**[Cite as *Cincinnati Ins. Co. v. Oblates of St. Francis de Sales, Inc.*, 2010-Ohio-4382.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Cincinnati Insurance Company

Appellee

v.

Oblates of St. Francis de Sales, Inc., et al.

Defendants

[The Archdiocese of Oklahoma City-Appellant]

Court of Appeals No. L-09-1146

Trial Court No. CI00-3242

**DECISION AND JUDGMENT**

Decided: September 17, 2010

* * * * *

Richard M. Garner, Beverly Adams, and Constance A. Snyder, for appellee.

Christine E. Mayle, for appellant.

* * * * *

HANDWORK, J.

**{¶ 1}** This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas, filed on April 28, 2009,[1] which granted summary

[1]The trial court's decision was journalized on May 1, 2009.

judgment in favor of appellee, Cincinnati Insurance Company ("CIC"), against appellant, the Archdiocese of Oklahoma City ("Archdiocese"), and denied the Archdiocese's motion for summary judgment.

**{¶ 2}** On July 7, 2000, CIC filed a complaint seeking declaratory judgment regarding its obligations to defend or indemnify the Oblates of St. Francis de Sales, Inc. ("Oblates") pursuant to two commercial umbrella liability insurance policies the Oblates had with CIC from January 1, 1994, through January 1, 1997, and from January 1, 1997, through January 1, 2000.[2] The issue of coverage arose as a result of a claim filed by a minor victim and his parents ("the claimants"), who alleged that the victim had been sexually abused by James Francis Rapp, a priest of the Oblates and employee of the Archdiocese, between approximately 1993 and 1997, while Rapp was assigned by the Oblates to serve as pastor of Assumption Parish in Duncan, Oklahoma ("Assumption"). The complainants asserted that the Oblates negligently failed to supervise Rapp and disclose Rapp's history of pedophilia to the parish members.

**{¶ 3}** Because the Oblates' primary insurer, the Transcontinental and Continental Insurance Companies ("CNA"),[3] and CIC both denied coverage, the Archdiocese lent the Oblates $5,000,000 to settle with the claimants. On or about May 5, 2003, CNA paid

---

[2]CIC's policies each had a $4,000,000 per occurrence and $4,000,000 aggregate limit of liability.

[3]CNA's limit of liability was $1,000,000 for each occurrence, with a $2,000,000 general aggregate limit.

$1,000,000 in coverage as full settlement of its single occurrence limit of liability. CNA's payment extinguished the Oblates primary insurance coverage, thereby allowing the Oblates to pursue coverage from CIC pursuant to its excess umbrella coverage.

**{¶ 4}** In 2004, the Oblates assigned its rights under its insurance policies to the Archdiocese. The Oblates were dismissed from this action and CIC and the Archdiocese filed cross-motions for summary judgment. In determining CIC's declaratory judgment action, the trial court held that CIC had no duty to indemnify the Archdiocese with respect to the settlement amount paid to the claimants because the Oblates conduct was expected, and therefore not an occurrence pursuant to the policy, and the policy excluded coverage for "claims arising out of the sexual or physical abuse or molestation of any person."

**{¶ 5}** The Archdiocese timely appealed the decision of the trial court. The only issue on appeal is CIC's duty to indemnify the Archdiocese pursuant to the January 1, 1994, through January 1, 1997, policy. On appeal, the following assignments of error are raised:

**{¶ 6}** 1. "The trial court erred when it concluded that the Oblates' negligence was not an 'occurrence' under the CIC policy and, therefore, the trial court erred when it granted summary judgment to CIC on this basis."

**{¶ 7}** 2. "The trial court erred when it concluded that coverage for negligence claims is excluded by the 'abuse to persons in the insured's care' exclusion of the CIC

policy and, therefore, the trial court erred when it granted summary judgment to CIC on this basis."

**{¶ 8}** 3. "The trial court erred when it denied the Archdiocese's Motion for Summary Judgment."

**{¶ 9}** This court notes at the outset that in reviewing a motion for summary judgment, we must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

**{¶ 10}** The Archdiocese argues in its first assignment of error that the trial court erred in finding that the Oblates' negligence was not an "occurrence" under CIC's policy. Specifically, the Archdiocese argues that the Oblates' hiring of Rapp, lack of supervision, and failure to warn the parishioners at Assumption regarding Rapp's history of ephebophiliac behavior were merely negligent acts and that the Oblates did not "expect" or "intend" Rapp to molest more boys. As such, the Archdiocese argues that the Oblates' negligent actions, which allowed Rapp to have access to his victim, were "occurrences" under CIC's policy and coverage should be provided.

