12

Service: **Get by LEXSEE®**
Citation: **407 f3d 631**

*407 F.3d 631, *; 2005 U.S. App. LEXIS 8254, ***

View Available Briefs and Other Documents Related to this Case

RESOURCE BANKSHARES CORPORATION; RESOURCE BANK, Plaintiffs-Appellees, v. ST. PAUL MERCURY INSURANCE COMPANY, Defendant-Appellant. AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA; ERIE INSURANCE COMPANY; FEDERAL INSURANCE CORPORATION; GREAT NORTHERN INSURANCE COMPANY, Amici Supporting Appellant. RESOURCE BANKSHARES CORPORATION; RESOURCE BANK, Plaintiffs-Appellants, v. ST. PAUL MERCURY INSURANCE COMPANY, Defendant-Appellee. AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA; ERIE INSURANCE COMPANY; FEDERAL INSURANCE CORPORATION; GREAT NORTHERN INSURANCE COMPANY, Amici Supporting Appellee.

No. 04-1946, No. 04-1962

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

407 F.3d 631; 2005 U.S. App. LEXIS 8254

March 17, 2005, Argued
May 11, 2005, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Res. Bankshares Corp. v. St. Paul Mercury Ins. Co., 2005 U.S. LEXIS 7892 (U.S., Oct. 31, 2005)

PRIOR HISTORY: **[**1]** Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. (CA-03-764). Henry Coke Morgan, Jr., Senior District Judge. Res. Bankshares Corp. v. St. Paul Mercury Ins. Co., 323 F. Supp. 2d 709, 2004 U.S. Dist. LEXIS 12468 (E.D. Va., 2004)

DISPOSITION: AFFIRMED IN PART AND REVERSED IN PART.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured, a bank, sued in state court on behalf of a class of recipients of the bank's advertising faxes under the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227, private right of action, sought a declaration in the United States District Court for the Eastern District of Virginia that the class-action suit triggered coverage under two provisions of its liability policies with defendant insurer.

OVERVIEW: On cross-motions for summary judgment, the district court found that one of the provisions mandated a duty to defend. The insurer appealed. The bank claimed it sent the faxes out accidentally, so the insurance policy should cover defending against the claims. However, the court held that the bank presented no evidence that it sent its faxes accidentally, so it could not avoid summary judgment on the point that the "property damage" provision provided no coverage for the class-action lawsuit. Moreover, the TCPA's unsolicited fax prohibition protected "seclusion" privacy, for which content was irrelevant. The bank did not buy insurance policies for seclusion damages; instead, it insured against, among other things, damages arising from violations of content-based privacy. This reasonable, non-technical distinction precluded coverage for an "advertising injury

offense."

OUTCOME: The court held that the policies did not compel the insurer to defend the bank for the class-action suit, and thus affirmed in part and reversed in part the decision of the district court. It remanded to the district court in order to grant the insurer's motions for summary judgment and deny the bank's pursuant with this opinion.

CORE TERMS: fax, privacy, coverage, advertising injury, class-action, unsolicited, recipient, insured, advertisement, property damage, seclusion, machine, summary judgment, advertising, lawsuit, right to privacy, spoken, right of action, facsimile, insurer, sender, sending, telephone, accidental, probable consequence, interstate commerce, insurance policies, insurance policy, duty to defend, unwanted

LexisNexis(R) Headnotes ♦ Hide Headnotes

Antitrust & Trade Law > Consumer Protection > Telemarketing

Communications Law > Privacy > Telephone Consumer Protection Act

Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview

HN1 The Telephone Consumer Protection Act, 47 U.S.C.S. § 227 prohibits, among other things like the use of certain automated telephone equipment for telemarketing, the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C.S. § 227(b)(1)(C). More Like This Headnote | *Shepardize:* Restrict By Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

HN2 47 U.S.C.S. § 227(b)(3) creates a private right of action so recipients of such faxes can sue the senders. More Like This Headnote | *Shepardize:* Restrict By Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

Governments > Courts > Rule Application & Interpretation

HN3 See 47 U.S.C.S. § 227(b)(3).

Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Communications Law > Privacy > Telephone Consumer Protection Act

HN4 The United States Court of Appeals for the Fourth Circuit has interpreted 47 U.S.C.S. § 227(b)(3) to mean that state courts have exclusive jurisdiction for private Telephone Consumer Protection Act, 47 U.S.C.S. § 227 actions. More Like This Headnote

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5 The appellate court reviews de novo a grant of summary judgment, which is to be given when no genuine issue of material fact remains for trial. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > Appropriateness

HN6 Summary judgment is proper unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview

HN7 A federal court hearing a diversity claim must apply the choice-of-law rules of the state in which it sits. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Formation > General Overview

Insurance Law > Claims & Contracts > Contract Formation > Policy Delivery

HN8 Under Virginia law, a contract is made when the last act to complete it is performed, and in the context of an insurance policy, the last act is the delivery of the policy to the insured. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > Forum & Place

Insurance Law > Claims & Contracts > Contract Formation > Policy Delivery

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN9 Generally, the law of the place where an insurance contract is written and delivered controls issues as to its coverage. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

Insurance Law > General Liability Insurance > Obligations > Defense

HN10 Under Virginia law, an insurer's obligation to defend an action depends on comparison of the policy language with the underlying complaint to determine whether the claims alleged in the complaint are covered by the policy. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN11 In determining insurance policy coverage, Virginia courts apply the "eight corners rule," comparing the four corners of the policy with the four corners of the complaint. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN12 A policyholder bears the burden of proving that the policyholder's conduct is covered by the policy. Yet this burden is not especially onerous since the insurer must defend unless it clearly appears from the initial pleading the insurer would not be liable under the policy contract for any judgment based upon the allegations. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN13 The duty to defend is broader than the duty to indemnify because it arises whenever the complaint alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy. However, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, it has no duty even to defend. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings

HN14 In Virginia an insurance policy is a contract to be construed in accordance with the principles applicable to all contracts. As with other contracts, when interpreting a policy courts must not strain to find ambiguities, (words used are given their ordinary and customary meaning when they are susceptible of such construction), or examine certain specific words or provisions in a vacuum, apart from the policy as a whole. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > General Overview

HN15 A policy provision is ambiguous when, in context, it is capable of more than one reasonable meaning. More Like This Headnote

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

HN16 Because insurance companies typically draft their policies without the input of the insured, the companies bear the burden of making their contracts clear. Accordingly, if an ambiguity exists, it must be construed against the insurer. But this does not authorize the court to make a new contract for the parties, nor to adopt a construction not justified by the language or intent of the parties. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings

HN17 To decide whether something is an accident under an insurance policy, Virginia courts ask whether an event was a natural and probable consequence of the insured's intended actions. Under this formulation, an accident is an event which creates an effect which is not the natural or probable consequence of the means

employed and is not intended, designed, or reasonably anticipated. Stated otherwise, the question is whether the incident or injury was a reasonably foreseeable result of the insured's actions. An accident is a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; a mishap resulting in injury to a person or thing. More Like This Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

HN18 The Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227, prohibits all unsolicited advertisements sent by fax. Specifically, the TCPA defines the term by noting that the term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission. 47 U.S.C.S. § 227(a)(4). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Summary Judgment > Standards > General Overview

HN19 On a motion for summary judgment, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

HN20 A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56 (e). More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN21 "Privacy" is a word with many connotations. The two principal meanings are secrecy and seclusion, each of which has multiple shadings. A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. Some other uses of the word "privacy" combine these senses: for example, a claim of a right to engage in consensual sexual relations with a person of the same sex, or to abort an unwanted pregnancy, has both informational (secrecy) and locational (seclusion) components, with an overlay of substance (the objection to governmental regulation). More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

Insurance Law > General Liability Insurance > Coverage > Advertising Injuries

HN22 The term "advertising injury," as construed in an overwhelming majority of reported cases, is injury to another that results from the content of statements about the products or services of the insured. More Like This Headnote | *Shepardize:* Restrict By Headnote

Communications Law > Privacy > Telephone Consumer Protection Act

HN23 The unsolicited fax prohibition of the Telephone Consumer Protection Act, 47 U.S.C.S. § 227, provides one small bit of sanctuary from certain solicitations, but does not even hint at protecting anyone from private facts being divulged through an advertisement. More Like This Headnote | *Shepardize:* Restrict By Headnote

Available Briefs and Other Documents Related to this Case:

- U.S. Circuit Court Brief(s)
- U.S. Circuit Court Brief(s)

COUNSEL: Charles E. Spevacek, MEAGHER & GEER, P.L.L.P., Minneapolis, Minnesota, for St. Paul Mercury Insurance Company.

