STATE OF INDIANA	)	MARION SUPERIOR COURT
	)ss:	CIVIL DIVISION 10
COUNTY OF MARION	)	CAUSE NO. 49D10-0305-PL-907

STATE FARM FIRE & CASUALTY)
INSURANCE CO.,)
Plaintiffs/Counterclaim Defendant)
)
vs.)
)
IVY and FRANCIS LIKENS,)
Defendants/Counterclaim Defendants)
)
and)
)
M.S., et.al.,)
Defendants/Counterclaim Plaintiffs)

DECLARATORY JUDGMENT AFFIRMATIVE FOR M.S. AND THE LIKENS AND NEGATIVE TO STATE FARM

Introduction

Plaintiff State Farm Fire & Casualty Insurance Company ("State Farm") seeks declaratory judgment regarding insurance coverage for Defendants Ivy and Francis Likens ("Likens"). M.S., a minor, and parents seek separate damages for personal injuries to M.S. from the Likens's son while in his care, and counterclaim here for declaratory judgment. The Court finds declaratory judgment for M.S. and the Likens, and against State Farm, for coverage under the policy.

Issue

Was the injury "expected or intended" by the Likens?

Was the injury related to "child care" or a "business pursuit"?

Facts and Procedural History

The Likens are a married couple with marginal education and income. The record shows their emotional and mental stability is problematic due to stressful circumstances surrounding their household environment, and the behavior of their three sons. In 1999, local authorities intervened and referred them for a parenting assessment with the Childrens' Bureau, a well-known licensed family counseling agency. The resulting report shows the Likens scored below average in standardized parenting testing, and need substantial improvement.

The Likens's sons have a history of misconduct. Wayne spent some time in the Indiana Boys School after some sex-related incidents: at age twelve, he had intercourse with a ten-year-old girl; and at approximately age 13, he had oral sex with two younger boys. Wayne was treated during his incarceration, and his mother Ivy believes he was "cured" when he was released around 2000. Before this case, Wayne had no history, however, of violence or other criminal behavior. The evidence includes hearsay and counseling records indicating disruption and angry behavior from the two younger sons, some sexual, some not. But there is also no indication of molestation or violent criminal behavior. Although the evidence is fragmented and sometimes inconclusive regarding the extent and effect of the sons' behavior, it is clear the Likens were overwhelmed at times, frequently uncertain, but desirous to address the problems they could.

Around July 2001, M.S. and her family were next-door neighbors to the Likens. Francis Likens was employed, and M.S.'s mother apparently was not. Francis Likens told M.S.'s family about job openings with Francis Likens's employer. M.S.'s mother became employed there soon afterwards. So, M.S.'s mother asked Ivy Likens if she would "baby-sit" M.S. and her other children when she worked. The two families agreed that Ivy Likens would be paid $20 for any

day she cared for the children. There was no agreement or commitment regarding the length of this arrangement or any set number of days. There was no intent to run a home business, no advertising, and no recordkeeping. Ivy had never babysat in the past for anyone other than family members. Ivy testifies she would not have been surprised if M.S's family found other arrangements. Indeed, M.S.'s mother told Ivy she was looking for other arrangements after only two days of babysitting. Ultimately, Ivy only babysat M.S. and her siblings five times over a 2-week period.[1]

On August 7, 2001, seven years after Wayne's last known sexual encounter, and perhaps two years after his treatment and "cure," Ivy was baby-sitting for M.S. and the other children in her home. Wayne was 17 years old and apparently residing there. Ivy left M.S. in the care of Wayne so she could deliver lunch to her husband at work. During that period of time, M.S. was seriously injured and molested by Wayne. He later pled guilty to criminal charges.

Ivy testifies she did not intend that M.S. suffer injuries, did not believe it would happen, and trusted that M.S. and other children would be safe with Wayne. The Court considers all the circumstances, including her education, income, test scores, and demeanor. The Court finds her testimony has weight and establishes her subjective belief, although mistaken, that no harm would come to the children in Wayne's care. She later pled guilty to Neglect of a Dependent, specifically, that she "*knowingly and intentionally* placed M.S. in a situation that endangered the life or health of M.S." (emphasis supplied)

State Farm insures the Likens. The policy provides coverage for an "accident" resulting in bodily injury. However, the policy <u>excludes</u> coverage for:

a. "bodily injury . . . which is either *expected or intended by an insured* . . ." (emphasis supplied);

[1] July 24, July 27, August 1, August 2, and August 7, 2001.

b. “bodily injury . . . arising out of *business pursuits* of any insured . . . “ (emphasis supplied); and

c. “bodily injury to any person who is in the care of any insured because of *child care services* provided by or at the direction of . . .any insured . . . This exclusion does not apply to the occasional child care services provided by any insured, or to the part-time child care services provided by any insured who is under 19 years of age . . .” (emphasis supplied).