**{¶ 11}** CIC's policy states that it will pay "on behalf of the Insured the ultimate net loss for occurrences during the policy period in excess of the underlying insurance * * *."

An "occurrence" is defined by the policy as "an accident, or a happening or event, or a continuous or repeated exposure to conditions which occurs during the policy period which unexpectedly or unintentionally results in personal injury * * *."

**{¶ 12}** "In order to avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expected or intended." *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, syllabus. For example, an intentional injury exclusion "'will not apply if the insured intentionally does an act, but has no intent to commit harm, even if the act involves the foreseeable consequences of great harm or even amounts to gross or culpable negligence.'" Id. citing *Allstate Ins. Co. v. Steinemer* (C.A.11, 1984), 723 F.2d 873, 875. Likewise, "'the resulting injury which ensues from the volitional act of an insured is still an "accident" within the meaning of an insurance policy if the insured does not specifically intend to cause the resulting harm or *is not substantially certain that such harm will occur*.'" (Emphasis added.) Id. citing *Quincy Mut. Fire Ins. Co. v. Abernathy* (1984), 393 Mass. 81, 84, 469 N.E.2d 797, 799.

**{¶ 13}** Thus, in order for the Archdiocese to be indemnified for the damages it paid to the claimants, the happenings or events that caused the claimants' injuries must have been caused by continuous or repeated exposure to conditions which were not *expected* or *intended* by the Oblates to cause such injuries. The trial court held that the Oblates "expected," i.e. knew that Rapp was substantially certain to molest more boys if

Rapp was allowed to remain in contact with adolescent boys without appropriate supervision. Because the injuries suffered by the claimants were expected by the Oblates, the trial court found that the Oblates' actions were not "occurrences" and, therefore, were not covered by CIC's policy.

**{¶ 14}** According to Rapp's personnel file and evidence submitted to the trial court, Rapp was accused in 1969 of sexual misconduct toward male students while teaching at a boy's high school in Salt Lake City, Utah. Rapp admitted to these accusations and underwent psychiatric evaluation. Thereafter, Rapp took an extended leave of absence from the Oblates in the 1970's. In 1978, he returned to the Oblates and again was assigned to teach boys at high schools in New York and Michigan. In 1984, he was accused of sexually molesting a 15-year-old male student in Michigan. Again, Rapp admitted to the allegations and underwent additional psychiatric counseling.

**{¶ 15}** On October 17, 1986, St. Luke's Institute ("St. Luke's") evaluated Rapp and informed the Oblates that Rapp's history of sexual contact with youngsters spanned slightly less than 20 years, with the most recent contact being six months prior to St. Luke's evaluation. The evaluation stated, "It is clear from Father Rapp's history that his ephebophiliac behavior extends over many years with a number of contacts * * *. Given the severity of his problem, it is unlikely that any progress could be made other than in an intensive comprehensive setting. These sexual disorders are apparently not curable but manageable, much the way alcoholism is an [incurable] but manageable condition. * * *

In any case, it is important that Father Rapp not be in the presence of youth without another responsible adult there." Thereafter, in October 1986, Rapp was sent to the House of Affirmation ("Affirmation") in Montara, California for in-patient therapy.

**{¶ 16}** Upon the closing of Affirmation in June 1987, Rapp concluded his in-patient therapy and was assigned to a church in Illinois. While Rapp's treatment at Affirmation was considered "very successful," and it was thought that Rapp should be able "to function well in pastoral ministry," the director of Affirmation noted that "[a]s was always the case, some sort of ongoing counseling was certainly recommended."

**{¶ 17}** There was no allegation of sexual misconduct in Illinois, but, in 1990, Rapp was reassigned to Assumption. The assignment was made without any warning to the church regarding Rapp's extended history of repeated ephebophiliac behavior, the fact that his condition was incurable, but manageable, that he needed to maintain ongoing counseling for his sexual deviance, or that it was important that he not be in the presence of youth without another responsible adult there. Assumption had no restrictions in place for Rapp and no counseling was undertaken.

