STATE OF VERMONT

SUPERIOR COURT **Windsor Unit**	**CIVIL DIVISION** **Docket No. 460-9-04 Wrcv**

Scott Mann, Nathan LaBrecque, **Plaintiffs.** **v.** **Adventure Quest, Inc., Peter Drutchal,** **Defendants.**	

Decision and Order on Plaintiff Scott Mann's Motion to Reconsider

Introduction

Plaintiffs sue Defendants for sexual abuse. Peter Drutchal, who was a founder and instructor at Adventure Quest, committed the alleged acts of sexual abuse on Scott Mann and Nathan LaBrecque. Adventure Quest's insurer, Virginia Surety Company, Inc., intervened on behalf of Adventure Quest. The case has been tried, reversed by the Vermont Supreme Court, and received multiple decisions on motions for summary judgment. On March 3, 2014, the Court ruled on Virginia Surety's renewed motion for partial summary judgment and Mann's cross-motion for summary judgment. The Court granted in part and denied in part Virginia Surety's motion and denied Mann's motion. On March 12, 2014, Mann filed a motion to reconsider on the insurance defense-waiver rule and the scope of coverage under the endorsement.

The dispute relates to which acts committed by Drutchal are covered by Virginia Surety. Adventure Quest had policies with Virginia Surety between 1994 and 1996. During that time, Drutchal committed one act of potential sexual abuse sticking his hand in Mann's sleeping bag and one act that also may have been sexual abuse by manually stimulating Mann.[1] Other acts of potential abuse occurred when Drutchal and Mann engaged in a sexual relationship in 1999–2001. The parties dispute whether the damages from the abuse that occurred in 1999–2001 are part of the same occurrence that started in the mid-1990s.

Much of this confusion relates back to the first jury trial where the parties objected to the Court providing a special verdict form that would have required the jury to specify which acts Drutchal committed, when those acts occurred, and whether each act constituted sexual abuse under the policy. Mann claimed he was subject to an act of manual stimulation in March 1995. The jury did not specify whether they determined this act occurred or whether it was sexual abuse. The same is true with respect to the placing of his hand inside the sleeping bag. This

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[1] The Court refers to the act in March 1995 as an act of manual stimulation. Mann masturbated in the presence of Drutchal. During the masturbation, Drutchal placed his hand on Mann's hand to assist in the stimulation. Drutchal did not place his hand directly on Mann's penis.

The endorsement provides coverage for other types of specified sexual misconduct. For ease of reference, the Court encompasses them all within the term sexual assault for purposes of this decision.

threshold determination is important because Mann must first prove an act of sexual abuse during a policy period before he can use the additional acts of abuse that are alleged to have occurred in 1999–2001 to prove his damages under the endorsement. If the March 1995 act of manual stimulation occurred and was sexual abuse, then the 1999–2001 acts and the March 1995 act are a single occurrence by virtue of the wording of the endorsement

The Court concludes the March 3, 2014 was unduly restrictive on what events may be used to prove Mann's damages. The Court correctly concluded that Mann may not use acts of grooming to prove damages because grooming is not a covered act. However, the Court did not address whether the acts of alleged sexual abuse that occurred in 1999–2001 may be used to prove damages, as those had previously been addressed in the earlier order by Judge DiMauro. The Court also did not address Mann's arguments about the insurance defense waiver-rule. The Court grants Mann's motion for reconsideration and clarifies the March 3, 2014 order.

The Insurance Defense-Waiver Rule

The Court first addresses Mann's claim that Virginia Surety may not assert a defense of lack of coverage because it failed to do so at its initial denial of coverage. According to Mann, Virginia Surety initially denied coverage on his claims against Adventure Quest for three reasons: the policy was obtained through a material misrepresentation; the abuse did not constitute an occurrence because it was intentional; and, Adventure Quest failed to notify Virginia Surety of Adventure Quest becoming a school. Virginia Surety later argued it was not responsible for damages based on Drutchal's sexual abuse of Mann that occurred in 1999 through 2001 because those acts fell outside the term of the policy. Mann asserts the defense-waiver rule prohibits Virginia Surety from raising this new defense to coverage.

Virginia Surety claims it lacked knowledge of Mann's desire to include the 1999–2001 acts in his claim until 2010. Virginia Surety argues the defense-waiver rule requires a knowing waiver of rights. A knowing waiver can only occur for claims of which the insurer has knowledge. Virginia Surety's attorney attached an affidavit stating he did not know of Mann's expanded claims until years into the litigation.

The defense-waiver rule limits the ability of an insurer to raise additional defenses after it lists its defenses in an initial denial. *See Cummings v. Conn. Gen. Life Ins. Co.*, 102 Vt. 351, 360 (1930). Waiver can occur explicitly or implicitly. *See id.* The purpose of the rule is to require insurance companies to deal with candor and frankness with their customers. *See id.* at 361; *see also Hamlin v. Mut. Life Ins. Co.*, 145 Vt. 264, 268 (1984) (discussing context in applying the insurance defense-waiver rule).