William Edgar Spivey, KAUFMAN & CANOLES, Norfolk, Virginia, for Resource Bankshares Corporation and Resource Bank.

ON BRIEF: Alan B. Rashkind, FURNISS, DAVIS, RASHKIND AND SAUNDERS, P.C., Norfolk, Virginia, for St. Paul Mercury Insurance Company.

R. Johan Conrod, Jr., KAUFMAN & CANOLES, Norfolk, Virginia, for Resource Bankshares Corporation and Resource Bank.

Andrew Butz, William H. White, Jr., BONNER KIERNAN TREBACH & CROCIATA, Washington, D.C., for Amicus Curiae American Casualty Company of Reading, PA, Supporting St. Paul Mercury Insurance Company.

Vernon Priddy, III, SANDS, ANDERSON, MARKS & MILLER, Richmond, Virginia; Daniel J. Cunningham, Kathleen A. Sweitzer, TRESSLER, SODERSTROM, MALONEY & PRIESS, Chicago, Illinois, for Amici Curiae Erie Insurance Company, Federal Insurance Company, and Great Northern Insurance Company, Supporting St. Paul **[**2]** Mercury Insurance Company.

JUDGES: Before KING and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge. Judge Gregory wrote the opinion, in which Judge King and Senior Judge Hamilton joined.

OPINION BY: GREGORY

OPINION:

[*633] GREGORY, Circuit Judge:

On March 8, 2002, Cohen & Malad, LLP, an Indiana limited partnership, sued Resource Bankshares Corporation and Resource Bank ("Resource") in Indiana state court on behalf of a class of recipients of Resource's faxes. The lawsuit was based on the private right of action provided by the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2003) ("TCPA"). During the times relevant to the lawsuit, Resource had a series of materially identical one-year general commercial liability insurance policies with St. Paul Mercury Insurance Company ("St. Paul"). Resource sought a declaration in the United States District Court for the Eastern District of Virginia that the class-action suit triggered coverage under two separate provisions of the policies. On cross-motions for summary judgment, the district court found that one of the two provisions mandated a duty to defend. We hold that the policies do not compel St. Paul to defend Resource **[**3]** for the class-action suit, and thus affirm in part and reverse

in part the decision of the district court.

I.

HN1 The TCPA prohibits, among other things like the use of certain automated telephone equipment for telemarketing, the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." *Id.* § 227(b)(1)(C). HN2 Section 227(b)(3) creates a private right of action so recipients of such faxes can sue the senders. It provides that:

> HN3 (1) A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State n1
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an **[**4]** amount equal to not more **[*634]** than 3 times the amount available under subparagraph (B) of this paragraph.

Id.

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 HN4 We have previously interpreted this portion of the statute to mean that state courts have exclusive jurisdiction for private TCPA actions. *See Int'l Sci. & Tech. Inst., Inc. v. Inacom Communs.*, 106 F.3d 1146 (4th Cir. 1997).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The Indiana class-action complaint alleged that Resource violated the TCPA by engaging in the mass transmission of unsolicited fax advertisements over a period of four years to an unknown class of recipients, numbering at least 40. Consistent with the straightforward and content-free nature of the TCPA, beyond simply noting that the faxes were advertisements, the class-action complaint never claimed that the faxes' content injured anyone (by, for example, claiming that the fax libeled them, divulged a trade secret, or infringed on a trademark). Rather, the complaint indicated that the mere receipt of the ads was harmful. n2

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 In this regard, the complaint stated:

> 3. ...With regard to fax advertising in particular, the United States Congress

recognized that the proliferation of facsimile machines had been accompanied by explosive growth in unsolicited facsimile advertising, or 'junk faxes.'

4. Congress further noted that fax advertisers took advantage of fax machines by sending advertisements to available fax numbers, knowing the fax would be received and printed by the recipient's machine. Congress found this practice problematic for two (2) reasons: (i) it shifts some of the costs of advertising from the sender to the recipient; and (ii) it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk faxes.

J.A. 14-15.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**5]**

The insurance policies at issue, written in admirably plain English, contain two relevant provisions: one describing the coverage for "property damage" caused by an "event" and one for damages resulting from an "advertising injury offense." The property-damage provision states that St. Paul will "pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage," J.A. 41, and explains that:

Property damage means:

. physical damage to tangible property of others, including all resulting loss of use of that property; or

. loss of use of tangible property of others that isn't physically damaged.

J.A. 42. To trigger coverage under this provision, any property damage must flow from an "event," which the policies define as "an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions." J.A. 42 (emphasis added).

As for the "advertising injury" provision, the policies state that:

We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that:

. results from the advertising of your products, work, **[**6]** or completed work; and

. is caused by an advertising injury offense committed while this agreement is in effect.

J.A. 43. The limitation to "advertising injury offense" means that coverage extends only to damages arising from the following offenses:

. Libel or slander.

. Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.

. *Making known to any person or organization written or spoken material* **[*635]** *that violates a person's right of privacy*.

. Unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising.

J.A. 43 (emphasis added). The third-listed offense - "making known to any person or organization written or spoken material that violates a person's right of privacy" - is chiefly at issue here.

Resource notified St. Paul of the suit and claimed coverage, which, on June 4, 2002, St. Paul denied. On August 7, 2002, a district court in North Carolina issued an opinion styled *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744 (M. D.N.C. 2002). *Prime TV* held that, under North Carolina law, both **[**7]** the "property damage" and "advertising injury" sections of the insurance policy in that case mandated coverage for a suit alleging a TCPA violation. In June of the next year Resource told St. Paul of the *Prime TV* case and argued that the policy was materially identical to St. Paul's. St. Paul again denied that the policies entitled Resource to coverage. Then, on November 4, 2003, Resource brought this declaratory judgment action. Resource seeks a declaration that St. Paul must defend, indemnify, and reimburse Resource for all costs associated with the class-action litigation.

The parties filed cross-motions for summary judgment. Recognizing that courts of several other jurisdictions had already held for insureds seeking coverage for defense of TCPA suits under generally similar policies, n3 the district court held that the "property damage" provision was inapplicable because Resource's conduct was not an "accident," J.A. 81-84, but found that the advertising injury offense provision applied because the faxes violated the recipient's "right to privacy." J.A. 74-80. Both parties appeal the judgments unfavorable to them.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 *See Park Univ. Enters. v. Am. Cas. Co. of Reading*, 314 F. Supp. 2d 1094 (D. Kan. Apr. 15, 2004); *Registry Dallas Assocs., L.P. v. Wausau Bus. Ins. Co.*, 2004 U.S. Dist. LEXIS 5771, 2004 WL 614836 (N. D. Tex. Feb. 26, 2004); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 300 F. Supp. 2d 888 (E. D. Mo. 2004), *aff'd*, 401 F.3d 876 (8th Cir. 2005); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 2003 U.S. Dist. LEXIS 25532, 2003 WL 23278656 (S. D. Ill. Dec. 9, 2003) (advertising injury provision mandates coverage), *rev'd*, 392 F.3d 939 (7th Cir. 2004); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365 (S. D. Ga. 2003); *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N. D. Tex. 2003); *Prime TV*, 223 F. Supp. 2d 744; *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W. 3d 232 (Tx. Ct. App. Feb. 11, 2004); *Merchant's & Businessmen's Mut. Ins. Co. v. A.P.O. Health Co., Inc.*, 228 N.Y.L.J. 22 (N. Y. Sup. Ct. Aug. 29, 2002).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**8]**

II.

HN5 We review *de novo* a grant of summary judgment, *Seabulk Offshore, Ltd. v. Am. Home*

Assurance Co., 377 F.3d 408, 419 (4th Cir. 2004), which is to be given when no genuine issue of material fact remains for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). HN6 Summary judgment is proper "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249 (citations omitted).