**{¶ 18}** On March 30, 1994, the Oblates received notice that Rapp was accused of molesting a Michigan boy in 1984. The Oblates' Provincial in 1994 examined Rapp's personnel file, which contained information concerning his past misconduct and misgivings people had about him; however, because the allegations brought forth in 1994 concerned incidents prior to Rapp's in-patient therapy in 1986, the Provincial did not

inform the Archdiocese or the other Oblate pastors at Assumption regarding Rapp's history or diagnosis.

**{¶ 19}** On April 17, 1994, the Oblates notified the Archdiocese of the Michigan allegations against Rapp. The Archdiocese responded that since it had never been informed of Rapp's ephebophiliac predation, it had "not supervised his ministry or provided him with any special guidance" for "three years." For Rapp to continue at Assumption, the Archdiocese stated, in part, that Rapp's personnel file and evaluations from St. Luke's and Affirmation needed to be produced. The Oblates' Provincial requested that Rapp seek counseling; however, there is no record of any counseling occurring. Nevertheless, Rapp remained at Assumption until his arrest in 1999.

**{¶ 20}** The Archdiocese argues that no harm was intended. We note, however, that an insured's denial of an intention to harm anyone is "only relevant where the intentional act at issue is not substantially certain to result in injury." *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 39. Based upon the Oblates' knowledge of Rapp's history and his need for supervision and ongoing treatment, the Oblates decision to give Rapp unfettered access to Assumption's parishioners, without warning, was substantially certain to result in additional incidents of sexual molestation of boys. Accordingly, we find that the Oblates' actions did not cause accidental injury to Rapp's victim. Rather, the injury to Rapp's victim was expected, i.e., substantially certain to

occur, and, therefore, the Oblates' actions were not "occurrences" pursuant to CIC's policy.[4]

**{¶ 21}** We recognize that in *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 393, the Ohio Supreme Court held that allegations of negligent hiring related to sexual molestation could constitute a policy "occurrence," and therefore afford coverage. Relying on *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.* (W.D.Ark.1994), 842 F.Supp. 1151, 1158, affirmed (C.A.8, 1994), 33 F.3d 1476, the Ohio Supreme Court in *Shaffer* held that a ruling that the Diocese expected or intended the injuries sustained by a mentally retarded man who was molested while in a residential facility operated by a religious order of the Roman Catholic Church, known as the Little Brothers of the Good Shepherd, would be "a tortured interpretation of the facts" and "an inherently illogical interpretation." We, however, find that, unlike the facts in this case, the facts in *Shaffer* and *Silverball* do not demonstrate that the molester in either case had any history of sexual abuse or that the respective employers knew of the molesters' potential propensities toward sexual abuse. As such, we find that these cases are distinguishable on their facts.

[4]Accord *Diocese of Winona v. Interstate Fire & Cas. Co.* (C.A.8, 1996), 89 F.3d 1386, 1394, where court found that knowledge of priest's sexual abuse of boys, failed treatment attempts, and lack of warning or supervision when priest transferred to new church demonstrated "overwhelming evidence that the Diocese knew or should have known that [the priest's] continued sexual abuse was highly likely to reoccur."

**{¶ 22}** Additionally, based on the facts presented in this case, we find that a conclusion that the Oblates were substantially certain that Rapp would continue to sexually assault boys in his care, if he was unsupervised and not undergoing continued therapy for his incurable condition, is not a tortured interpretation of the facts or inherently illogical. As such, we find that the actions of the Oblates were not "occurrences" pursuant to CIC's policy and, therefore, the Archdiocese is not entitled to indemnification from CIC for the damages paid to the claimants. Accordingly, the Archdiocese's first assignment of error is found not well-taken.

**{¶ 23}** The Archdiocese argues in its second assignment of error that the trial court erred in finding that coverage for negligence claims is excluded by the "abuse to persons in the insured's care" exclusion of CIC's policy. Based upon the authority of *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, paragraph two of the syllabus, we find the Archdiocese's second assignment of error well-taken. However, based upon our ruling with respect to the first assignment of error, we nevertheless find that CIC is entitled to judgment as a matter of law.

**{¶ 24}** The Archdiocese argues in its third assignment of error that the trial court erred by denying the Archdiocese's motion for summary judgment. Again, however, based upon our ruling with respect to the first assignment of error, we find that CIC was entitled to judgment as a matter of law and that the trial court correctly denied the

Archdiocese's motion. The Archdiocese's third assignment of error is therefore found not well-taken.

**{¶ 25}** On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. The Archdiocese is ordered to pay the costs of this appeal pursuant to App. R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE