finding that the policy did not cover the grandparents. *Id*. at *3.

As in *Sutherby*, the deceased in the underlying action sexually abused his minor grandchildren, and the grandmother allegedly failed to protect them from her husband's abuse. Spayd, like the grandmother in *Sutherby*, has maintained a homeowners insurance policy with MetLife that specifically excluded from the definition of "bodily injury" "the actual, alleged or threatened sexual molestation of a person." Therefore, similar to the grandparents in *Sutherby*, Spayd is not entitled to a defense by MetLife from injuries arising from her husband's sexual abuse of her grandchildren.

Furthermore, even if sexual molestation was not specifically excluded from the definition of "bodily injury" under the policy, the sexual molestation of V.P. and J.P. does not constitute an "occurrence." The policy's definition of "occurrence" is "an accident." *See* Policy 9, Ex. 3, ECF No. 1-3. An "accident" is an unexpected and undesirable event occurring unintentionally. *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 291 (Pa. 2007) (holding that a death caused by another's criminal conduct is not "accidental"). Stated differently, an intentional act is not an "accident." *See Terra Nova Ins. Co., Ltd. v. North Carolina Ted, Inc.*, 715 F.Supp. 688, 692 (E.D. Pa. 1989) (citing *Gene's Rest., Inc. v. Nationwide Ins. Co.*, 548 A.2d 246, 247 (Pa. 1988)). Thus, determining whether certain conduct was an "occurrence" requires a showing that the underlying injury was caused by an accident or by intentional conduct. *See Britamco Underwriters, Inc. v. George Giouzelis, Inc.*, No. CIV.A. 93-4547, 1994 WL 622109, at *2 (E.D. Pa. Nov. 8, 1994), *aff'd*, 65 F.3d 161 (3d Cir. 1995).

As to the deceased's conduct, the sexual assault of DiGuglielmo's children does not constitute an "occurrence" because sexual molestation is an intentional criminal act. *See Westfield Ins. Co. v. Holland*, No. CIV.A. 07-5496, 2008 WL 5378267, at *7 (E.D. Pa. Dec. 19, 2008) (holding that the defendant's purportedly mutual sexual conduct with disabled elderly woman was an intentional criminal act not covered by the insurance policy); *see also 12th St. Gym Inc. v. Phila. Indem. Ins. Co.*, Civ. A. No. 031931, 2006 WL 1652690, at *3 (Pa. Com. Pl. June 12, 2006) (holding that gym employee's sexual assault of a client was excluded from policy coverage). Additionally, the doctrine of inferred intent applies to cases involving sexual molestation of children by an insured individual. *See Wiley v. State Farm Ins. & Cas. Co.*, 995 F.2d 457, 464-65 (3d Cir. 1993). This rule creates an irrefutable presumption that "harm to children in sexual molestation cases is inherent in the very act of sexual assault committed on a child regardless of the motivation for, or nature of, such assault, and that the resulting injuries as a matter of law are intentional." *Nationwide Mut. Fire. Ins. Co. v. Deresky*, 83 Pa. D. & C.4th 91, 99 (Ct. Com. Pl. 2006) (citing *id*.). Therefore, the deceased's conduct with regard to V.P. and J.P. during the relevant period was intentional and is not an "occurrence" as defined in the policy.

Spayd's alleged negligent supervision and failure to protect V.P. and J.P. also does not constitute an "occurrence" under the MetLife policy. The law of the Commonwealth of Pennsylvania does not automatically bar insurance recovery because the underlying event

involved intentional, criminal activity. *Mohn v. Am. Cas. Co.*, 326 A.2d 346, 348 (Pa.1974). Nonetheless,

> whether or not intended acts are specifically excluded by the policy, Pennsylvania law does not require an insurer to defend against claims deriving from crimes or intentional torts when its policy defines a covered 'occurrence' as an 'accident.' This is true even when an insured is sued for *negligently* failing to prevent the harmful intentional acts of *another* person.

Nationwide Mut. Fire Ins. Co. v. Molitor by Molitor, No. CIV. A. 95-0503, 1995 WL 672397, at *4 (E.D. Pa. Nov. 9, 1995) (emphasis in original, footnote omitted). Thus, an insurer is under no duty to defend a policyholder "even when a strong connection existed between the underlying incident and specifically pleaded acts of negligence." *Id*. (citing *Britamco Underwriters v. Grzeskiewicz*, 639 A.2d 1208 (Pa. Super. 1994). Ultimately, "'[i]t is not the negligen[ce] . . . that caused the harm, but instead the underlying harmful conduct. Consequently, [courts] refuse to separate these inherently intertwined causes of action.'" *Id*. (citation and footnote omitted)).

In *Molitor*, Mr. and Mrs. Craig were sued by another family with two minor children.[5] Mr. Craig had molested one of them and faced criminal proceedings after the children notified their parents. Ms. Craig was sued for negligence in failing to prevent her husband's predatory behavior. Relying on their homeowners insurance policy with Nationwide, the Craigs requested defense by Nationwide. Nationwide claimed it was not obligated to defend either of the Craigs and moved for summary judgment. The court found that because Mr. Craig's sexual acts that provided the basis for negligence claims against Ms. Craig were not accidental, there was no "occurrence" per the policy and, hence, no obligation to defend Ms. Craig.

Here, Spayd's situation mirrors that of the Craigs. As in *Molitor*, Spayd is being sued for negligently failing to prevent the sexual abuse of minor children at the hands of her deceased husband. Because the claims against Spayd spring from intentional acts of her husband, there is not an "occurrence" as defined by the policy, and she is not entitled to a defense by MetLife.

B. The policy also contains a provision that excludes coverage for sexual abuse, which also relieves MetLife of the duty to defend.

The abuse exclusion in MetLife's policies precludes coverage for the sexual abuse that occurred during the relevant time. Mot. Summ. J. ¶ 31, ECF No. 10. The policies state that MetLife does "not cover bodily injury caused by or resulting from the actual, alleged or threatened sexual molestation or contact, corporal punishment, physical abuse, mental abuse or emotional abuse of a person." Policy 33 ¶ 18, Ex. 4, ECF No. 1-4. The plain language of this provision excludes the injury inflicted herein. *See Sutherby*, 2010 WL 715491, at *4 (finding that the abuse exclusion in a similarly-worded policy clearly precluded coverage because the granddaughter's injuries were all alleged to have been "caused by or resulting from the . . . sexual molestation"); *see also Allstate Ins. Co. v. Bates*, 185 F. Supp. 2d 607, 613 (E.D.N.C. 2000) (holding that the wife of a sexual abuser was not covered by a homeowners insurance policy for charges arising out of the molestation). Therefore, similar to the grandmother in *Sutherby*, Spayd is not entitled to a defense by MetLife. This Court concludes that the abuse

[5] The children in this case were the Craigs' own nieces.

exclusion is a separate and additional ground for exclusion of coverage to Spayd, and that MetLife has no duty to defend her in the underlying action.

VII. CONCLUSION

For the reasons set forth above, MetLife is entitled to a declaration that it does not have a duty to defend Spayd for the lawsuit against her. A decision on whether MetLife has a duty to indemnify would be premature, because no judgment has yet been entered against Spayd. Therefore, the latter request for relief is denied at this time, without prejudice.

A separate order will follow.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge