IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KEYSTONE INSURANCE COMPANY, Plaintiff, v. STEPHANIE WALLS and ALAN N. COOPER, ESQUIRE, Guardian ad Litem and Next Friend of NICHOLAS TRUSELO, Defendants.	C.A. No. 03C-01-055 CHT NON-ARBITRATION (TRIAL BY JURY)

Opinion and Order

On the Plaintiff's Motion for Summary Judgment

Submitted: August 9, 2005
Decided: January 31, 2006

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TOLIVER, JUDGE

Before the Court is the motion by Keystone Insurance Co. ("Keystone") for summary judgment. Granting this motion would relieve Keystone of its obligation to defend or indemnify Stephanie Walls in the civil action filed on behalf of Nicholas Truselo for permanent injuries he sustained while in her care. The matter having been briefed and argued, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

Nicholas Truselo was placed in the care of Stephanie and Ronald Walls by the Department of Health and Social Services on August 15, 2000. This arrangement is commonly referred to as "foster care" and involved providing for Nicholas' daily needs as well as his overall welfare. The next day, August 16, 2000, a case worker had occasion to visit Nicholas at the Walls' home where he was apparently found to be doing quite well. On August 17, 2000, it appears that Mrs. Walls violently shook Nicholas and dropped him on the floor or ground. Mrs. Walls sought medical treatment for Nicholas four days later when she called for emergency medical services and reported that he was choking. When the paramedics arrived, they found that Nicholas was unable to breath and had no

pulse. His injuries were ultimately diagnosed as blunt trauma to the head resulting in irreversible brain damage, which will require care twenty-four hours a day, every day, for the rest of his life.[1]

At some point in time prior to the date Nicholas was injured, the Walls purchased a homeowner's indemnity insurance policy from Keystone.[2] The policy contained several provisions and exclusions which are relevant to the instant dispute. Specifically, under "Section II - Liability Coverages", the policy provides coverage for the following:

> **COVERAGE E - Personal Liability**
>
> If a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the Damages for which the 'insured' is legally liable; and
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or

[1] The summary of the events is extracted from the complaint filed in Cooper v. State of Delaware, et al., C.A. No. 02C-08-073 (CHT) (hereinafter "Truselo") at ¶¶ 22, 25, 30 - 33. The named defendants in the civil case included, among others, the State of Delaware, Delaware Department of Services For Children, Division of Family Services, Division of Public Health, Department of Health and Social Services.

[2] The Keystone policy, Homeowners 84 Policy No. 0 0120 9578, was effective 1/19/00 to 1/19/01.

fraudulent . . . .[3]

However, that same section of the policy provides:

> 1. **Coverage E - Personal Liability and Coverage F - Medical Payments to Others** do not apply to 'bodily injury' or 'property damage':
>
> a. which is *expected* or *intended* by the 'insured' . . . [emphasis added].[4]

As a result of an investigation by the New Castle County Police, Mrs. Walls was indicted on April 9, 2001 on two charges, Assault by Abuse or Neglect, 11 Del. C. §615(a); and Endangering the Welfare of a Child, 11 Del. C. §1102, arising out of conduct which took place between August 17 and August 21, 2000.[5] On December 12, 2002, Mrs. Walls was convicted on both charges following a trial by a jury.

On August 7, 2002, prior to her trial and conviction, Alan Cooper, who had been appointed Guardian *Ad Litem* for Nicholas, initiated a civil action against Mrs. Walls, her husband, various agencies and officials of the State of Delaware as well as several of the medical personnel who

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[3] Id. at 12.

[4] Id. at 13.

