SHORT FORM ORDER **INDEX NO. 020461/2006**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

FRED S. KANTROW &
MARLENE R. KANTROW

Plaintiff(s),

-against-

SECURITY MUTUAL INSURANCE COMPANY

Defendant(s).

ORIG. RETURN DATE: February 9, 2007
MTN. SEQ. #: 001-CASEDISP

PLTF'S ATTORNEY:
GARY P. FIELD, ESQ.
425 NEW YORK AVE, STE 204
HUNTINGTON, NY 11743

DEFT'S ATTORNEY:
WILLIAMSON, CLUNE & STEVENS, ESQS.
317 N. TIOGA STREET
ITHACA, NEW YORK 14851

Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion and supporting papers 1 - 6 : Affirmation in opposition 7 - 10 ; Reply affidavit and supporting papers 11 - 13 ; it is,

ORDERED that the motion (001) by the defendant for summary judgment is granted and the complaint is dismissed in its entirety.

This is an action by the plaintiffs for a judgment declaring that a disclaimer by their insurance company of coverage in a related action (*Maher v Kantrow,* Supreme Court, Suffolk County, Index No. 18874/05) was improper and that the defendant/insurer is obligated to defend and indemnify the insureds in the related action.

The parties to the instant action agree that there are no facts in dispute. The facts are as follows:

The underlying action (Index No. 18874/05) arises out of an incident where a 14-year-old girl was in the home of these plaintiffs (the Kantrow's) and was allegedly sexually assaulted by the Kantrow's minor son. The plaintiffs in the underlying action are the minor child by her mother and the mother individually; the defendants are the Kantrow parents. The Kantrow's son is not a named party to the action. The complaint in the underlying action has two causes of action. The first cause of action alleges injuries suffered by the minor child due to her being "physically detained and sexually assaulted" by the Kantrow's son and that said injuries were the result of the Kantrow's negligent supervision of their son. The second cause of action seeks derivative relief on behalf of the minor child's mother.

The Kantrow's had a homeowners policy in effect at the time of the alleged incident from the defendant in the instant action, Security Mutual Insurance Company (hereinafter Security). Security was provided with copies of the summons and complaint in the underlying action and issued a timely disclaimer based upon its reliance on the terms of the applicable policy which, according to Security, excluded the alleged sexual assault as an "occurrence" for which coverage is provided and, moreover, the Kantrow's son is within the policy definition of an "insured" and there is a further exclusion of coverage for child abuse and sexual abuse by the "insured."

In support of this motion for summary judgment, Security submits a copy of the policy and points to several specific provisions, to wit:

> ***"Coverage L-Personal Liability***
> ***We*** pay, up to ***our*** limit of liability, all sums for which any ***insured*** is legally liable because of ***bodily injury*** or ***property damage*** caused by an ***occurrence*** to which this coverage applies" (Policy, Form ML-9, Ed.1/87, page L-1).

An "occurrence" is defined as: "an accident, including continuous or repeated exposure to substantially similar conditions" (Policy, Form ML-20, Ed.1/87, page 2, subparagraph 7.b.10).

An "***Insured*** means ***you*** and . . . any other person under the age of 21 in ***your*** care or in the care of ***your*** resident relatives" (Policy, Form ML-20, Ed.1/87, page 1, subparagraph 6.a).

Also,

> "This policy does not apply to liability:
> * * *
> m. arising directly or indirectly out of instances, occurrences or allegations of child abuse;
> n. arising directly or indirectly out of instances, occurrences or allegations of sexual abuse of any person; [and]
>
> * * *
> ***Exclusions m, n*** ...shall be applicable whether the excluded claims are made directly or are made indirectly or derivatively as claims sounding in negligence or breach of contract"

(Policy, Form ML-9, Ed.1/87, page L-3, EXCLUSIONS, paragraph 1).

Security argues, in light of the above, that the allegations in the underlying complaint cannot be described as an "accident" since allegations of sexual abuse are comprised of intentional and not accidental conduct and, thus, there is no "occurrence" here which would be covered under the policy. In addition, as defined, the Kantrow's minor son is clearly an "insured" under the terms of the policy.

Moreover, Security submits that since the allegations arise directly out of the alleged sexual assault and were the direct consequence of the alleged sexual abuse, the exclusion provisions cited above expressly apply thus precluding coverage for the allegations in the underlying action.