HN7 A federal court hearing a diversity claim must apply the choice-of-law rules of the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941); Am. Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89, 92 (4th Cir. 2003). This appeal arises from a complaint filed in the Eastern District of Virginia, so we look to Virginia's choice-of-law rules.

HN8 "Under Virginia law, a contract is made when the last act to complete it is performed, and in the context of an insurance policy, the **[**9]** last act is the delivery of the policy to the insured." Seabulk Offshore, 377 F.3d at 419; Buchanan v. Doe, 246 Va. 67, 431 S.E. 2d 289, 291, 9 Va. Law Rep. 1446 (Va. 1993) HN9 ("generally, the law of the **[*636]** place where an insurance contract is written and delivered controls issues as to its coverage."). Since the policies were delivered to Resource in Virginia, the parties correctly agree that Virginia law governs. HN10 "Under Virginia law, an insurer's obligation to defend an action 'depends on comparison of the policy language with the underlying complaint to determine whether the claims alleged [in the complaint] are covered by the policy.'" Am. Online, 347 F.3d at 93 (quoting Superperformance Int'l, Inc. v. Hartford Cas. Ins. Co., 332 F.3d 215, 220 (4th Cir. 2003)); see Erie Ins. Exch. v. State Farm Mut. Auto Ins. Co., 60 Va. Cir. 418, 423 (Va. Cir. Ct. 2002) HN11 (courts apply the "eight corners rule," comparing the four corners of the policy with the four corners of the complaint). HN12 A policyholder bears the burden of proving that the policyholder's conduct is covered by the policy. See Furrow v. State Farm Mut. Auto. Ins. Co., 237 Va. 77, 375 S.E. 2d 738, 740, 5 Va. Law Rep. 1427 (Va. 1989) **[**10]** (citing Md. Cas. Co. v. Cole, 156 Va. 707, 158 S.E. 873, 876 (Va. 1931)). Yet this burden is not especially onerous since the insurer must defend unless "it clearly appears from the initial pleading the insurer would not be liable under the policy contract for *any* judgment based upon the allegations." Reisen v. Aetna Life and Cas. Co., 225 Va. 327, 302 S.E. 2d 529, 531 (Va. 1983) (citing Travelers Indem. Co. v. Obenshain, 219 Va. 44, 245 S.E. 2d 247, 249 (1978)). HN13 The duty to defend is broader than the duty to indemnify because it "arises whenever the complaint alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy." Brenner v. Lawyers Title Ins. Corp., 240 Va. 185, 397 S.E. 2d 100, 102 (Va. 1990); Reisen, 302 S.E. 2d at 531. "However, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, 'it has no duty even to defend.'" Brenner at 102 (quoting Obenshain, 245 S.E. 2d at 249).

HN14 In Virginia "an insurance policy is a contract to be construed in accordance with **[**11]** the principles applicable to all contracts." Seabulk Offshore, Ltd., 377 F.3d at 419 (citing Graphic Arts Mut. Ins. Co. v. C.W. Warthen Co., 240 Va. 457, 397 S.E. 2d 876, 877, 7 Va. Law Rep. 895 (Va. 1990)). As with other contracts, when interpreting a policy courts must not strain to find ambiguities, see, e.g., Salzi v. Virginia Farm Bureau Mut. Ins. Co., 263 Va. 52, 556 S.E. 2d 758, 760 (Va. 2002) ("'As in the case of any other contract, the words used are given their ordinary and customary meaning when they are susceptible of such construction.'") (quoting Graphic Arts, 397 S.E. 2d at 877), or examine certain specific words or provisions in a vacuum, apart from the policy as a whole. See, e.g., TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C., 263 Va. 116, 557 S.E. 2d 199 (Va. 2002); First Am. Title Ins. Co. v. Seaboard Sav. & Loan Ass'n, 227 Va. 379, 315 S.E. 2d 842, 845 (Va. 1984). HN15 A policy provision is ambiguous when, in context, it is capable of more than one reasonable meaning. See Caldwell v. Transp. Ins. Co., 234 Va. 639, 364 S.E. 2d 1, 3, 4 Va. Law Rep. 1611 (Va. 1988) (citing St. Paul Ins. v. Nusbaum & Co., 227 Va. 407, 316 S.E. 2d 734 (Va.

1984)). **[**12]**

HN16 Because insurance companies typically draft their policies without the input of the insured, the companies bear the burden of making their contracts clear. Accordingly, if an ambiguity exists, it must be construed against the insurer. *See, e.g.*, *Craig v. Dye*, 259 Va. 533, 526 S.E. 2d 9 (Va. 2000); *Caldwell*, 364 S.E. 2d at 3; *Ocean Accident & Guar. Corp. v. Washington Brick & Terra Cotta Co.*, 148 Va. 829, 139 S.E. 513, 517 (Va. 1927) ("It is a well recognized rule that insurance policies, in case of doubt, should be construed most strongly against the insurer. But this does not **[*637]** authorize the court to make a new contract for the parties, nor to adopt a construction not justified by the language or intent of the parties.").

III.

For the following reasons, we hold that neither the "property damage" nor the "advertising injury" provision covers the class-action lawsuit. St. Paul thus owes Resource no duty to defend the suit.

A.

As the policy language quoted above makes plain, Resource is entitled to coverage for "property damage" liability only for actions that are reasonably termed an "accident." n4 What can be called **[**13]** an "accident" has, at times, been a puzzling question. n5 Yet often, as here, the answer is clear enough.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 St. Paul also contends that no "property damage" was ever implicated by the class-action lawsuit. Because a separate fatal flaw exists in Resource's property-damage claim - the fact that sending the faxes was not an "accident" - the district court did not address this question, and neither do we.

n5 As one court wrote,

> Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled, and it must be reheard in an appellate court.

Brenneman v. St. Paul Fire & Marine Ins. Co., 411 Pa. 409, 192 A.2d 745, 747 (Pa. 1963); *see also* *Aetna Ins. Co. v. Carpenter*, 170 Va. 312, 196 S.E. 641, 646 (Va. 1938) ("The word 'accidental' is not easy to define in specific legal terms applicable to every case."); *see generally* Adam F. Scales, *Man, God, and the Serbonian Bog: the Evolution of Accidental Death Insurance*, 86 Iowa L. Rev. 173 (2000) (explaining the longstanding difficulties faced in deciding whether a death was "accidental" and proposing a solution).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**14]**

HN17 To decide whether something is an accident under an insurance policy, Virginia courts ask whether an event was a natural and probable consequence of the insured's intended actions. Under this formulation, an accident "is an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." *Lynchburg Foundry Co. v. Irvin*, 178 Va. 265, 16 S.E. 2d 646, 648 (1941); *see also Citizens Home Ins. Co. v. Nelson*, 218 Va. 216, 237 S.E.2d 100, 102 (Va. 1977) (same). Stated otherwise, the question is whether the incident or injury was a reasonably foreseeable result of the insured's actions. *See, e.g., Patch v. Metro. Life Ins. Co.*, 733 F.2d 302, 304 (4th Cir. 1984) (noting that the crucial inquiry in the "natural or probable consequence" test is the "forseeability of consequences and not intent of the insured"); *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 286 S.E. 2d 225, 226 (Va. 1982) (accident is an "incident unexpected from the viewpoint of the insured"; intentional actions are not accidents); *Smith v. Combined Ins. Co. of Am.*, 202 Va. 758, 120 S.E. 2d 267, 268 (Va. 1961) **[**15]** (insured who resisted arrest, wounded a police officer, and took refuge in a building that was set on fire by police tear gas bombs was not entitled to benefits from accidental-death policy because his death was a reasonably foreseeable consequence of his actions); *Ocean Accident & Guarantee Corp. v. Glover*, 165 Va. 283, 182 S.E. 221, 222 (Va. 1935) (adopting a common-language dictionary definition of "accident"); *Baker v. Va. Employment Comm'n*, 1998 WL 972284 (Va. Cir. Ct. 1998) (an accident "is a befalling; an event that takes place without one's foresight or expectation; an **[*638]** undesigned, sudden, and unexpected event; a mishap resulting in injury to a person or thing." (citing *Derby v. Swift & Co.*, 188 Va. 336, 49 S.E. 2d 417 (Va. 1948)).