[5] State v. Walls, I.D. No. 0008018129; Count I, Cr. A. No. 01-04-0533 (Assault by Abuse or Neglect); and Count II, Cr. A. No. 00-09-2077 (Endangering the Welfare of a Child).

treated Nicholas.[6] In the complaint that he filed on behalf of Nicholas, Mr. Cooper specifically describes the conduct attributed to Mrs. Wall as follows:

> 37. The aforesaid injuries sustained by Nicholas were proximately caused by the negligent, grossly negligent, reckless and wanton conduct of Mrs. Walls who, in her personal capacity and in her capacity as an employee and/or agent of the Division, the Department, and the State:
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> (a) violently shook Nicholas and dropped or threw him to the floor;
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> (b) failed to report the conduct described in (a) to appropriate authorities;
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> (c) deprived Nicholas of prompt medical care for his injuries;
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> (d) failed to provide Nicholas a fair opportunity in life pursuant to 31 Del. C. §303(1);
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> (e) failed to care for Nicholas, a dependent or neglected child committed to her care pursuant to 31 Del. C. §303(4);
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> (f) failed to exercise such duties as were necessary, proper and expedient for the supervision, care, custody, board and placement of

[6] Truselo Compl., at ¶¶ 1-4.

Nicholas pursuant to 31 Del. C. §304;

(g) failed to provide services to Nicholas to prevent him from becoming abused, neglected and dependant pursuant to 29 Del. C. §9003(2); and

(h) failed to provide protective services to Nicholas pursuant to 29 Del. C. §9003(3)(a). . . .[7]

On January 8, 2003, Keystone initiated the instant action asking the Court to declare whether it had a duty to defend and/or indemnify Mrs. Walls based upon the insurance policy described in the underlying civil action filed on behalf of Nicholas.[8] A motion for summary judgment was filed by Keystone on August 1, 2003, in which Keystone asserted that the homeowner's policy did not provide coverage in light of the allegations against Mrs. Walls nor did Keystone have a duty to defend her. The defense has opposed that motion obviously arguing that there is coverage for the injuries suffered by Nicholas, or at the very least, Keystone is obligated to defend Mr. and Mrs. Walls during the pendency of

[7] Truselo Compl., at ¶37.

[8] Keystone has not moved for summary judgment on the grounds that it has no duty to defend Ronald Walls, a named defendant and an insured under the policy in question. For purposes of this motion, the Court will only refer to Mrs. Walls.

the Truselo litigation.

Keystone's principal contention in support of its motion concerns the conduct of Ms. Walls vis 'a vis the policy coverage exclusions referred to above. Keystone insists that the homeowners policy excludes coverage for personal injury which is intentionally caused by the insured or which the insured expects to result from his or her actions. It argues as a result, that Mrs. Walls' conduct and the injuries to Nicholas which resulted, fall within that exclusion.

Keystone further contends that Mrs. Walls convictions for Endangering the Welfare of a Child and Assault by Abuse or Neglect conclusively establish that the injuries were expected within the meaning of the policy. Any further litigation regarding her state of mind is therefore precluded by the doctrine of collateral estoppel and/or issue preclusion. The reasoning used to support that argument is critical to the resolution of this dispute.

In the context of the Assault by Abuse or Neglect charge, Keystone contends that the jury determined that Mrs. Walls acted recklessly, meaning that she ". . . was aware of and consciously disregarded a substantial and unjustifiable risk that serious physical injury to Nicholas would result from

her conduct."[9] Keystone would like the Court to interpret that finding to mean that she "expected" that injury would occur as a result of her conduct. When Mrs. Walls was convicted of Endangering the Welfare of a Child, the jury found that she acted knowingly in that regard. Keystone argues the finding of knowing behavior is the equivalent of intentional conduct and is therefore within the exclusion.

Further, Keystone distinguishes between the terms "expected" and "intentional" as used in the policy arguing that they have different meanings. It relies on the decision in State Farm Fire and Casualty Co. v. Hackendorn,[10] where this Court recognized that "[e]ven if the injuries were unintended, where they were the natural, foreseeable and expected and anticipatory result of the insured's intentional act, they would fall under the 'expected' exclusionary language."[11] Therefore, the absence of a jury determination that Mrs. Walls intentionally injured Nicholas does not preclude the entry of summary judgment in Keystone's favor.

Finally, Keystone contends that it has no duty to defend

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[9] 11 Del. C. § 231.

[10] 605 A.2d 3 (Del. Super. Ct. 1991).

[11] Id. at 9.

the Truselo litigation. Simply put, Keystone argues that because the injuries were "expected", there is no coverage under the instant policy. It therefore follows that if there is no coverage, Keystone has no duty to defend Mrs. Walls.

In opposing this motion, Mr. Cooper's first response is that the convictions of Mrs. Walls for Endangering the Welfare of a Child and Assault by Abuse or Neglect do not establish that the injuries inflicted on Nicholas were intentionally caused or expected by Mrs. Walls. Although those convictions required that the jury find that she acted recklessly and knowingly, neither finding is synonymous with, or the equivalent of, intentionally or expectantly causing the resulting injuries. Collateral estoppel and/or issue preclusion, as a consequence, does not prohibit either side from relitigating the issues related to Mrs. Walls' mental state at the time Nicholas was injured.

Second, assuming the doctrine of collateral estoppel does not apply, Mr. Cooper contends that summary judgment is not otherwise appropriate. There are, he argues, disputes regarding material issues of fact as to Mrs. Walls mental status at all points in time relative to this litigation.

Lastly, Mr. Cooper maintains that the cause of action

against Mrs. Walls contains other allegations of tortious conduct clearly not within the exclusionary language of the policy. They are, as a result, within the coverage of the policy. Since the duty to defend applies where at least one count of the causes of action is arguably within coverage, Keystone must provide Mrs. Walls with a defense as to all causes of action then existing.

DISCUSSION

As noted, Keystone filed this action as one seeking a declaratory judgment concerning its rights under the homeowner's insurance policy. Disposition by means of declaratory relief is warranted when the following factors are satisfied:

> (1) [i]t must be a controversy involving the rights or other legal relations of the party seeking declaratory relief;
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> (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claims;
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> (3) the controversy must be between parties where interests are real and adverse; and
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> (4) the issue involved in the controversy must

be ripe for judicial declaration.[12]

None of the parties dispute that this action is one which is ripe for resolution by such means.

It is well established that summary judgment may be granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[13] The moving party bears the initial burden of proving that no such issues exist.[14] Once that burden is satisfied, the non-moving party must establish that disputed material issues of fact do indeed remain.[15] The facts must be viewed most favorably to the nonmoving party and if there is but one reasonable interpretation, summary judgment is appropriate.[16] Disposing of litigation via summary judgment is encouraged, when possible, to expeditiously and economically resolve lawsuits.[17]

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[12] Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, 623 A.2d 1133, 1136-37 (Del. Super. Ct. 1992) (citing Marshall v. Hill, 93 A.2d 524 (Del. Super. Ct. 1952)).

[13] Davis v. West Center City Neighborhood Planning Advisory Comm., Inc., 2003 WL 908885, at *1 (Del. Super.) (citing Dale v. Town of Elsmere, 702 A.2d 1219, 1221 (Del. 1997)).

[14] Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979).

[15] Albu Trading, Inc. v. Allen Family Foods, 2003 WL 21327486, at *1 (Del. Supr.) (citing Brzoska v. Olson, 668 A.2d 1355, 1364 (Del. 1995)).

[16] Pullman, Inc. v. Phoenix Steel Corp., 304 A.2d 334 (Del. Super. Ct. 1973); Shultz v. Delaware Trust Co., 360 A.2d 576 (Del. Super. Ct. 1976).

[17] Davis v. University of Del., 240 A.2d 583 (Del. 1968).

In Delaware, the interpretation of an insurance contract is a question of law in the absence of any dispute of material fact.[18] "All provisions of a policy are to be read together and construed according to the plain meaning of the words involved, as to avoid ambiguity while at the same time giving effect to all provisions."[19] While the duty to defend and the duty to indemnify under a contract of insurance are similar, there are critical distinctions which a court must recognize notwithstanding their commonality.

In that regard, this Court has held:

> [W]hile the duty to defend and the duty to indemnify obviously bear some relationship, they are independent of one another. The duty to defend, moreover, is broader than the duty to indemnify. The former is said to include the duty to defend any litigation that includes a potentially covered claim. Indemnification, absent some affirmative defense or other manner of avoidance, is based solely upon the terms of the contract of insurance.

It went on to state that:

> Multiple claim suits, like the present case, often include some claims that are covered under the policy, as well as non-

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[18] Collins v. State Farm Mut. Auto. Ins. Co., 830 A.2d 1241, 1245 (Del. Super. Ct. 2003) (citing Judge v. State Farm Ins. Cos., 1993 WL 1611307 (Del. Super.)).

[19] Hercules Inc. v. Onebeacon America Ins. Co., 2004 WL 249592, at *1 (Del. Super.) (citing Delaware County Constr. Co. v. Safeguard Ins. Co., 228 A.2d 15 (Pa. Super. Ct. 1967)).

> covered claims. When litigation includes both covered and non-covered claims, the insurer has a duty to defend the entire suit until it can determine which claims fall outside the policy coverage. Stated differently, the duty to defend extends to all causes of action in a complaint as long as one cause of action is potentially covered. The insurer's obligation in that regard is reduced and/or terminated altogether once it can reasonably be determined that potentially covered claims fall outside the policy coverage, or when they are dismissed or settled. . . (Citations ommitted).[20]

The Delaware Supreme Court has provided the following guidance as to how the existence of coverage is to be determined:

> In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend. The rationale underlying this principle is that the determination of whether a party has a duty to defend should be made at the outset of the case, both to provide the insured with a defense at the beginning of the litigation and to permit the insurer, as the defraying entity, to control the defense strategy.[21]

The Court must interpret the allegations in the complaint

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[20] *See* McLewin v. Hill, 1998 WL 109840 (Del. Super.). See also Conrail v. Liberty Mutual, et al., 2005 Del. Super. LEXIS 92.

[21] American Ins. Group v. Risk Enterprise Mgmt. Ltd., 761 A.2d 826, 829 (Del. 2000)(citations omitted).

in a light most favorable to the insured. Any doubt surrounding the construction of the policing language or the extent of coverage must be construed in the same manner.[22] And, there may be occasions in which an insurer is required to defend a lawsuit even though indemnification may ultimately be determined not to be available under the policy.[23]

Given the applicable law as referenced above, the initial determination to be made is whether any claims made against Ms. Walls may be considered "covered" under the terms of the policy in question. If the answer is negative, the litigation ends since there is no coverage, there can be no duty to defend. If the response is affirmative as to the existence of any claims which are arguably within the coverage of the policy, even though there are some that are not included, there is at least a duty to defend which extends to the entire case. Any questions regarding indemnification will, as a result, be deferred to the conclusion of the Truselo litigation.

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[22] Id. at *3; Twin City Fire Ins. Co. v. Del. Racing Ass'n, 840 A.2d 624, 630 (Del. 2003).

[23] See First Delaware Ins. Co. v. Tilcon Delaware, Inc., 1998 WL 278311, at *4, n. 23 (Del. Super.).

Keystone's Duties Under the Policy's Exclusionary Clause

According to the provisions of its policy, Keystone agreed to pay on behalf of the insured damages, up to the limit of liability, for claims brought against the insured because of bodily injury. In connection with those same claims, Keystone is obligated to provide its insured, in this case Mrs. Walls, with a defense at Keystone's expense regardless of its view of the merits of the litigation. This coverage however does not apply to bodily injury which the insured either expects or intends to occur; the essence of the Section II (1)(a) coverage exclusion clause referenced above. Analysis of Keystone's duty to defend, along with the effect of the exclusion clause upon that duty, must necessarily begin with the definition of the phrase "expected or intended" used in the policy.