The defense-waiver rule contains limits. An "insurer cannot be held to have waived a defense to a claim of which it was ignorant at the time of sending the letter." *Segalla v. U.S. Fire Ins. Co.*, 135 Vt. 185, 190 (1977). Further, when a claimant tenders a claim that obscures the basis for the claim, the insurance company does not waive defenses to aspects of the claim that are unclear. *See Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, 2004 VT 124, ¶ 18, 177 Vt. 421. A waiver cannot extend coverage when none exists. *See Sperling v. Allstate Indem. Co.*, 2007 VT 126, ¶ 25, 182 Vt. 521.

The context of cases invoking the defense-waiver is also helpful for understanding its application. *See Am. Fid. Co. v. Kerr*, 138 Vt. 359, 362–63 (1980). Cases invoking the defense waiver rule typically involve an insured seeking coverage from an insurer. *See id.* When an insurer controls the defense of a claim brought against the insured, the insurer cannot then raise additional defenses against the insured. *Id.* An exception exists where the insurer agrees to defend the insured, but the insurer reserves its rights to assert defenses against the insured in a separate action. *See Hardwick*, 2004 VT 124, ¶ 18.

In this case, Virginia Surety did not waive its rights to assert the defense of no coverage for the acts committed by Drutchal in 1999–2001. Virginia Surety did not have sufficient notice of Mann's intent to claim damages for the 1999–2001 acts to give a knowing waiver. *See id.* Although the complaint states this abuse occurred, the complaint does not clearly indicate Mann's intent to use the endorsement to tie in those acts for his claim of damages. Virginia Surety's attorney also submitted an affidavit that indicated he did not understand Mann to include these acts as part of his claim until 2010. Under the circumstances, the claim was obscure and did not give Virginia Surety proper the knowledge required for a knowing waiver. *See id.* Furthermore, Virginia Surety disputes coverage and the defense-waiver rule cannot expand the scope of coverage. *See Sperling*, 2007 VT 126, ¶ 25.

The Court is also concerned about the context in which Mann invokes the defense-waiver rule. Mann is a victim and not the insured. Although victims are not prohibited from invoking the rule, the purpose of the rule is not as well served by this application. *See Cummings*, 102 Vt. at 360–61. That is, an insurer does not have the same duty of frankness with a victim as with the insured because the victim is not the beneficiary of the indemnification contract. *See id.* This case is also not the usual example where an insurance company controls a defense and the Court must protect the insured against the insurer's choices. *See Kerr*, 138 Vt. at 362–63. The purpose of the rule would not be served by blocking Virginia Surety from raising the coverage defense in these circumstances. *See Sperling*, 2007 VT 126, ¶ 25.

Scope of Coverage under the Endorsement

The Court next considers the scope of the coverage under the endorsement. Courts interpret insurance policies by their plain meaning and resolve ambiguities in favor of the insured. *See Fireman's Fund Ins. Co. v. CNA Ins. Co.*, 2004 VT 93, ¶ 9, 177 Vt. 215. Courts read insurance policies and their endorsements together to generate a consistent whole. *See id.* ¶ 20.

Virginia Surety issued Adventure Quest two insurance policies, from 1994–1995 and from 1995–1996. The policies contain a limitation that Virginia Surety is only liable for damages from acts that occur during the policy period. Each policy also contains a sexual abuse endorsement. By its terms, the endorsement "changes your policy." The endorsement also indicates:

> Multiple incidents of sexual abuse, sexual molestation, sexual exploitation, or sexual injury to one person shall be deemed to be one occurrence and shall be

> subject to the coverage and limits in effect at the time of the first incident even if some of such incidents take place after expiration of this policy.

The Court reads the policy and the endorsement together. *See id.* ¶ 20. The endorsement indicated it "changes your policy." The plain language of the policy indicates only events that occurred within the period are covered and the endorsement expands the definition of a sexual abuse occurrence. *See id.* ¶¶ 9, 20. Specifically, the endorsement indicates that once an act of sexual abuse occurs between two people, then all subsequent acts of sexual abuse are deemed one occurrence that happened at the time of the initial act of abuse.[2] Thus, under the plain language of the policy, Mann may use the 1999–2001 acts to prove damages if an act of sexual abuse occurred within the normal policy periods. The Court does not find these statements ambiguous, but would interpret an ambiguous provision in favor of the insured. *See id.* ¶ 9.

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[2] Cases from other jurisdictions also indicate all instances of sexual abuse are a single occurrence under the sexual abuse endorsement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 709 S.E.2d 85, 90–91 (S.C. Ct. App. 2011); *TIG Ins. Co. v. San Antonio YMCA*. *See* 172 S.W.3d 652, 658 (Tex. Ct. App. 2005). In *TIG*, parents sued a YMCA for negligently hiring a staff member, who sexually abused six children. *Id.* at 655. The insurance company issued a commercial general liability policy and a sexual abuse endorsement. *Id.* at 656. As in *Mann*, the endorsement changed the coverage and defined sexual abuse occurrence. *See id.* at 657.