Resource does not deny that it intentionally sent advertisements by fax. Rather, as we understand it, Resource submits the possibility that it only intended to fax ads to recipients who actually wanted them, and only did otherwise inadvertently. In other words, Resource suggests that it could not foresee that the faxes were *unsolicited*. In support of the claim that a TCPA violation could be an **[**16]** accident, Resource cites *Park University Enterprises, Inc. v. American Casualty Co. of Reading, PA*, 314 F. Supp. 2d 1094 (D. Kan. 2004). Resource also cites several cases from other contexts (although none from the Virginia Supreme Court) which could all be called "mistaken identity means accidental action." These cases basically hold that various actions which are not necessarily injurious when consent exists can be an accident under insurance law when they are mistakenly performed on an *unconsenting* party. *See, e.g., York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 155 S.E. 2d 501 (N. C. 1967) (under North Carolina law, insured who intentionally cut down a neighbor's trees in the mistaken belief that they were on the insured's property was covered by accident insurance); *Erie Ins. Exchange v. Sipos*, 64 Va. Cir. 55 (Va. Cir. Ct. 2004) (insured who disposed of property from an apartment under the mistaken belief that it was unwanted debris when it really belonged to a new tenant was entitled to coverage because action was an accident). n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 Resource also claims a case from this court, *Atlantic Permanent Federal Savings & Loan Association v. American Casualty Co.*, 839 F.2d 212 (4th Cir. 1998), for the proposition that "Virginia courts have never extended the 'intentional wrongdoing' defense to conduct which, though itself 'intentional, 'was not intended to cause injury." *Id.* at 217. We pause to note *Atlantic Permanent's* inapplicability to this context. This quote is plucked from a section dealing with an argument regarding whether Virginia's public policy prohibited issuing insurance policies for actions which, while intentionally done, were not intended to cause injury. *See id*. That we earlier noted that Virginia law did not affirmatively make such actions *uninsurable* is entirely different from saying that *this* type of policy - one covering accidents -

actually covers the conduct at issue in this case.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**17]**

Resource's "accidental fax" argument does not persuade us. HN18 The TCPA prohibits all *unsolicited* advertisements sent by fax. Specifically, the TCPA defines the term by noting that "the term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's *prior express invitation or permission.*" 47 U.S.C. § 227(a)(4) (2003) (emphasis added). Here lies the problem: Resource has offered precisely no evidence that would cause a reasonable person to mistakenly believe that they had received prior express consent to send their fax ads.

Without such evidence, Resource cannot begin to carry its burden, *see* *Furrow*, 375 S.E. 2d at 740, of establishing that its conduct potentially merits coverage, even though at this stage in the proceedings all that it needs to prove is that a reasonable jury could find as much, *see* *Anderson v. Liberty Lobby*, 477 U.S. at 249 HN19 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." (citations **[**18]** omitted)). As *Anderson* explained, HN20 "a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but ... *must set forth specific facts* showing that there is a genuine issue for trial.'" **[*639]** *Id.* at 248 (quoting Fed. R. Civ. P. 56(e)) (emphasis added). Thus, while Resource disputes the forseeability of its consequences, this dispute is not a genuine one under the summary judgment standards and, unlike *Universal Underwriters*, 401 F.3d at 882, the forseeability of Resource's conduct is not "an open factual question," *id.* Because Resource plainly (1) intended to transmit the faxes to *someone*, and (2) fails to present evidence that could reasonably be mistaken as express permission to send these faxes, we can only conclude that the sending was not accidental. It is obvious to anyone familiar with a modern office that receipt is a "natural or probable consequence" of sending a fax, and receipt alone occasions the very property damage the TCPA was written to address: depletion of the recipient's time, toner, and paper, and occupation **[**19]** of the fax machine and phone line. In this way we fully agree with the Seventh Circuit's opinion on this issue in *American States Ins. Co.*, 392 F.3d 939, 943 (7th Cir. 2004), which explained that:

> junk faxes use up the recipient's ink and paper, but senders anticipate that consequence. Senders may be uncertain whether particular faxes violate § 227 (b)(1)(C) but all senders know exactly how faxes deplete recipients' consumables ... Because *every* junk fax invades the recipient's property interest in consumables, this normal outcome is not covered.

Id.; *see also* *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N. D. Tex. 2003). Accordingly, we affirm the district court's grant of summary judgment to St. Paul on the "property damage" provision.

B.

Resource's other claim is based exclusively on the third prong of the advertising-injury offense part of the policies: "making known to any person or organization written or spoken material that violates a person's right to privacy." J.A. 43.

We first note that neither the class-action complaint nor the TCPA's private right of action ever actually mentions the word "privacy. **[**20]** " *See* J.A. 14-19. Rather, the district court held that the complaint implied an allegation of a right-to-privacy violation. n7 We can grant to Resource that the harm occasioned by unsolicited faxes involves protection of some sort of "privacy." Junk faxes cause some economic damage (each instance may be small but is nonetheless real, and the amount becomes especially serious when aggregated) and what might be called *some* kind of harm to privacy (in the same sense that certain nuisances invade privacy). The TCPA's private right of action obviously meant to remedy and prevent these twin harms, so the class-action complaint could imply *some* sort of "privacy" concern. n8 But the **[*640]** word privacy carries different meanings in different contexts, n9 and if any overlap exists between the complaint's "implied privacy" and the policies' explicit use of the word it is only nominal (both in the sense that it is in name only and that it is trivial). But, contrary to Resource's contentions, this nominal overlap does not necessarily result in *ambiguity*. Every word in this sentence contains different meanings, but all read clearly in context.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 St. Paul argues that since the complaint did not explicitly allege a violation of the right to privacy - indeed, that the word "privacy" was nowhere mentioned within the four corners of the complaint - this should end the case. This may or may not be right, but because we are not certain that the Virginia Supreme Court would categorically rule out a claim that was not explicit if it was somehow implicit in the text and because the matter can be resolved on another perfectly good reason, we refrain from deciding the matter and thus assume arguendo that an implied privacy allegation could be sufficient. **[**21]**

n8 We do not, however, grant this based on Resource's citation of our decision in *International Science & Technology Institute, Inc.*, 106 F.3d 1146 (4th Cir. 1997). That decision contained dictum stating that "the TCPA was enacted to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." *Id.* at 1150 (citing S. Rep. No. 102-178, at 1 (1991)). Resource claims that this helps to prove their point that the private right of action was passed to protect "privacy," and this citation is typical of their legislative history argument.

We pause to clarify *International Science & Technology Institute's* application in this case. Besides being pure dictum, it does not aid Resource's argument because, if anything, it only indicates that the TCPA had two broad reasons for being: (1) privacy for home-phone users, and (2) facilitation of interstate commerce for fax users. But, as we explain, St. Paul cannot get off so easily either: interstate commerce can surely be facilitated by some species of the genus "privacy" - here, the seclusion species. *See* Prosser, *infra* n. 10. This simply means that we must decide whether St. Paul's policies protect liability arising from violations of "seclusion" privacy. *See American States*, 392 F.3d at 942. **[**22]**

n9 This is no new revelation. The path-breaking scholarship on "privacy" in the law was written well over a hundred years ago by Samuel D. Warren and Justice Brandeis, *see The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (collecting cases in which relief had been afforded on the basis of, e.g., defamation, a breach of confidence, or the invasion of some property right and grouping them together as a "right to privacy"). These disparate strands

were carefully teased out, defined, and clarified by Dean Prosser some 45 years ago. *See* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). Prosser found four separate privacy-related torts: "1. Intrusion on the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id*. at 389. For a more recent treatment, see, e.g., Jerry Kang, *Privacy in Cyberspace*, 50 Stan. L. Rev. 1193, 1202-04 (1998) (finding three distinct categories of privacy interests: (1) physical space, such as that violated by trespass and unwarranted search and seizure; (2) decisional privacy, as discussed in *Roe v. Wade*; and (3) informational privacy, or "control over the processing - i.e., the acquisition, disclosure, and use - of personal information.").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**23]**

The real question, then, is whether, when read *in context*, a reasonable purchaser of insurance would believe that the sort of privacy interests protected by the policies overlap with the sort of privacy with which the TCPA is concerned. *See American States*, 392 F.3d at 942 ("To say, as the district court did, that § 227(b)(1)(C) protects privacy, and then stop the analysis, is to avoid the central question in the case: whether the policies cover the sort of seclusion interests affected by faxed ads."). In *American States* the Seventh Circuit adeptly analyzed the two types of "privacy" really at issue in insurance coverage disputes for TCPA lawsuits. We approve of its analysis, and hold that the St. Paul policies do not cover the sorts of privacy invasions envisioned by the TCPA's unsolicited fax prohibition. As Judge Easterbrook explained:

> HN21"Privacy" is a word with many connotations. The two principal meanings are secrecy and seclusion, each of which has multiple shadings. *See Restatement (Second) of Torts* § 652 (1977); Richard S. Murphy, *Property Rights as Personal Information*, 84 Geo. L.J. 2381 (1996). **[**24]** A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and **[*641]** peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. Some other uses of the word "privacy" combine these senses: for example, a claim of a right to engage in consensual sexual relations with a person of the same sex, or to abort an unwanted pregnancy, has both informational (secrecy) and locational (seclusion) components, with an overlay of substance (the objection to governmental regulation).