To that end, "expected" can be defined as a "substantial probability" and requires more than a "reasonable foreseeability."[24] An injury is expected if the actor knew or should have known there was a substantial probability that a

[24] New Castle County v. Continental Casualty Company, 725 F. Supp. 800 (D. Del. 1989).

certain result would take place.[25] It is apparent that the term focuses on the anticipation that a certain result will follow and be proximately caused the actor's conduct. The word "intended" as applied to exclusion clause "denotes that the actor desire[d] to cause the consequences of his act or believes that consequences are substantially certain to result from it."[26] Stated another way, where the tortfeasor clearly lacks the intent to inflict any damage or injury, and it is not foreseeable that damage or injury will occur, the exclusion will not apply.[27]

The next step in the analysis is to determine whether the aforementioned definitions apply in light of or against the relevant allegations and/or counts of the Truselo complaint.

Under Delaware law, every allegation of the underlying complaint must fall "solely and entirely within a specific and unambiguous exclusion from coverage."[28] Even if one count or theory of the plaintiff's complaint against Mrs. Walls remains after application of the "intentional or expected"

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[25] Hackendorn, 605 A.2d 3, 8-9. See also Keating v. Goldick, 2004 Del. Super. Lexis 102, at *19; County of Broome v. Aetna Casulaty and Surety Co., 146 A.D.2d 337, 340 (N.Y. App. Div. 1989).

[26] 7A Appleman's Insurance Law and Practice, § 4492.02 at 29.

[27] Dell Ent. v. Farmers Mutual Ins., 514 A.2d 1097, 1100 (Del. 1986).

[28] Nat'l Union Fire Ins. Co., v. Rhone-Poulenc Basic Chemicals Co., 1992 Del. Super. Lexis 45, at *30.

injury exclusion, Keystone's duty to defend continues.[29] The insurer has the burden of proving that there is no possible situation where the insurer would be obligated to defend the insured.[30] However, Mrs. Walls was charged with and convicted of Endangering the Welfare of a Child and Assault by Abuse or Neglect which in turn involved a finding that she had engaged in knowing and reckless conduct. The Court's analytical sojourn must therefore take a different route beginning with the applicability of collateral estoppel. Again, Keystone argues that given the verdict in the criminal case, that doctrine obviates any duty to defend and/or indemnify Mrs. Walls in the Truselo litigation.

Application of Collateral Estoppel to the Policy's Exclusionary Clause

Collateral estoppel prevents a party from relitigating a factual issue previously litigated and decided.[31] The requisites of the doctrine are:

(1) the original court must have had

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[29] Id.

[30] Continental Casualty Co. v. Alexis I. duPont School Dist., 317 A.2d 101, 103 (Del. 1974).

[31] Nationwide Mutual Insurance Co. v. Flagg, et al., 789 A.2d 586, 593 (Del. Super. 2001) (citing State v. Machin, 642 A.2d 1235, 1238 (Del. Super. 1993)).

> jurisdiction of the subject matter of the suit and the parties to it; (2) the parties to the original action were the same as the parties or their privies, here; (3) the cause of action in the original action was the same in the case at bar, or the issues necessarily decided in the prior action were the same as those raised in the case at bar; and (4) the decree rendered the prior action is final.[32]

Collateral estoppel is inapplicable, according to Mrs. Walls, because she would be denied the opportunity to argue defenses that would negate the charge that she expected or intended to injury Nicholas, e.g., mental or psychological conditions or disorders which might negate or diminish intent or awareness.[33] More Specifically, because there is no indication that they were raised at the Mrs. Walls' criminal trial the issues are not the same and collateral estoppel does not bar her from raising them in the Truselo litigation. In support of this contention, Mrs. Walls relies principally on the Flagg decision.

