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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

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FABRICE LaFLEUR, an infant under the age of 18 years, by his father and natural guardian, JOE K. LaFLEUR

Petitioners,

- against -

OTSEGO MUTUAL FIRE INSURANCE COMPANY,

Respondent.

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TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 14997/09
Motion Seq. Nos.: 01, 02
Motion Dates: 08/27/09
08/27/09
**XXX**

**The following papers have been read on these motions:**

| | Papers Numbered |
|---|---|
| Order to Show Cause, Affirmation, Affidavit and Exhibits | 1 |
| Notice of Cross Motion, Verified Answer, Affirmation and Exhibits | 2 |
| Affirmation in Opposition to Cross Motion and In Support of Order to Show Cause and Exhibits | 3 |
| Reply | 4 |

Upon the foregoing papers, it is ordered that the motions are decided as follows:

In Motion Sequence Number 01, the attorneys for the petitioners seek a judgment directing respondent Otsego Mutual Fire Insurance Company (Otsego) to defend Fabrice LaFleur, an infant under the age of 18 years, by his father and natural guardian, Joe K. LaFleur, in the Nassau County Supreme Court Action bearing Index No. 013414/08 and entitled: *Dario Pellegrino, an infant under the age of 18 years by his father and natural guardian Francis A. Pellegrino, and Francis A. Pellegrino, individually, Plaintiffs; against Diocese of Rockville Centre, St. Dominic Roman Catholic Church, St. Dominic High School, Fabrice*

*LaFleur, an infant under the age of 18 years, by his father and natural guardian, Joe K. LaFleur, Philip O. Izevbehai, an infant under the age of 18 years, by his father and natural guardian, Philip H. Izevbehai, Justin Toussaint, an infant under the age of 18 years, by his guardian, Bridgette L. Carter, George Beamon, an infant under the age of 18 years, by his mother and natural guardian, Deborah L. Beamon, and Jareid Bryan, an infant under the age of 18 years by his mother and natural guardian Paulette Bryan, Defendants* (hereinafter referred to as the "underlying action").

In respondent's Cross Motion, Motion Sequence Number 02, the attorneys for the respondent Otsego Mutual Fire Insurance Company ("Otsego") seek a judgment that Otsego has no obligation to provide the petioners with legal representation in the underlying action.

The parties entered into a stipulation consenting to the jurisdiction of this Court and converting the putative special proceeding into a Declaratory Judgment Action. The petition shall be deemed a complaint, and the answer to petition, an answer to the complaint. For the sake of clarity, the Pelligrino infant shall be referred to as the "infant plaintiff" and the LaFleur infant shall be referred to as the "infant defendant."

In the underlying action, the infant plaintiff alleges that while attending a basketball game he was accosted in the boys' locker room of St. Dominic's High School by five boys. He asserts the infant defendant was one of the five boys. In the underlying lawsuit, he sued the Diocese, the parish and the school for negligence. He also set forth causes of action against the five boys for assault, battery, unlawful imprisonment and negligence.

The second cause of action sounding in negligence against the infant defendant and the four infant co-defendants alleges that:

> "Upon entering the boys' locker room, the infant plaintiff was grabbed, forced to the ground and held down by one or more of the individual infant defendants who were students enrolled at St. Dominic High School. (par. 36)
> .....the infant defendants negligently, recklessly and carelessly caused the infant plaintiff to suffer injuries. (par. 47)
> As a result of the negligence of the infant defendants, the infant plaintiff suffered serious psychological and other injuries. (par. 48)"

The contract of insurance defines an "occurrence" in form ML-20, under the section entitled POLICY DEFINITIONS, item #10 on page 2 as "an accident....." Pursuant to form ML-9, Coverage L, page L-1, respondent Otsego will "pay up to our limit of liability, all sums for which any insured is legally liable because of bodily injury.... caused by an occurrence to which this coverage applies." As a result of its investigation, respondent Otsego concluded that there had not been an "occurrence." By letter dated September 29, 2008, respondent Otsego declined to provide insurance coverage for this incident or claim stating there was no occurrence to which coverage might attach.