American States, 392 F.3d at 941. This passage puts words to the gut instinct one feels when comparing the class-action complaint with St. Paul's policies: if the class-action complaint alleges any violation of privacy, it is "seclusion" privacy. It is concerned with the manner of the advertisement. In contrast, the advertising-injury offense part of the policies is exclusively concerned with those types of privacy, *see* Prosser, *supra* n. 9, which, like secrecy, are implicated by *content* of **[**25]** the advertisements.

Consider closely the text and context of the operative sentence. It states that coverage exists for advertisements "making *known* to any person or organization written or spoken material that violates a person's right to privacy." J.A. 43 (emphasis added). It requires undue strain to believe that sending an unsolicited fax ad that has no private information or content (but rather simply advertised fairly the sender's wares) can reasonably be said to "make known"

material that violates a person's n10 right to privacy. It surely seems to us that the plainest and most common reading of the phrase indicates that "making known" implies telling, sharing or otherwise divulging, such that the injured party is the one whose private material is *made known*, not the one *to whom* the material is made known.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n10 St. Paul also makes the argument that "person" here means "human" person, not "legal" person or "organization" (which would include a LLP). St. Paul Br. at 29-34. St. Paul puts too fine a point on things here. But more fundamentally, as Resource argues, since this is a class-action complaint with unnamed parties, it is fair to assume that at least some of class members could be "persons" even in the restrictive sense that St. Paul suggests.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**26]**

But this alone is not the key to the case; applying the commonsense canon of construction compelling courts to look to the immediate context of a word or phrase for interpretive guidance gets to the heart of the matter. As noted above, the policies promise to pay for damages from injuries arising from:

> . Libel or slander
>
> . Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
>
> . Making known to any person or organization written or spoken material that violates a person's right to privacy.
>
> . Unauthorized use of any advertising idea, material, slogan, style, or title of others in your advertising.

J.A. 43. First, the meaning of "making known" in the third-listed offense is also informed by its next-door neighbor, which provides coverage for making known disparaging material. It is difficult to imagine how "making known" disparaging material harms the *recipient* of the material. Rather, it is clear to us that both of these "making known" provisions focus on harm to a third party. Moreover, these four offenses all share the common thread of assuming that the victim of the **[**27]** advertising injury offense is harmed by the sharing of the *content* of the ad, not the mere *receipt* of the advertisement. *See, e.g.*, *Select Design, Ltd. v. Union Mut. Fire Ins. Co.*, 165 Vt. 69, **[*642]** 674 A.2d 798, 802 (Vt. 1996) HN22 ("The term 'advertising injury, 'as ... construed in an overwhelming majority of reported cases, is injury to another that results from the *content* of statements about the products or services of the insured.").

But broadly prohibiting junk fax ads has nothing at all to do with the content of any ads. For example: a single, unsolicited page with nothing but a three-word slogan (perhaps "Refinance with Resource" or "Just Do It") or even a name or an abstract squiggle alone - if it can be construed as an ad (say, "Nike," or its famous "Swoosh" trade-mark) - violates the TCPA and triggers the private right of action. However, a *solicited* ad that somehow manages to simultaneously defame, libel, tell trade secrets, and infringe ten trademarks, may incur lots of legal liability but is in no way prohibited by the TCPA.

In contrast, however, we see quite easily how the TCPA might facilitate interstate commerce by allowing owners of fax **[**28]** machines sufficient *seclusion* to do with their fax-dedicated phone line and fax machine as they wished without sifting through stacks of unwanted faxes that deplete their paper and toner. In our view, then, HN23 the TCPA's unsolicited fax prohibition provides one small bit of sanctuary from certain solicitations, but does not even hint at protecting anyone from private facts being divulged through an advertisement (which, of course, the policies plainly do). Accordingly, the privacy prong of the advertising injury provision cannot be construed to cover a violation of the TCPA.

One does not have to look far to find how a policy could have been written differently in order to secure coverage for TCPA violations. After oral argument in this case, the Eighth Circuit decided *Universal Underwriters*, 401 F.3d 876, which Resource claims aids them. In *Universal Underwriters*, the policy at issue promised to pay all damages arising from, among other things, "private nuisance (except pollution), [and] invasion of rights of privacy ..." and did not limit or qualify these terms. *Id.* at 881. An unwanted fax is a paradigmatic private nuisance, and we think the **[**29]** "invasion of rights of privacy" provision's proximity to the private nuisance language, but separation from "advertising injury," surely had to influence the Eighth Circuit's reasoning. Indeed, *Universal Underwriters* took care to distinguish *American States*, 392 F.3d 939, where, like this case, the privacy provision was embedded in an advertising injury part. *See* *Universal Underwriters*, 401 F.3d at 882-83.

The point is that context matters, and here, like *American States* and unlike *Universal Underwriters*, the context points against coverage. We must therefore reverse the ruling of the district court finding that the privacy clause imposes a duty to defend Resource.

IV.

To sum up: simply sending a fax is what causes the property damage protected by the TCPA and alleged in the class-action lawsuit, and Resource presented us with no evidence that it sent its faxes accidentally. It thus cannot avoid summary judgment on the point that the "property damage" provision provides no coverage for the class-action lawsuit. Moreover, the TCPA's unsolicited fax prohibition protects "seclusion" privacy, for which content is irrelevant. Unfortunately **[**30]** for Resource, it did not buy insurance policies for seclusion damages; instead, it insured against, among other things, damages arising from violations of content-based privacy. This reasonable, non-technical distinction precludes coverage for an "advertising injury offense."

[*643] For the foregoing reasons, we remand to the district court in order to grant St. Paul's motions for summary judgment and deny Resource's pursuant with this opinion. The judgment of the district court is thus

AFFIRMED IN PART AND REVERSED IN PART.

- Citation information available
* Click on any *Shepard's* signal to *Shepardize*® that case.

13

Service: **Get by LEXSEE®**
Citation: **2006 us dist lexis 33474**

*2006 U.S. Dist. LEXIS 33474, **

STATE FARM FIRE & CASUALTY COMPANY, Plaintiff, v. PIRTHI SINGH, et al., Defendants.

CIVIL NO. 3:05CV834

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

2006 U.S. Dist. LEXIS 33474

May 25, 2006, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insurer sought a declaratory judgment, pursuant to 28 U.S.C.S. § 2201 et seq., that it had no obligation or the duty to defend claims brought by defendant employee in her underlying state court action against defendant corporate officer for injuries the employee allegedly incurred as the result of an assault by the officer at their place of employment. The insurer and employee field cross-motions for summary judgment.

OVERVIEW: In the underlying complaint, the employee asserted that both she and the officer who assaulted her were performing services in the course and scope of their respective corporate employment at a Dairy Queen restaurant, when the officer engaged in unwanted touching and restraint of the employee. The court noted that both of the corporation's insurance policies (liability and umbrella) specifically excluded bodily injury to any employee of the insured arising out of and in the course of employment by the insured. The exclusion precluding coverage for bodily injury occurring in the course of employment was thus triggered, which precluded coverage for any "in house" occurrence. The officer had been convicted of assault as a result of the incident, so the exclusions of both policies for injury resulting from such willful conduct also applied to the claim for false imprisonment as well. The policies also excluded claims by one insured, the employee, against another insured, the officer. Under Virginia law, the burden was on the principal to prove that the agent was not acting within the scope of his employment, but the state court pleadings alleged just the opposite.