In Flagg, the defendant in the underlying criminal action, had been convicted of one count of Murder First Degree

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[32] Id. (citing Columbia Casualty Co. v. Playtex FP, Inc., 584 A.2d 1214, 1216-18 (Del. 1991)).

[33] The sole argument raised by Mrs. Wall regarding the applicability of the doctrine of collateral estoppel is based on whether issues decided prior are the same as those now raised. For this reason, it is presumed that she concedes that the other prongs of the standard are met.

and several counts of Rape First Degree which occurred during a six day rampage. His defense was based in substantial part on the claim that he was not guilty by reason of mental illness. The surviving victim, Ms. Puglisi, and her children, brought suit against Mr. Flagg as a result of the losses inflicted during that period of time. Nationwide filed a separate declaratory judgment action seeking a determination by this Court that it did not have to provide a defense for Mr. Flagg or indemnify the Puglisis for the claims so asserted under a homeowner's insurance policy covering Mr. Flagg's home, where some of the criminal activity took place.

Because Mr. Flagg was convicted of acting intentionally when he committed the murder and rape in question, Nationwide argued that his conduct fell within the policy's exclusion of coverage where the conduct complained of was "intentional or expected". It is also argued that the Puglisis were barred from relitigating the issue of Mr. Flagg's intent by the doctrine of collateral estoppel. The Puglisis countered that they should be allowed to present evidence of his mental illness and voluntary intoxication which would bear on the issue of whether his acts fell within the exclusionary language of the policy.

After defining the doctrine, the Court held that while the Puglisis were in fact barred from relitigating the mental illness defense, they could litigate the effect of Mr. Flagg's intoxication on whether he acted "intentionally". On that point, the Court stated:

> Flagg's conviction of a host of crimes, all of which contain the element of intention, means the jury rejected his defense of not guilty by reason of mental illness. Further, the fact that he acted intentionally has been established. The difference in burden of proof in these proceedings is irrelevant. As a matter of fact, it is less in the civil case . . . .
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> . . .
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> While the Puglisis are collaterally estopped from relitigating Flagg's mental illness and the issue of intent, the same does not apply to his possible intoxication due to drugs and/or alcohol and the issue of intent. This is the Puglisis' second argument, namely, that collateral estoppel is inapplicable to this issue. One element of collateral estoppel is that the issue was raised and decided in the other proceeding, here the criminal trial. Intoxication could not have been raised or decided in that trial. Voluntary intoxication is not permitted as a defense in a criminal action.[34]

Mrs. Walls' argument is inimical to the policy underlying collateral estoppel which is designed to provide a definite

[34] Flagg, 789 A.2d at 595.

end to litigation and preserve judicial resources.[35] As Keystone emphasizes, in Flagg, the defendant, by law, was precluded from raising the issue of voluntary intoxication in mitigation of his intent. This distinguishes that case from the instant situation where Mrs. Walls was provided a full and fair opportunity, without obstacle, to raise defenses before the criminal jury had she so desired.

The Walls jury decided the issues which are preeminent here, that is, the crimes committed by Mrs. Walls as well as her mental state during the period when they occurred. The fact that she may not have put every conceivable response before the jury does not allow Mrs. Walls to avoid the force and effect of the doctrine in the instant situation. The focus should be on whether the issue was raised and disposed of, not how one of the litigants chose to argue it. The extent to which collateral estoppel applies must therefore be determined.

In finding Mrs. Walls guilty of Endangering the Welfare of a Child as set forth in Count II of the indictment, the jury found that Mrs. Walls, between August 17 and August 21, 2000, knowingly acted in a manner to cause injury to the

[35] Id. at 593.

physical, mental and moral welfare of Nicholas, who prior thereto, had not been so afflicted. That period of time and the activities which Mrs. Walls is alleged to have committed during that time span, clearly encompass the conduct and injuries inflicted upon Nicholas about which his guardian complains in the Truselo litigation.[36] Moreover, the defense in the criminal case was in no way limited in terms of the availability or the right to raise certain affirmative defenses. In sum, the issues are identical and both causes of action, the trial of the criminal charges against her as well as the Truselo litigation, arise from the same operative set of sequential events. The findings by the jury in the criminal trial must therefore be deemed to have a binding effect on the Truselo litigation.