On April 12, 2002, M.S. and parents filed their separate action for personal injuries against the Likens, not Wayne, and claim Ivy was negligent by leaving M.S. in Wayne’s care. Accordingly, State Farm filed this declaratory judgment arguing Ivy’s actions and guilty plea show intentional acts precluded by the policy, as well as business and child care exclusions. M.S counterclaims for coverage. The parties moved for summary judgment, but the Court found issues of disputed material fact (Order of June 23, 2005). The Court then conducted a fact hearing under I.C. 34-14-1-9.

Law

Courts use the same rules of construction to interpret insurance contracts as all other contracts. Jones v. Western Reserve Group (1998), Ind.App., 699 N.E.2d 711, 714. Any ambiguity in an insurance policy is to be construed strictly against the insurer. This is particularly true where a policy excludes or limits coverage.[2] Strict construction means the

[2] PSI Energy, Inc. v. Home Ins. Co. (2004), Ind.App., 801 N.E.2d 705 found an *implied* “expected or intended” *exception* in a policy and held the insured had the burden to show coverage. Here, the policy clearly contains a *written* “expected or intended” *exclusion* that is strictly construed against State Farm.

insurer is bound by the plain and ordinary meaning of the words viewed from the standpoint of the insured. Sutton v. Littlepage (1996), Ind.App., 669 N.E.2d 1019. In construing terms in an insurance policy, courts favor coverage of the insured. Allstate Insurance Company v. Neumann (1982), Ind.App., 435 N.E.2d 591, 593.

Indiana law explains the "expected or intended" exclusion for auto liability coverage as follows:

1. The intent aspect means the "volitional performance of an act with an intent to cause injury . . ." Sans v. Monticello Ins. Co. (1997), Ind.App., 676 N.E.2d 1099, 1102; Stevenson v. Hamilton Mut. Ins. Co. (1996), Ind.App., 672 N.E.2d 467, 470-72.
2. " 'Expected' injury means injury that occurred when the insured acted even though he was consciously aware that harm was **practically certain** to occur from his actions." (emphasis supplied) Id.

More importantly here, negligent and reckless conduct is not enough to meet the **practically certain** standard requirement to exclude expected injuries even if the evidence demonstrates a disregard for safety, such evidence "is not enough to warrant exclusion under either the lesser 'expected injuries' standard or the greater' intended injuries' standard." Coy v. National Ins. Ass'n. (1999), Ind.App., 713 N.E.2d 355, 360 (citing Bolin v. State Farm Fire & Casualty Co. (1990), Ind. App., 557 N.E.2d 1084, 1088).

Indiana law is clear that a child molester is not covered by State Farm policies. State Farm Fire & Casualty Co. v. C.F. (2004), Ind.App., 812 N.E.2d 181; Wiseman v. Leming and State Farm (1991), Ind.App., 574 N.E.2d 327. But the law is less clear regarding coverage for the Likens (parents of a child molester) or Ivy's criminal actions. The policy term "accident" has

been defined to mean an "unexpected happening without an intention or design." Terre Haute First Nat'l Bank v. Pac. Employers Ins. Co (1993), Ind.App., 634 N.E.2d 1336. Furthermore, some courts distinguish between intent for an "accident" and unexpected results from other intentional conduct. In Allstate Ins. Co. v. Norris, 795 F. Supp. 272 (S.D. Ind. 1992), an insured intended to shoot an assailant, but shot a bystander instead. The insured's policy provided damages arising from an "accident." In holding the policy did not cover the bystander's injuries, the court noted the distinction between an event that is unexpected or unintended (which is an accident), and an act that is intended, but causes unexpected consequences (which is not). In Red Ball Leasing, Inc. et.al. v. Hartford Accident and Indemnity Co., 915 F.2d 306 (7th Cir. 1990), some motor vehicles were mistakenly repossessed. The court found:

> A volitional act does not become an accident simply because the insured's negligence prompted the act. Injury that is caused directly by negligence must be distinguished from injury that is caused by a deliberate and contemplated act initiated at least in part by the actor's negligence at some earlier point. The former injury may be an accident. *See N.W. Elec. Power Coop., Inc. v. American Motorists Ins. Co.*, 451 S.W.2d 356, 363-64 (Kan. Ct. App. 1969); 11 Couch on Insurance 2d § 44:267 at 415 (1982). However, the latter injury, because it is intended and the negligence is attenuated from the volitional act, is not an accident.
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> Id. at 311

Most importantly, the Indiana Supreme Court discussed policy coverage and intentional acts exclusions in child molest negligence claims in Frankenmuth Mutual Insurance Company v. Williams (1997), Ind., 690 N.E.2d 675. As with Likens, a babysitter's family member molested a child, the babysitter was sued for negligence, and the babysitter's insurer denied coverage under an intentional act exclusion. The court found policy coverage, in part, because the insurer's "arguments are essentially an attempt to conflate the conduct of [babysitter] with that of her [family member] in order to bring . . . within the intentional act exclusion." Id. at 678. But the court went on to explain its view regarding the babysitter's intent and liability:

> If the negligent complaint had gone to trial, [babysitter] might well have won. Where a person's negligence creates a situation in which a third party might commit an intentional tort or criminal act, the negligence is not a proximate cause of any resulting injuries unless the negligent person "realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime." Restatement (Second) of Torts § 448 (1965); cf. Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 520-21 (Ind. 1994) (holding as matter of law that voluntary and willful suicide constitutes intervening cause). A factfinder in [babysitter's] case would have had to decide (1) whether she was negligent and (2) whether she knew or should have known that her [family member] would molest . . . Particularly in light of [her] deposition testimony that she had no idea her [family member] was capable of child molestation, a factfinder might well have concluded that any negligence on her part was not a proximate cause of any of the injuries . . . **As a matter of Indiana law, [her] negligence caused an injury--exposure to the risk of molestation--that must be considered separately from the injuries resulting from the molestation itself.**
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> Id. at 678-9 (emphasis supplied)

Indiana courts are clearer regarding the "business pursuit" exclusion. Under Asbury v. Indiana Union Mut Ins. Co. (1982), Ind.App., 441 N.E.2d 232, "an insured is engaged in business only when he pursues a continued or regular activity for the purpose of earning a livelihood." Id. at 239.

Analysis

There Is No "Business Pursuits" or "Child Care" Exclusion

The evidence is largely undisputed, or at least convincing by its weight, that the Likens had no past, present, or future plan to pursue a child care business. The evidence shows Ivy Likens was occasionally babysitting, and the injury happened when 17-year-old son Wayne babysat over a lunch hour. They were simply babysitting upon the request of M.S.'s mother, and the arrangement was about to end. When Ivy took her husband's lunch on August 7, 2001, she left M.S. in the temporary care of Wayne. Since the babysitting was occasional and not a

continuous or regular activity, no "business pursuits" is established. Since M.S. was in the part-time care of Wayne, who was less than 19 years old, no "child care" exclusion is established under the policy.

The Injury Was Not "Expected" or "Intended"

Overall, Red Ball and Frankenmuth, including language of holdings and dicta, show Indiana law often observes two kinds of intents for acts resulting in injury. On one hand, there is an intent to act from which an unexpected and unintended result occurs, which the law calls "accident." For example, one intends to drive a car, but does not expect or intend to hit another vehicle. On the other hand, there is a stronger intent to act and achieve a specific result, but the result causes injury. For example, the shooter in Allstate Ins Co. v. Norris, supra., intends to shoot someone, but hurts another person instead; or, in Red Ball, the seller intends to repossess the specific vehicle, but finds later it made an accounting error. The law finds insurance policy provisions excluding coverage for intentional acts generally do not apply to "accidents," but do exclude coverage when the intent is aimed towards a specific outcome, regardless what actually happens. In other words, when an actor expects *something* to happen, it is not an accident.

State Farm seems to characterize Ivy's action, that is, leaving M.S. with Wayne, as more analogous to the shooter in Allstate than the babysitter in Frankenmuth. However, its policy clearly covers M.S.'s injuries unless the injuries were "expected or intended" by Ivy. Accordingly, State Farm's argument, like the insurer in Frankenmuth, seemingly attempts to "conflate the conduct" of Ivy with that of Wayne in order to bring it within its intentional act exclusion. Rather, it must show Ivy "expected and intended" Wayne to molest M.S. separate from the alleged negligent intent. Ivy's guilty plea to "knowingly and intentionally" placing M.S. in a situation that endangered M.S.'s life or health only begs the same question: did Ivy expect or

intend M.S. would be injured? As Frankenmuth indicates, Ivy's crime, and the injury to which she admits, is "exposure to the risk of molestation," not the molestation itself.

There is no evidence that the Likens intended to harm M.S. so, no "intended" result is established. Did Ivy "expect" Wayne to injure M.S.? There is no evidence that Ivy was "practically certain" that Wayne would act as he did, rather the record clearly shows the opposite: Ivy believed no harm would occur. Whether Ivy should have believed otherwise is an issue of negligence in the separate damage action. Since there is no "expected or intended" harm, the policy exclusion does not apply.

Conclusion

There is no evidence showing "business pursuits" or "child care" exclusion under the policy. In addition, the Likens did not "expect" or "intend" the harm Wayne inflicted on M.S. Therefore, the policy provides coverage to the Likens for M.S. injuries

Order

Declaratory judgment entered finding the State Farm policy provides coverage to the Likens for injuries of M.S. as an "accident."

Dated this 6th day of October 2005.

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David J. Dreyer, Judge