OUTCOME: The insurer was entitled to judgment in its favor.

CORE TERMS: bodily injury, insured, coverage, personal injury, state action, occurrence, duty to defend, policy language, willful violation, penal statute, umbrella policy, scope of employment, indemnify, assault, underlying insurance, policy period, territory, detention, assaulted, theory of respondeat superior, summary judgment, supervisor, workplace, convicted of assault, sexual harassment, property damage, false arrest, imprisonment, co-insured, sickness

LexisNexis(R) Headnotes ◆ Hide Headnotes

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend

HN1 To find that an insurer has a duty to defend under Virginia law pursuant to a policy of

insurance, the court must examine (1) the policy language to ascertain terms of the coverage and (2) the underlying complaint to determine whether any claims alleged therein are covered by the policy. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Exclusions

HN2 Exclusions of coverage in an insurance policy are to be narrowly interpreted, and an insurer bears the burden of establishing that an exclusion in issue is applicable to the acts giving rise to the claim. More Like This Headnote

Business & Corporate Law > Agency Relationships > Types > Employee & Employer

HN3 A corporation acts through its agents. Accordingly, a corporation is liable for the acts of its employees, directors, officers, and other agents while they act within the scope of employment. More Like This Headnote

Business & Corporate Law > Agency Relationships > Types > Employee & Employer

Torts > Intentional Torts > General Overview

HN4 Under controlling Virginia law, intentional torts may be within the scope of employment where the focus is not on an offending employee's motive, but the context in which the action occurred. More Like This Headnote

Civil Procedure > Summary Judgment > Standards > General Overview

HN5 A court considering summary judgment must treat the facts in the complaint as true. More Like This Headnote

COUNSEL: **[*1]** For State Farm Fire And Casualty Company, Plaintiff: Guy M. Harbert, III, Maxwell Huddleston Wiegard, Gentry Locke Rakes & Moore, Roanoke, VA.

For Manchester Marketing, Inc., Defendant: David James Sensenig, LeClair Ryan PC, Richmond, VA.

For Catherine E. Fitzpatrick, Defendant: Bridget N. Long, Marks & Harrison, Richmond, VA.

JUDGES: Dennis W. Dohnal, United States Magistrate Judge.

OPINION BY: Dennis W. Dohnal

OPINION: MEMORANDUM OPINION

This matter is a declaratory judgment action that is before the court by consent of the parties (28 U.S.C. § 636(c)(1)) on cross motions for summary judgment. 28 U.S.C. § 2201 *et seq.* The Plaintiff, State Farm Fire & Casualty Company (State Farm), moves the court to decide as a matter of law that it has no obligation, including the duty to defend, against the claims that are being pursued in a state court action by Catherine E. Fitzpatrick (Fitzpatrick) against Pirthi Singh, his business partner, Kaur P. Singh, their business, P&G Associates, Inc. (P&G), and Manchester Marketing, Inc. (Manchester), a related business entity, for injuries Fitzpatrick allegedly incurred as the result of an assault **[*2]** by Singh. n1 Any obligation of State Farm for providing a defense and to indemnify its insured against any recovery arises under either of two liability insurance policies that each name P&G as the insured. State Farm has joined Fitzpatrick and the state action defendants as defendants in this case in order to

resolve all potential coverage issues. n2 Fitzpatrick opposes State Farm's motion and has filed a cross motion for summary judgment for a determination that either there is coverage, or that the question of coverage is a question of material fact that cannot be resolved on summary judgment. State Farm seeks a declaration that it has no duties pursuant to either the governing Business Policy or the Umbrella Policy under the circumstances giving rise to the state court action.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Fitzpatrick is the only defendant that has filed any responsive pleadings. Manchester Marketing was dismissed as a party defendant in the state action, but State Farm has joined it as an additional party defendant in this case, presumably in order to resolve all potential coverage issues.

n2 The two policies at issue are a Business Policy, policy number 96-KL-2926-4 (ex. 2 to Pl.'s Mem. Supp. Mot. Summ. J.)(Pl.'s Mem.) and Commercial Liability Umbrella Policy policy number 96-KL-2928-8 (ex. 3 to Pl.'s Mem.).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*3]**

The relevant portions of the Business Policy are:

> Coverage L - Business Liability
> We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury . . . This insurance applies only:
> 1. to bodily injury or property damage caused by an occurrence which takes place in the coverage territory during the policy period;
> 2. To personal injury caused by an occurrence committed in the coverage territory during the policy period. The occurrence must arise out of the conduct of your business, excluding advertising;
>
> . . .
> Right and Duty To Defend
> We will have the right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent. The amount we will pay for damages is limited as described in Limits of Insurance. Damages because of bodily injury include damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury. We may investigate and settle any claim or suit at our discretion. Our right and duty to defend and when we have used up the applicable limit of insurance in the payment **[*4]** of judgments or settlements or medical expenses.
>
> . . .
> Business Liability Exclusions
> Under coverage L, this insurance does not apply:
> 1. to bodily injury or property damage . . .
> b. to any person or property which is the result of willful and malicious acts of the insured.
>
> . . .
> 5. To bodily injury or personal injury to any employee of the insured arising out of and in the course of their employment . . . by the insured . . .

. . .
16. To personal injury . . .

. . .
c. arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;

. . .

Who is an Insured

. . .
2. Each of the following is also an insured:
a. your employees . . . but only for acts within the scope of their employment by you. However, no employee is an insured for
(1) bodily injury or personal injury to you or to a fellow employee while in the course of his or her employment . . .

. . .

Definitions

3. bodily injury means bodily injury, sickness or disease sustained by a person . . .
10. occurrence means:

b. the commission of an offense, or a series of similar related offenses, which results in personal injury . . .

11. personal **[*5]** injury means injury, other than bodily injury, arising out of one or more of the following offenses:

a. false arrest, detention or imprisonment;

(Pl.'s Mem., ex. 2 at 20-22, 24, 27, 32).

The relevant portions of the Umbrella Policy are:

This insurance applies only:
1. to bodily injury . . . caused by an occurrence which takes place in the coverage territory during the policy period;
2. to personal injury caused by an occurrence committed in the coverage territory during the policy period. The occurrence must arise out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done

by or for you;

. . .
Right and Duty to Defend
1. When underlying insurance or any other insurance does not apply to an occurrence:
If a claim or suit is covered by this policy but not covered by any underlying insurance or any other insurance available to the insured, we will have the right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent. We may investigate and settle any claim or suit at our discretion. Our right and duty to defend **[*6]** and when we have used up the applicable limit of insurance in the payments of judgment or settlements. The cost of defense and investigation are in addition to the amount of the net loss payable. If we are not permitted by law or otherwise to carry out the duties set forth above, we will pay the insured for any expense incurred with our written consent.

. . .
Business Liability Exclusions
Under Coverage L - Business Liability, this insurance does not apply:
1. to bodily injury or property damage:

. . .
b. to any person or property which is the result of willful and malicious acts of the insured.

. . .
5. To bodily injury . . . to any employee of the insured arising out of and in the course of their employment by the insured . . .

. . .
15. to personal injury unless the underlying insurance provides coverage for the loss;

. . .
18. to personal injury . . .

c. arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured . . .

Designation of Insured
Who is an Insured
2. Each of the following is also an insured:

a. your employees . . . while acting within the scope of their employment by you . . .

. . **[*7]** .
Definitions
3. bodily injury means bodily injury, sickness or disease sustained by a person. .
.
10. occurrence means:

b. the commission of an offense, or a series of similar related offenses, which results in personal injury . . .

11. personal injury means injury, other than bodily injury, arising out of one or more of the following offenses:

a. false arrest, detention or imprisonment;

(Pl.'s Mem., ex. 3 at 1-2, 4, 6-7, 11-12).