> *All acts of "Sexual Abuse Occurrence" by an actual or alleged perpetrator or perpetrators, including "Negligent Employment" of such perpetrator or perpetrators, shall be deemed and construed as one occurrence which takes place when the first act of sexual molestation or abuse occurs, regardless of the number of persons involved, or the number of incidents or locations involved, or the period of time during which the acts of sexual molestation or abuse took place.*

Id. (emphasis in original).

The policy had a limit of $1 million for each occurrence, and an aggregate limit of $2 million. *Id.* at 656. The insurance company paid $1 million toward a settlement, but argued the aggregate limit did not apply because all instances of sexual abuse were one occurrence. *Id.* at 655. The issue is thus different than the one in *Mann* because the parties argued about the definition of occurrence as it relates to multiple victims rather than as it relates to timing.

Nevertheless, the opinion contains helpful language about the interpretation of the sexual abuse endorsement. Much like Vermont, Texas requires enforcement of unambiguous contracts as written. *Id.* at 658. The policy and endorsement should be read together to create a consistent whole. *Id.* Courts read ambiguous insurance contracts favor the insured. *Id.* The court concluded a sexual abuse occurrence includes all acts of abuse regardless of when they took place. *Id.* The court then held for the insurer on the issue of how many acts took place because the policy unambiguously grouped all instances of sexual abuse into a single occurrence. *See id.*

Other courts disagree with *TIG's* approach and have allowed separate suits based on the abuse of separate victims. For example, the Court of Appeals of South Carolina held that abuse of seven students gave rise to seven claims rather than one. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 709 S.E.2d 85, 90–91 (S.C. Ct. App. 2011). The court also briefly addressed a deemer clause that indicated the abuse is deemed to have occurred when the first abuse occurs. *Id.* at 92. The court found the clause irrelevant to the number of claims involved. *See id.* The South Carolina Court of Appeals therefore did not disagree with the Texas Court of Appeals about when the abuse occurs. *See id.*; *TIG*, 172 S.W.3d at 658.

Although neither of these cases concerned a policy that expired, they both suggest language in sexual abuse endorsements make multiple instances of sexual abuse of one person a single occurrence. *TIG* is particularly helpful because the language of the endorsement is similar to the endorsement in this case. *TIG* reinforces that all instances of sexual abuse are a single occurrence under the endorsement. *Beaufort County School District* is consistent with *TIG* on this point, even though the cases come to different conclusions. This Court therefore finds the cases persuasive as to the meaning of the sexual abuse endorsement's timing provision.

In the March 3, 2014 order, the Court partially addressed the scope of the coverage. The Court ruled, "Mr. Mann is not entitled to a declaration that incidents of abuse that occurred after the expiration of the policies are covered." The Court came to this conclusion because acts of grooming are not covered by the policy as grooming does not involve an act of sexual abuse. To receive coverage by Virginia Surety, Mann must first prove the March 1995 act of manual stimulation occurred and was an act of sexual abuse, instead of an act of grooming. Mann is not entitled to a decree that he may use the 1999–2001 to prove damages because he must first prove that an act of sexual abuse occurred during the policy. The Court clarifies the acts of sexual abuse in 1999–2001 may be used to prove damages if Mann shows an act of sexual abuse occurred during the 1994–1996 policy periods.

Among other things, the jury must determine which acts occurred, when the acts occurred, and if each act was sexual abuse rather than grooming. Unlike the first trial, the Court will require a special verdict form that clarifies which acts the jury found. The specific timing and classifications of the acts is essential to determining Virginia Surety's liability. All that has been done by virtue of the first jury verdict is to establish a recovery in negligence against Drutchal and Adventure Quest and the damages resulting from that negligence. Whether any or all of Mann's damages are covered under the insurance policies issued has not been determined.

Conclusion

The Court grants Mann's motion for reconsideration. The defense-waiver rule does not prevent Virginia Surety from raising these defenses because it did not have sufficient knowledge to knowingly waive its defense. The Court clarifies Mann may use the 1999–2001 sexual relationship incidents to prove damages under the policy and endorsement if Mann proves an act of sexual abuse occurred during the policy period. Mann is not entitled to summary judgment against Virginia Surety because the parties dispute whether sexual abuse occurred during the stated term of the policy. On the other hand, the Court revises its March 3, 2014 to indicate that Virginia Surety is also not entitled to summary judgment because a jury could find an act of sexual abuse occurred under the policy. If the jury finds an act of sexual abuse occurred against Mann within the stated term of the policy and acts of sexual abuse occurred in 1999–2001 incidents, then the all of the acts are deemed one occurrence that happened at the time of the first act of sexual abuse.

Order

The Court **GRANTS** Mann's motion for reconsideration (MPR 70). The Court revises its March 3, 2014 order to **DENY** Virginia Surety's motion for summary judgment and also **DENY** Mann's motion for summary judgment.

Dated at Woodstock, Vermont on April 25, 2014.

Harold E. Eaton, Jr.
Superior Court Judge

FILED

APR 29 2014

VERMONT SUPERIOR COURT
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