Moreover, respondent Otsego argued that pursuant to the contract of insurance, and in particular, form ML-9 EXCLUSIONS, paragraph #1(b), the policy does not apply to liability "caused intentionally by or at the direction of any insured." Respondent Otsego further concluded that even if the incident complained of were to be considered an occurrence, that pursuant to the terms, conditions and exclusions contained in the insurance contract, the incident would be excluded from coverage because it was an intentional act. Form ML-84, the exclusion found at EXCLUSIONS, paragraph #1(o) was amended to read that "the policy does not apply to liability arising directly or indirectly out of instances, occurrences or allegations of criminal activity by the insured...." Petitioners provided respondent Otsego documentation regarding a

Family Court matter where the infant defendant appeared in Family Court to answer charges asserting that he "be adjudged a juvenile delinquent" as a result of the underlying incident in the locker room.

According to the incident report made by a witness and the infant plaintiff, the infant defendant began turning the lights on and off in the locker room while the other boys grabbed the infant plaintiff. (Police Department Supporting Depositions, Exhibit B, Answer to Petition); Annexed to the Order to Show Cause (Exhibit I) is a Notice of Disposition or Termination of Proceeding for the infant petitioner stating there was an adjournment in contemplation of dismissal. The underlying charges were "Unlawful Imprisonment" and "Act in Manner to Injure Child Less than 17." The disposition of all charges was "Without Admission."

Petitioners argue that the complaint "clearly alleges negligence, which can easily be established as an "occurrence," "accident" or "unintentional act" for which coverage should be provided." The attorneys for petitioners rely on *Automobile Insurance Co. of Hartford v. Cook* 7 N.Y.3d 131, 818 N.Y.S.2d 176 (2006) wherein the Court of Appeals stated:

> It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is "exceedingly broad" and an insurer will be called upon to provide a defense whenever the allegations of the complaint "suggest....a reasonable possibility of coverage" (*Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 648, 609 N.E.2d 506, 593 N.Y.S.2d 966 [1993]). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*Ruder & Finn v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670, 422 N.E.2d 518, 439 N.Y.S.2d 858 [1981]).
> The duty remains "even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 63, 575 N.E.2d 90, 571, NYS2d 672 [1991]). For this reason, when a policy represents that it will provide the insured with a defense, we have said that it actually constitutes "litigation insurance" in addition to liability coverage (see *Seaboard Sur. Co.*

> *v Gillette Co.*, 64 N.Y.2d 304, 310, 476 N.E.2d 272, 486 N.Y.S.2d 873 [1984] quoting *International Paper Co. v. Continental Cas. Co.*, 35 N.Y.2d 322, 326, 320 N.E.2d 619, 361 N.Y.S.2d 873 [1974]). Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.
> When an insurer seeks to disclaim coverage on the further basis of an exclusion, as it does here, the insurer will be required to "provide a defense unless it can 'demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and further, that the allegations, *in toto,* are subject to no other interpretation' *"Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 159, 589 N.E.2d 365, 581 N.Y.S.2d 142 [1992] [citation omitted]). In addition, exclusions are subject to strict construction and must be read narrowly (see *Seaboard*, 64 N.Y.2d at 311).

The attorneys for petitioners contend that the sole act of participation that the supporting depositions of the infant plaintiff have petitioner doing is allegedly "switching the lights on and off." Petitioners' attorneys further assert that turning the switch on and off would eliminate both the battery and assault claims and since it did not include any type of force or prevention by the infant defendant for the infant plaintiff to freely leave, the false imprisonment action is discredited as to the infant defendant. Petitioners' attorneys then argue that by eliminating the intentional torts of assault, battery and false imprisonment, the negligence claim stands independently of these intentional torts and coverage is triggered. *See* Mesidor Reply Affirmation to Motion and Opposition to Cross-Motion dated September 3, 2009, pg. 8, par. 15. In short, petitioners' attorneys argue that by removing the assault, battery and false imprisonment causes of action, there is left only a cause of action alleging negligence which may be found to be the accidental actions of the infant defendant in participating in the incident.

> Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonable prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing

> to do an act that a reasonably prudent person would have done under the same circumstances. (PJI 2:10)

Attorneys for respondent argue that couching the claim in terms of negligence cannot overcome the clear and unambiguous exclusion. *See Eisenberg v. Anavil*, 50 A.D.3d 731, 855 N.Y.S.2d 236 (2d Dept. 2008); *Utica First Ins. Co. v. Star-Brite Painting & Paperhanging*, 36 A.D.3d 794, 828 N.Y.S.2d 488 (2d Dept. 2007). Respondent Otsego asserts that the injury sued upon is based on an assault, or battery or false imprisonment without which the infant plaintiff would have no independent cause of action in the underlying lawsuit for negligence. *See U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 N.Y.2d 821 (1994).

In support of respondent Otsego's position is the argument that at times the resultant harm is deemed "inherent in the nature of the wrongful act, regardless of the actor's expressed intent." *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153 (1992). In other words, under certain circumstances "cause and effect cannot be separated; that to do the act is necessarily to do the harm which is its consequence ; and that since unquestionably the act is intended so also is the harm." *Allstate Ins. Co. v. Mugavero, supra* at 160.

The critical question is whether the harm that resulted could have been other than harm "intentionally caused." *Allstate Co. v. Mugavero, supra.* In *Slayko v. Security Mut. Ins. Co.*, 98 N.Y.2d 289 (2002), the Court qualified that standard, explaining that "conduct, though reckless (that) was not inherently harmful" did not fall within the exclusion. The Court further noted that "[t]he general rule remains that 'more than a casual connection between the intentional act and the resultant harm is required to prove that the harm was intended" *Id.*, quoting *Allstate Ins. Co v. Mugavero.*, 79 N.Y.2d at 160.

No doubt were the infant plaintiff to prevail on either the assault or battery, or false

imprisonment causes of action as to the infant defendant, the insurer would not be required to pay under the policy. On the other hand, should all of the infant plaintiff 's intentional causes of action as to the infant defendant be dismissed there would remain the cause of action sounding in negligence.

Recognizing the erudite and comprehensive arguments made by learned counsel for all parties in presenting the facts and issues in a light most favorable to their respective clients, this Court is constrained to grant a declaratory judgment against the respondent insurer, and in favor of the petitioners ordering the carrier to provide the petitioners with legal representation in the underlying action under Nassau County Index No. 013414/08. The application for respondent Otsego for a declaratory judgment that it does not have to defend in the underlying action is denied.

The Court rejects the arguments made by respondent Otsego that notice to the insurer was not timely and those made by petitioners that the disclaimer was not timely.

The Court recognizes that where the insurance policy does not contemplate coverage in the first instance, requiring the payment of a claim upon failure to timely disclaim would impermissibly create coverage where it never existed, which is not the case in the within action. *See Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 712 N.Y.S.2d 433 (2000).

Any requested relief not specifically granted is denied.

This constitutes the Decision and Order of this Court and terminates all proceedings under Index No. 14997/09.

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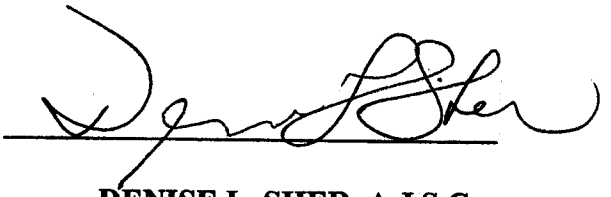

**DENISE L. SHER, A.J.S.C.**

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Dated: Mineola, New York
February 19, 2010