The related state action that is pending in the Circuit Court of the City of Richmond, Virginia, asserts six claims on behalf of Fitzpatrick against the various defendants: Count I for assault and battery of Fitzpatrick by Pirthi Singh and P&G Associates; Count II for intentional infliction of emotional distress to Fitzpatrick by Pirthi Singh and P&G Associates; Count III for False Imprisonment of Fitzpatrick by Pirthi Singh and P&G Associates; Count IV for negligent hiring and/or retention of Pirthi Singh by Kaur P. Singh, P&G Associates, and Manchester Marketing; Count V for negligent failure by P&G Associates and Manchester Marketing to protect employees, including Fitzpatrick, from foreseeable danger of physical and sexual **[*8]** assault; and Count VI for punitive damages against all defendants. n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 The underlying lawsuit includes no allegation of sexual harassment as State Farm asserts. (Pl.s' Mem. at 1).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In the state action, Fitzpatrick alleges that on March 25, 2004, she was assaulted by Pirthi Singh at a Dairy Queen in Chesterfield, Virginia, where she was employed as a server and cashier. At that time, Pirthi Singh was a co-owner, President, and Director of P&G Associates while Kaur P. Singh was also a co-owner, director, and officer of P&G, which owns and operates the business. (Pl.'s Mem., ex. 1 PP1-9). n4 Specifically, it is alleged that Pirthi Singh "patted Ms. Fitzpatrick on the back and hugged her. When Ms. Fitzpatrick pulled away from him, he pulled her back into him, hugged her tighter and grabbed her left breast." Id. P10. Fitzpatrick reported the incident to the police who conducted an investigation that discovered that a surveillance video that had recorded the alleged assault. Id. P11. Pirthi Singh was subsequently **[*9]** convicted of assault as a result of the incident. Id. P12.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 Manchester Marketing is a Dairy Queen franchisee that controlled the operation and/or participated in the operation and management of the particular business premises involved. (P.'s Mem., ex. 1 (Fitzpatrick Mot. J.) PP2, 7-8). It was removed as a party in the state action in any event.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Fitzpatrick asserts that both she and Pirthi Singh were performing services in the course and

scope of their respective employment when he engaged in the unwanted touching and restraint of Fitzpatrick resulting in her being physically injured, restrained, groped, put in fear and terror, filled with anxiety, placed in reasonable apprehension of bodily harm, degraded, humiliated; all such activity causing mental and emotional anguish, pain, suffering, and related injury. Id. PP14-15; 20-25; 28-30, 40, 49, 55. In the state action, Fitzpatrick seeks damages for bodily and personal injuries against P&G, as the employer, for the actions of its agent (Pirthi Singh), **[*10]** pursuant to the doctrines of agency, respondeat superior, and vicarious liability (Counts I, II, III). Id. PP26, 31, 39. The state action also contains allegations that P&G, together with Kaur P. Singh and Manchester Marketing, are liable for negligence in the hiring and retention of Pirthi Singh and that the Defendants acted both negligently and willfully so as to justify an award of punitive damages in addition to other requested monetary relief (Counts IV, V, VI). Id. PP41-55.

Question Presented

Whether State Farm is obligated to defend and indemnify the Defendants in the state court action.

Analysis

In order to decide whether State Farm has any duties under the policies at issue, the court must determine whether the conduct alleged in the state action is "covered" under the policies. Travelers Indem. Co. v. Obenshain, 219 Va. 44, 245 S.E.2d 247, 249 (1978). *HN1* To find that an insurer has a duty to defend under Virginia law pursuant to a policy of insurance, the court must examine: "(1) the policy language to ascertain terms of the coverage and (2) the underlying complaint to determine whether any claims alleged therein are covered by the policy." Town Crier, Inc. v. Hume, 721 F.Supp. 99, 103 (E.D.Va. 1989). **[*11]** State Farm concedes that the state action here adequately includes allegations of both "bodily injury" (with respect to all defendants in counts I, II, IV, V) and "personal injury" (with respect to Pirthi Singh and P&G in count III) as defined in the subject policies. (Pl.'s Mem. at 11-12). However, State Farm argues that it nonetheless has no duty to defend or to indemnify under the controlling policies because specific coverage exclusions apply.

HN2 Exclusions are to be narrowly interpreted and an insurer bears the burden of establishing that an exclusion in issue is applicable to the acts giving rise to the claim. Am. Reliance Ins. Co. v. Mitchell, 238 Va. 543, 385 S.E.2d 583, 585, 6 Va. Law Rep. 737 (1989). Here, both policies specifically exclude "bodily injury to any employee of the insured arising out of and in the course of their employment by the insured . . ." (Pl.'s Mem., ex. 2 at 22; ex. 3 at 2). Indeed, the allegations of the state action specifically assert that on May 25, 2004, Fitzpatrick "was working as a server and cashier at the Dairy Queen" when the incident occurred in which she encountered an unknown man in the women's restroom and "reported the incident to Pirthi Singh," who was **[*12]** acting in the course of his employment as an owner and agent of the business, whereupon the assault took place. (Pl.'s Mem., ex. 1 PP2, 9, 14-16, 18, 25). Additional allegations asserting that the incident "arose out of and in the course of [Fitzpatrick's] employment by the insured" are set forth in the state action, as noted by State Farm, and must be considered as true for purposes of resolving the pending motions. (Pl.'s Mem., ex. 1 P48 (the employment of Pirthi Singh "was likely to cause . . . injury and harm to female employees, including Catherine E. Fitzpatrick"); P51 (Ms. Fitzpatrick was invited onto the business premises as an employee); P52 ("the danger of injury to employees, including Ms. Fitzpatrick," was foreseeable); and P54 (regarding a duty to "provide warnings to protect employees, including Ms. Fitzpatrick"). Moreover, Fitzpatrick alleges that Pirthi Singh was "acting in the course and scope of his employment with and ownership of P&G . . . [a]t all relevant times." Id. PP15, 18, 25. The state action further alleges that P&G, Kaur P. Singh, and Manchester Marketing, acted through their agent, Pirthi Singh, further confirming the employment context in which **[*13]** the incident occurred and

the relationship of the various party defendants. Id. PP26, 29, 31.

State Farm cites a number of decisions for the proposition that similar exclusionary language has been upheld to preclude coverage for workplace claims of sexual harassment and sexual assault. (Pl.'s Mem. at 13-15). Two of the decisions cited are from within this federal circuit, including the court of appeals holding in Gates, Hudson & Assoc. v. The Federal Ins. Co., 141 F.3d 500 (4th Cir. 1997), in which the court held that a similar exclusion denied coverage in a workplace employee sexual harassment and wrongful termination context. *See also* West Am. Ins. Co. v. Bank of Isle of Wight, 673 F.Supp. 760 (E.D. Va. 1987)(exclusionary language regarding workplace "bodily injury" barred coverage for wrongful termination, negligence, and breach of fiduciary duty). Fitzpatrick attempts to distinguish such case precedent by arguing that the holdings were dependent upon what the courts found to be encompassed within the meaning of "bodily injury," as defined by the controlling policy language, as opposed to whether the activity occurred within the course **[*14]** of the claimant's employment, and that the activity involved intentional conduct by an employer that does not have to be established to sustain a finding of negligence as regards P&G pursuant to a theory of respondeat superior.

The court concludes that where the allegations of the state action clearly demonstrate that Fitzpatrick was an employee of the insured when the incident occurred, the exclusion for precluding coverage for bodily injury occurring in the course of employment is triggered, which, in simple terms, is intended to preclude coverage for any "in-house" occurrence that would have to be the subject of separate coverage. n5 Counts I, II, IV and V allege bodily injury as defined by policy language ("bodily injury means bodily injury, sickness or disease sustained by a person"). (Pl.'s Mem., ex. 1 PP25, 30, 40, 49, 55). Therefore, there is no coverage for any of those claims alleging bodily injury where Fitzpatrick has alleged she was an employee at all relevant times.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 The fact that Fitzpatrick allegedly suffered injury inflicted by a co-employee is irrelevant to the applicability of the exclusion based on whether the incident occurred while she was engaged in her employment, although the circumstance implicates another exclusion concerning actions attributable to a "co-insured" as discussed later herein.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*15]**

