

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH II

OUTAGAMIE COUNTY

TROY J. MERRYFIELD and
TODD D. MERRYFIELD,

Plaintiffs,

Case No. 08-CV-1

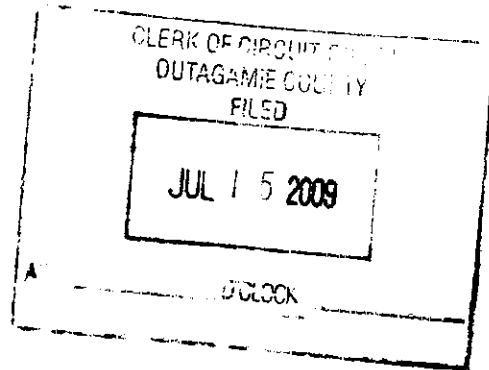
v.

CATHOLIC DIOCESE OF GREEN BAY, INC.,

Defendant.

INDIANA INSURANCE COMPANY, f/k/a
TOWER INSURANCE COMPANY, INC.,

Intervening Defendant



ORDER FOR JUDGMENT AND JUDGMENT

The above-entitled action, having been presented to the Honorable Nancy J. Krueger, Outagamie County Circuit Court Judge, on the motion for summary judgment of Intervening Defendant, Indiana Insurance Company, f/k/a Tower Insurance Company, Inc., by its attorneys, Denissen, Kranzush, Mahoney & Ewald, S.C., by Daniel J. Hurst and Amy J. Wilkinson, through their briefs and supporting materials in support of its motion for summary judgment; and the Defendant, Catholic Diocese of Green Bay, Inc., by its attorneys, Everson, Whitney, Everson & Brehm, S.C., by John M. Thompson, having presented to the Court its response brief and supporting materials in opposition to the motion for summary judgment; and the Court having considered the briefs and materials in support of and in opposition to the motion for summary judgment of Intervening Defendant,

Indiana Insurance Company, f/k/a Tower Insurance Company, Inc., and having been fully advised in the premises, did, on June 25, 2009, duly render its written decision granting the motion for summary judgment, said written decision being incorporated by reference in this Order; and the Court having concluded that there are no genuine issues of material fact, that the Indiana Insurance policy, No. SMP 5-5000, is unambiguous, and that Intervening Defendant is entitled to summary judgment as a matter of law on the grounds that the allegations contained in Plaintiffs' Second Amended Complaint in this action do not constitute an "occurrence" under the Indiana Insurance policy and as a result, Indiana Insurance has no duty to defend or indemnify Catholic Diocese of Green Bay, Inc. for the causes of action set forth in Plaintiffs' Second Amended Complaint including, but not limited to fraud and fraud (intentional non-disclosure).

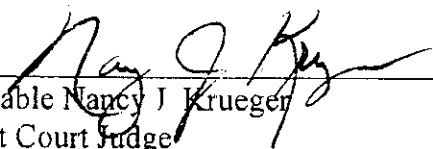
NOW, THEREFORE, on the motion for summary judgment of Intervening Defendant, Indiana Insurance Company, f/k/a Tower Insurance Company, Inc., and this Court's written decision of June 25, 2009,

IT IS HEREBY ORDERED that the motion for summary judgment of Intervening Defendant, Indiana Insurance Company, f/k/a Tower Insurance Company, Inc., be, and the same hereby is, granted, and the Court declares that the Intervening Defendant, Indiana Insurance Company, f/k/a Tower Insurance Company, Inc., has no duty to defend or indemnify the Catholic Diocese of Green Bay, Inc for any of the allegations contained in Plaintiffs' Second Amended Complaint in this action. Therefore, judgment may be, and hereby is, entered in favor of Indiana Insurance Company, f/k/a Tower Insurance Company, Inc.

This judgment is the final disposition as to Indiana Insurance Company, f/k/a Tower Insurance Company, Inc , and Catholic Diocese of Green Bay, Inc. and is the document from which appeal may follow as a matter of right under Wis. Stat. § 808.03(1).

Dated at ~~Green Bay~~^{Appleton}, Wisconsin, this 14th day of July, 2009.

BY THE COURT:



Honorable Nancy J. Krueger
Circuit Court Judge

asserts that the policy is not ambiguous and covers occurrences that result from accidents and not incidents which the insured could expect or intended

Summary Judgment Standard

Wis Stat § 802.08(2) provides that summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See, *Jorgensen v Water Works, Inc*, 218 Wis 2d 761, 770, 582 N.W.2d 98 (1998).

To determine if there is a genuine issue of material fact, the Court must examine the moving party’s affidavits or other proof to determine if the moving party has a prima facie case for summary judgment. *Grams v Boss*, 97 Wis 2d 332, 338, 294 N.W.2d 473 (1980). To establish a prima facie case for summary judgment, a party must present a defense that would defeat the opposing party. *Id.* Upon the moving party making a prima facie case, “the court must examine the affidavits and other proof of the opposing party to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial.” *Id.* The Court may grant summary judgment only if the moving party has demonstrated a right to judgment with such clarity as to leave no room for controversy. *Id.*

DISCUSSION

The Plaintiffs allege four claims against the Defendants:

- 1) Troy Merryfield alleges Fraud against the Diocese
- 2) Troy Merryfield alleges Fraud (Intentional Non-Disclosure) against the Diocese
- 3) Todd Merryfield alleges Fraud against the Diocese

- 4) Todd Merryfield alleges Fraud (Intentional Non-Disclosure) against the Diocese

The Indiana policy provides coverage for “an occurrence” defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured ” The policy also provides coverage for “personal injury . . . caused by an occurrence” under an excess coverage endorsement. Indiana argues that this policy is not ambiguous, and the definition of occurrence explicitly excludes such expected or intentional acts as the Diocese is being accused of here

