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Appellate Division Holds Duty to Defend Converts to Duty to Reimburse

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In a case involving insurance coverage, the Appellate Division recently held that an insurer’s duty to defend should have been converted to a duty to reimburse pending resolution of a coverage action, where a plaintiff alleged personal injuries from multiple causes – some covered and some excluded under the policy. Wear v. Selective Ins. Co., - N.J. Super. – (App. Div. 2018).

Plaintiff, Theresa Wear, worked in a building owned by defendant Woodbury Medical. She claimed to suffer injuries due to exposure to alleged toxic conditions in the building.

Selective Insurance issued a commercial policy to Woodbury Medical. It contained a specific exclusion for bodily injury caused by the ingestion of any “fungi” within a building structure, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage. The aforementioned language in the exclusion is known as an anti-concurrent or anti-sequential clause.

After a complex procedural history, the Appellate Division held that it was premature to order Selective to assume responsibility for the insured’s defense since it was unclear, based on the anti-concurrent and anti-sequential language in the exclusion whether any claims would be covered. Therefore, it held that the duty to defend should be converted to a duty to reimburse pending resolution of the coverage action, citing the precedential opinion in Grand Co II Condo v. Ginsberg, 291 N.J. Super. 58 (App. Div. 1996).

Importantly, the court noted that in a situation where two or more identifiable causes – one a covered event and one excluded – may contribute to a single property loss, there is coverage absent an anti-concurrent or anti-sequential clause in the policy. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421 (App. Div. 2004).

**Duty – Social Service Agency Had Duty to Warn Foster
Parents of Child’s History of Dangerous Behavior**

In a tragic case involving the death of a foster parent, the Appellate Division held that a private social service agency owed a duty to plaintiffs to exercise reasonable care in placing the foster

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child in their home and to reasonably disclose his background so as to make an informed decision as to whether to accept him. The court further held that whether the murder was a proximate cause of the social service's negligence was a jury issue and the child's own criminal actions was not a superseding intervening cause which would relieve defendant of liability. Broach-Butts, et al. v. Therapeutic Alternatives Inc., et al., - N.J. Super. – (App. Div. 2018).

Defendant, Therapeutic Alternatives Inc., is a private social service agency. They placed a child, D.M., with the plaintiff, Wanda Broach-Butts, and her late husband, Theotis Butts.

Tragically, D.M. returned to plaintiffs' home fifteen months after leaving and killed Theotis. The trial court dismissed Therapeutic Alternatives on summary judgment and the Appellate Division reversed. The Appellate Division held that Therapeutic Alternatives had a duty to warn the plaintiffs of D.M.'s violent history and to allow them to make an informed decision as to whether to allow him into their home. D.M. had murdered his mother and threatened several people with bodily harm prior to being placed in the home.

The court held that whether the defendant's negligence was a proximate cause of injury to the plaintiff was a jury question and that the murder was a superseding intervening cause that relieved defendant of liability.