In support of these contentions, Security notes that it is well settled in New York that where insurance policies are clear and unambiguous, they should be given their plain and ordinary meaning (*see* ***Sanabria v Am. Home. Assur. Co.,*** 68 NY2d 866, 508 NYS2d 416 [1986]) and Security submits that the exclusionary language contained in this policy clearly and unambiguously excludes from coverage conduct based upon such allegations, to wit; allegations of child abuse or sexual abuse, whether direct, indirect, or derivative and even if couched in terms of negligence (*see* ***Allsate Ins. Co. v Mugavero,*** 79 NY2d 153, 581 NYS2d 142, [1992).

In addition, Security brings the court's attention to the public policy considerations behind such an exclusion as expressed by the New York State Court of Appeals:

> "We believe, moreover, that the ordinary person would be startled, to say the least, by the notion that [an insured] should receive insurance protection for sexually molesting . . . children, and thus, in effect, be permitted to transfer the responsibility for his deeds onto the shoulders of other homeowners in the form of higher premiums [citations omitted]" (***Allsate Ins. Co. v Mugavero,*** 79 NY2d 153, 161, 581 NYS2d 142, 146 [1992]).

The Kantrow's argue in opposition to this motion for summary judgment, inter alia, that Security "misperceives and mischaracterizes the basis of the underlying negligence action." They suggest that the underlying action sounds in negligent supervision, not sexual assault or abuse, even though the complaint in the underlying action clearly refers to the minor child's injuries being due to her being "physically detained and sexually assaulted." Thus, according to the Kantrow's, the court should focus on the allegations of negligent supervision by the Kantrow's and not the alleged sexual assault by the Kantrow's minor son.

The Kantrow's also urge reliance upon the recent Court of Appeals case, ***Automobile Ins. Co. v Cook*** (7 NY3d 131, 818 NYS2d 176 [2006]), in which insurance coverage was upheld for a homeowner who killed a home intruder in self-defense (and was acquitted of all criminal charges).

The court rejects the analysis of the Kantrow's. The essence of the underlying action is the sexual assault and characterizing it as one to recover damages for negligence would be exalting form over substance (*see* ***Allstate Ins. Co. v Schimmel,*** 22 AD3d 616, 802 NYS2d 510 [2d Dept 2005]). The injuries allegedly suffered in the underlying action were inherently the result of the alleged conduct by the Kantrow's minor son, that is, the sexual assault, and cannot, therefore, be construed as an accident within the policy's definition of "occurrence" (***Id.***). Nor, when reviewing the facts as pleaded in the underlying action, can it be said that there is any support for the injuries being due to negligent supervision rather than to child abuse,

sexual abuse or sexual assault thus failing to support a basis for recovery based upon negligence rather than the sexual assault (*see* ***Allstate Ins. Co. v Mugavero,*** *supra).*

Specifically, reliance upon the ***Cook*** case is misplaced and reliance upon the ***Mugavero*** case is still appropriate, notwithstanding the ***Cook*** decision, because the focus of the complaint in the underlying action is the sexual assault allegation which, if proven, can only be an intentional act which, unlike the lawful defense of one's person and home in the ***Cook*** case, is not a justifiable act as a matter of law, nor can it be termed accidental or unintentional.

Indeed, even the Court of Appeals in ***Cook*** distinguished it from the ***Mugavero*** case - where the disclaimer was upheld - because the sexual allegations in ***Mugavero***, as here, were of the kind that "cast the pleadings solely and entirely within the policy exclusions and . . . are subject to no other interpretation" (***Automobile Ins. Co. v Cook,*** 7 NY3d 131, 137, 818 NYS2d 176, 180 [2006][citing ***Allsate Ins. Co. v Mugavero***, *supra*, at 159, 145]).

Accordingly, Security has demonstrated as a matter of law that the applicable policy exclusions preclude coverage for the allegations contained in the underlying action (*see* ***Allstate Ins. Co. v Schimmel***, *supra*) and, thus, the complaint seeking a declaratory judgment that Security improperly disclaimed coverage and is obligated to defend and indemnify the Kantrow's in the underlying action is dismissed and the relief denied.

The court also notes that, in any event, a cause of action for parental negligent supervision is not recognized in New York (*see* ***Holodook v Spencer,*** 36 NY2d 35, 364 NYS2d 859 [1974]) unless it can be shown that the parent's conduct created a particular danger to third persons that was plainly foreseeable (*see* ***Rios v Smith,*** 95 NY2d 647, 652, 722 NYS2d 220, 224 [2001]). Here, in the context of the submissions on this motion and without prejudice to the issues before the court in the underlying action, the court notes that there are no factual allegations to support an allegation that the parent's conduct created the danger of the alleged sexual misconduct.

This decision constitutes the order of the court.

Dated: March 13, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.