"Personal injury" is defined in relevant part in both policies as "injury, other than bodily injury, arising out of one or more of the following offenses: a. false arrest, detention or imprisonment . . . ." (Pl.'s Mem., ex. 2 at 32; ex. 3 at 12). The only remaining claim of false imprisonment by Pirthi Singh and P&G (Count III) to the effect that Pirthi Singh *restrained,* patted, hugged, fondled, sexually abused and molested Fitzpatrick, involves an allegation of "personal injury" in the sense of detention within the policy language. However, an additional exclusion to the "in course of employment" exception precludes coverage for any injury resulting from the willful violation of a penal statute. (Pl.'s Mem., ex. 2 at 24, P16c; ex. 3 at 4, P18c). It is not disputed that Pirthi Singh was convicted of assault as a result of the incident n6 and the acts complained as asserted in Count III of the state action are the same that were the basis of Singh's conviction. Therefore, the exclusions of both policies for injury resulting from such willful conduct apply to the claim for false imprisonment as well. Palmetto Ford, Inc. v. First Southern Ins. Co., 1993 U.S. App. LEXIS 24481, 1993 WL 369248, **[*16]** at *7 (4th Cir. 1993). n7

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 The record does not include a copy of the judgment in the criminal case. However, because it has not been challenged, the court accepts as true that the Defendant Pirthi Singh was convicted of assault as a result of the subject incident as alleged in the state court action.

n7 Although not necessary for resolution of the pending motions since relief is premised on alternative grounds, in the interest of completeness and possible review, it is further noted that separate policy language that precludes coverage for acts by a co-insured employee is contained in the umbrella policy whereby where all employees are considered to be "insureds," but coverage would only apply if provided for in the "underlying insurance" (the Business Policy) which specifically excludes coverage for employment-related injury as previously discussed. (Pl.'s Mem. at 9, 19; ex. 3 at 4-5).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

*HN3*A corporation acts through its agents. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985). **[*17]** Accordingly, a corporation is liable for the acts of its employees, directors, officers, and other agents while they act within the scope of employment. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 543, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999). In this case, Pirthi Singh was an employee and officer of P&G at the time it is alleged he committed the intentional acts described in the state court action. *HN4*Under controlling Virginia law, even intentional torts may be within the scope of employment where the focus is not on an offending employee's motive, but the context in which the action occurred. Commercial Bus. Sys. Inc., v. Bellsouth Servs. Inc., 249 Va. 39, 453 S.E.2d. 261, 266 (Va. 1995); Plummer v. Ctr. for Psychiatrists, Ltd., 252 Va. 233, 476 S.E.2d 172, 174-175 (Va. 1996). The incident here arose in the course of a normal work schedule, on the business premises where both Pirthi Singh and Fitzpatrick were working. The initial encounter occurred when Fitzpatrick reported a concern to Singh (that there was a man in the women's bathroom) which was an activity (the reporting and receipt of such information) that was within the scope of each of their positions. Though P&G is liable for the acts **[*18]** of its agents, including Pirthi Singh, the exclusion for willful violation of a penal statute precludes coverage for both the principal, P&G, and its agents.

Fitzpatrick argues that whether she was an employee of the defendants (Kaur Singh, P&G and Manchester) at the time she was assaulted is "irrelevant to the issue at hand" because the allegations of the complaint are based on the theory of respondeat superior. n8 (Fitzpatrick's Mem. Supp. Cross Mot. Summ. J. at 3). Fitzpatrick argues that the discretion of a trial judge to determine the scope of employment as a matter of law is limited and whether an employee's acts were within the scope of his employment by insureds when committing a willful act should be a question for a jury. Id.; Commercial Bus. Sys., Inc., 453 S.E.2d at 265 (Va. 1995). This analysis is incorrect.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 Fitzpatrick's negligence claims against Kaur P. Singh, P&G, and Manchester (counts IV and V) are claims for bodily injury. Negligence is not one of the specified offenses that constitutes personal injury under the policies. (Pl.'s Mem., ex. 1 at 32).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*19]**

In this case, the agency relationship between is Pirthi Singh and P&G is undisputed and, therefore, it is well-settled under Virginia law that the burden is on the principal to prove that the agent was not acting within the scope of his employment. Commercial Bus. Sys., Inc., 453 S.E.2d at 265. Here, the court must take the facts pled in the motion for judgment as established for the purpose of analysis to determine whether coverage exists. Town Crier, 721 F.Supp. at 103. The motion for judgment not only states that Pirthi Singh was an officer, director and owner of P&G and the Dairy Queen, but also that "at all relevant times, Pirthi Singh was acting in the course and scope of his employment with and ownership of P&G Associates, Inc., at the Dairy Queen," that he was "performing services in the course and scope of his employment" when he "engaged in wrongful conduct" under the "actual and apparent authority given to him by P&G Associates," and that his actions arose "out of his performance of his duties as an owner and employee of P&G . . . in the course of his employment . . . to supervise and control the store and premises." (Pl.'s Mem., ex. 1 **[*20]** PP13-15, 18). Fitzpatrick is the only party that elected to respond or oppose State Farm's request for declaratory judgment. Therefore, there has been no action by the principal to challenge Pirthi Singh's status as an employee.

The motion for judgment in the state court action sets forth facts that demonstrate that Pirthi Singh was acting within the scope of his employment, presumably as Fitzpatrick's supervisor, and the person to whom employees should report things such as strange circumstances in the women's bathroom. Even given the egregious, intentional nature of the assault described in the complaint, under Virginia law, Singh was engaged as an employee in his role as supervisor when he assaulted Fitzpatrick. Doyle-Penne v. Muhammad, 2000 U.S. App. LEXIS 18902, 2000 WL 1086906, at *2 (4th Cir. 2000)(unpublished)(describing in detail why an intentional tort was within the scope of employment where an assistant assaulted her supervisor by pinning her against a wall and repeatedly punching her in the chest, the court found that the "dispute arose out of Muhammad's performance of her duties . . . during a normal business day, inside the offices . . . where both parties were employed. The altercation **[*21]** was caused by Muhammad transferring a telephone call to Doyle-Penne. Transferring calls was part of Muhammad's job. Indeed, few things are as synonymous with office routine as the use of the telephone system. Finally, the dispute occurred when Doyle-Penne, a more senior employee, attempted to correct a deficiency in Muhammad's performance of her job.").

Fitzpatrick's argument that the trial court's fact-finder must decide whether Singh was acting within the course and scope of his employment, and thus whether P&G is liable as the principal, is not the standard applicable in the questions presented in this case because[HN5] the court must treat the facts in the complaint as true. Town Crier, 721 F.Supp. at 103. Moreover, under both Virginia's broad interpretation of respondeat superior, as well as this court's required application of Virginia's law, there is no factual dispute but that Singh was acting within the course and scope of his employment. Doyle-Penne, 2000 U.S. App. LEXIS 18902, 2000 WL 1086906, at *2. Finally, and conclusively, the employee exclusion to the bodily injury claims does not relate to Pirthi Singh's status, but rather to Fitzpatrick's status as an employee. **[*22]**

However, Pirthi Singh's status as an employee is also established for purposes of determining that the co-insured exclusion also applies under the terms of the Umbrella Policy -- there is no coverage for "a claim for damages arising out of bodily injury [or] personal injury . . . which any insured . . . covered by this policy initiates, alleges, or causes to be brought against any other insured . . . covered by this policy.". (Pl.'s Mem., ex. 3 at 5). If, as Fitzpatrick urges, Pirthi Singh were not an insured because he was acting outside the scope of his employment, then P&G, Kaur P. Singh, and Manchester Marketing would all be relieved of any liability under the theory of respondeat superior and thus no coverage would be implicated. Kidd v. De Witt, 105 S.E. 124, 126, 128 Va. 438 (Va. 1923)(citing old case precedent to demonstrate that an employee must totally depart from the scope of his employment, not merely deviate from it, to preclude employer liability for an employee's

wrongful conduct). Not only does the language used in the policies clearly exclude claims based on bodily injury to an employee, additional language excludes claims for personal injury arising out of the **[*23]** willful violation of a penal statute, and claims by one insured (an employee, Fitzpatrick) against another insured (an employee, Pirthi Singh). (Pl.'s Mem., ex. 1 PP9, 13-14).

Conclusion

State Farm has demonstrated that it is under no duty to defend or indemnify P&G, Pirthi Singh, Kaur P. Singh, or Manchester Marketing under any theory advanced by Fitzpatrick and, therefore, the Plaintiff is entitled to judgment in its favor.

An appropriate Order shall issue.

/s/

Dennis W. Dohnal

United States Magistrate Judge

Dated: 5/25/06