Having reached that conclusion, the remaining inquiry is to what extent do the jury's finding that Mrs. Walls acted "knowingly" and "recklessly" during the relevant period of time, determine whether the injuries inflicted upon Nicholas

[36] Contrary to what Mr. Cooper implies, the indictment references conduct which occurred not only on August 17, but from that date up to and including August 21, 2000. Defs. Answ. Br., D.I. 16, at 10. The criminal convictions did as a result, mirror the identical period of time referenced in the Truselo complaint.

were "expected."[37]

Again, one acts knowingly when they are aware that his or her conduct is likely to cause a certain result. The Court finds that in this context, that to act "knowingly" is the equivalent of acting expectantly, i.e., where the actor knows that a certain result is likely to follow from his conduct.[38] The Court must further find as a result, that each of the contentions raised in Paragraph 37 of the Truselo complaint fall within the exclusionary clause of the Policy No. 0 0120 9578. No coverage is available for any of the claims so raised.

Alternatively, the jury's finding that Mrs. Walls acted "recklessly", and was therefore guilty of Assault by Abuse or Neglect, requires a similar conclusion. By finding that Mrs. Walls acted recklessly, the jury concluded that she knew the risk of harm that her conduct entailed and consciously ignored that risk. To do so necessarily requires a finding that the actor knew that a certain result was likely to follow his or her conduct and simply didn't care whether the anticipated result actually occurred. The injuries to Nicholas that were

[37] Neither side contends that Mrs. Walls acted intentionally or that the jury considered that question.

[38] This finding is consistent with Hackendorn and the other decisions cited in footnotes 22 and 23.

recklessly inflicted in this context were "expected" as well, thereby falling within the language of the policy's exclusionary clause.

The Court acknowledges Mrs. Walls testified in her criminal trial that she was not aware or conscious of the risk her conduct would result in injury to Nicholas. However, the jury, in finding her guilty as charged, simply didn't believe her or accept that explanation. The rejection of that explanation or interpretation of her conduct also applies to the jury's finding that she acted "recklessly" in the context of the Assault by Abuse or Neglect charge.

Lastly, Mrs. Walls also argues that the Truselo complaint contains allegations of mental states/culpability less than knowing and/or recklessness. As a consequence, she contends that the policy's exclusionary clause does not apply. However appealing that argument might be initially, it is simply not persuasive. As the Court noted in Flagg, collateral estoppel bars the relitigation of any claims for injuries which were negligently inflicted which a jury found the actor acted intentionally.[39] The higher level of culpability necessarily subsumes the lower level.

[39] Flagg, 789 A.2d at 593.

To the extent that Mr. Cooper argues that summary judgment is not warranted here because there are disputes of material facts, he is incorrect for at least two reasons. First, regardless of how it is viewed, the issues in question have been addressed and resolved by the instant parties or by those in privity with the instant parties in the criminal litigation. The conduct determined by the jury to have occurred falls within the policy exclusion. Second, the doctrine of collateral estoppel bars any further discussion or litigation regarding those matters.

To summarize, there are no causes of action for which there is coverage. As a result, there is no duty to indemnify Mrs. Walls for any of the claims raised in the Truselo litigation. The Court must therefore conclude that Keystone is not obligated to defend any aspect of that litigation. Accordingly, Keystone is entitled to have judgment summarily entered on its behalf.

CONCLUSION

For the aforementioned reasons, the Plaintiff's Motion for Summary Judgment must be, and hereby is, **granted.**

IT IS SO ORDERED.

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TOLIVER, JUDGE