For the Court to rule on Indiana’s Summary Judgment Motion, the Court must examine the Plaintiffs’ claims to determine if they could possibly be covered under the policy *Radtke v Fireman’s Fund Ins Co* , 217 Wis 2d 39, 43 (Ct App 1998). On a summary judgment motion, the Court must accept the facts as pled by the Plaintiff as true. *See, Pinter v Am Fam Mut Ins Co* , 2000 WI 75, ¶ 4, 236 Wis 2d 137. The Plaintiffs’ Second Amended Complaint of December 10, 2008, asserts:

In perpetrating Fraud, the Diocese:

- 1) “affirmatively represented to the Plaintiffs . . . [that Feeney] did not have a history of molesting children, that Defendant Diocese did not know that Feeney had a history of molesting children and that defendant Diocese did not know that Feeney was a danger to children ”
- 2) “knew that Feeney had a history of sexually molesting children and that he was a danger to children”
- 3) “knew that its misrepresentations were false or at least were reckless, without care of whether these representations were true or false”
- 4) “made the misrepresentation with the intent to deceive the Plaintiffs”

In perpetrating Fraud (Intentional Non-Disclosure), the Diocese:

- 1) “knew that Feeney had a history of sexually molesting children before the Plaintiffs” AND
- 2) “intentionally did not disclose this fact to the then minor Plaintiffs in order to induce [them] to act on the misrepresentations to [their] detriment ”

The first point of contention is that the policy is ambiguous because the definition of “occurrence” is not explicit as to whether the Plaintiffs’ claims are excluded from coverage. Wisconsin law favors an interpretation supporting coverage for the insured in the case of ambiguities in the policy. *Bradley Corp v Zurich Ins Co*, 984 F Supp 1193, 1198 (E D Wis. 1997); *Folkman v Quamme*, 2003 WI 116, ¶ 12, 264 Wis 2d 617 (2003). The Diocese argues that the actions alleged by the Plaintiffs do not clearly fall outside of the definition of occurrence provided in the policy, and therefore it should be interpreted in its favor. The Diocese also compares the Indiana policy to more recent policies that include explicit sexual assault exclusions. While the comparison shows the evolution of liability concerns, it does not aid the analysis of the policy at issue here. As the Diocese points out, the policy should be analyzed in context with its formation. That analysis shows it would be contrary to Wisconsin law to hold that a disagreement over the meaning of a policy provision and whether it applies in a particular situation rendered it ambiguous. *Mattheis v Heritage Mut Ins Co.*, 169 Wis.2d 716, 724, 487 N W 2d 52 (Ct. App. 1992).

The real dispute in this case is then over the definition of “occurrence” and whether the actions the Plaintiffs allege fall within that definition. The definition of “occurrence” in the policy clearly excludes intentional acts from coverage. The policy states an occurrence is “an accident . . .” Accident signifies a lack of intention. Where

harm is more likely to result from certain intentional conduct, intent can be inferred as a matter of law from the fraudulent allegation contained in the complaints. *A O Smith Corp v. Allstate*, 222 Wis.2d 475, 496, 499, 588 N.W.2d 285 (Ct. App. 1998). In *A O Smith*, the Court of Appeals reasoned that regardless of whether or not an injury was intended, when a reasonable person in defendant's position would believe that injury was substantially certain to result, then the defendant must be dealt with as though the injury was intended. 222 Wis.2d at 499. Assuming the facts to be as alleged by Plaintiff, whether or not the Diocese intended the abuse suffered by the Plaintiffs to occur, knowledge of Father Feeney's record gave the Diocese reason to believe that an injury was substantially certain to result, and therefore, the conduct is deemed intentional.

As Indiana asserts and correctly argues, the existence of the fraud exclusion does not change the definition of occurrence in this case. The fact that the exclusion is in some portions of the policy, but not in the comprehensive general liability (CGL) endorsement does not magically trigger coverage for intentional acts explicitly excluded from the definition of "occurrence." The exclusion contained in the other endorsements does not in any way contradict the terms or the definition of occurrence provided in the CGL endorsement. An explicit exclusion in the CGL endorsement excluding fraud or intentional act is unnecessary and redundant. "A contract of insurance is not to be rewritten by the court to bind an insurer to a risk that the insurer did not contemplate and for which it has not been paid." *J G & R C v Wangard*, 2008 WI 99, ¶ 21, 313 Wis.2d 329 (citation omitted).

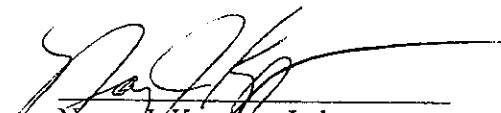
The Court finds that the Plaintiffs claims are not "occurrences" as defined under the Indiana Insurance policy and thus, are not covered by the policy. The alleged

misrepresentation includes an element of intent. The Plaintiffs allege the Diocese acted with an intent to keep knowledge of Father Feeney's past actions from the parishes to which it sent him and by extension from the Plaintiffs. As the policy specifically excludes coverage for intentional acts, Indiana has no obligation under this policy to defend and indemnify the Diocese in this matter. The Court grants Indiana Insurance's Summary Judgment Motion.

Indiana Insurance's Motion is GRANTED and Indiana Insurance shall draft an order in accordance with this decision within 20 days.

Dated this 25th day of June 2009

BY THE COURT:


Nancy J. Krueger, Judge
Circuit Court Branch II
Outagamie County

Orig: Clerk of Ct.
Cc: Atty. Jeffrey Anderson
Atty. John Peterson
Atty. Patrick Brennan
Atty. Jeffrey Demeuse
Atty. Daniel Hurst