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OPINION* OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JULY 26, 2019)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Appellant,

v.

ZURICH AMERICAN INSURANCE COMPANY,

No. 18-3073

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-16-cv-04466)
District Judge: Hon. Kevin McNulty

Before: CHAGARES, GREENAWAY, Jr.,
and GREENBERG, Circuit Judges.

GREENAWAY, Jr., Circuit Judge.

This appeal asks us to consider whether a specific exclusion provision in an insurance policy relieves an insurance company of the duty to defend an insured school district in a separate child abuse lawsuit gen-

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

erally alleging that the school district knew about its former employee's sexual abuse of students. Like the District Court, we conclude that the insurance company does not have a duty to defend the school district because the allegations made in the other lawsuit plainly fall within the exclusion provision. Accordingly, we will affirm the District Court's appealed summary judgment order.

I. BACKGROUND

A. Factual Origins

Appellant Montville Township Board of Education ("Montville") hired Jason Fennes ("Fennes") as a first-grade teacher and track coach in September 1998. After several reports and investigations of his alleged sexual abuse against students, Fennes resigned in June 2010. Months later, in September 2010, Cedar Hill Prep School ("Cedar Hill") hired him as a teacher. In March 2012, while still employed by Cedar Hill, Fennes was arrested and indicted on charges of sexually abusing a number of Montville students between 2005 and 2008 and a Cedar Hill student between 2010 and 2011.

In August 2012, a student at Cedar Hill ("Child M") sued Fennes and Cedar Hill for injuries resulting from Fennes's sexually abusing her in February 2012. In her third amended complaint ("Complaint") filed in January 2015, Child M added Montville as a defendant, specifically alleging that the school district knew about Fennes's sexual abuse, failed to notify the authorities, and agreed to withhold Fennes's history of sexual abuse from his prospective employers. The lawsuit ("Child M Action") thus claimed that Montville

enabled and facilitated Fennes's sexual abuse at Cedar Hill.

During the relevant time, Montville held an insurance policy ("Policy") with Appellee Zurich American Insurance Co. ("Zurich"). The Child M Action potentially implicates two coverage parts of the Policy: while the first ("Commercial General Liability Part") generally excludes coverage for "bodily injury. . . arising out of or relating in any way to an abusive act," App. 155 (internal quotation marks omitted), the second ("Abusive Acts Part")—the only part at issue in this appeal—obligates Zurich to defend Montville against any lawsuit for "loss because of injury resulting from an abusive act to which th[e] [Policy] applies," *id.* at 173 (internal quotation marks omitted). The latter part defines "loss" as generally comprising "those sums that the insured is legally obligated to pay as damages" and "injury" as meaning "physical injury, sickness, disease, mental anguish, mental injury, shock[,] fright[,] or death of the person(s) who is the subject of an abusive act." *Id.* at 177 (internal quotation marks omitted). Further, it defines an "abusive act" as being:

> [A]ny act or series of acts of actual or threatened abuse or molestation done to any person, resulting in injury to that person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person, resulting in injury to that person, by anyone who causes or attempts to cause the person to engage in a sexual act:
>
> (a) Without the consent of or by threatening the person, placing the person in fear[,] or asserting undue influence over the person;

(b) If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or

(c) By engaging in or attempting to engage in lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of any person.

Id. (internal quotation marks omitted).

But the Abusive Acts Part also includes an exclusion ("Prior Known Acts Exclusion") of its own. Under that exclusion, there is no coverage under the Abusive Acts Part of the Policy for "[a]ny claim or suit based upon, arising out of[,] or attributable, in whole or in part, to any abusive act of which any insured, other than any insured actually committing the abusive act, has knowledge prior to the effective date" of the Policy. *Id.* at 174 (internal quotation marks omitted). As pertinent here, the Policy took effect in July 2011.

Approximately a week after Child M filed the Complaint, Zurich sent Montville a letter disclaiming coverage and reserving its rights under the Policy. According to Zurich, it had no obligation to defend Montville under either part of the Policy. As to the Commercial General Liability Part, Zurich determined that Child M's bodily injury arose from Fennes's abusive acts, thereby excluding coverage. As to the Abusive Acts Part, Zurich concluded that the allegations in the Complaint brought the Child M Action within the Prior Known Acts Exclusion, therefore also barring coverage.

B. Procedural History

In June 2016, Montville thus brought the instant lawsuit. Originally, the case took the form of an order to show cause in New Jersey state court, seeking a declaration that Zurich owed Montville a duty to defend it in the Child M Action. But Zurich removed this case to the District Court on the basis of diversity jurisdiction.

Before the District Court, the parties agreed to trifurcate the case, with the duty to defend up first for determination. Both parties eventually filed cross-motions for summary judgment on the issue. In a thorough and well-reasoned opinion, the District Court ruled in Zurich's favor, holding that it did not have a duty to defend Montville in the Child M Action. Following the parties' lead, that opinion focused its analysis on the Commercial General Liability Part of the Policy. In particular, the opinion determined that the injuries alleged in the Complaint arose out of abusive acts, rendering coverage excluded under the plain language of the Commercial General Liability Part.

Mere weeks later, however, Montville apparently changed its approach. In a motion for reconsideration, Montville argued that it is entitled to coverage under the Abusive Acts Part instead of the Commercial General Liability Part. Out of an abundance of caution, the District Court granted Montville's motion. In so doing, the District Court clarified that it would construe its prior summary judgment opinion as being a partial grant of summary judgment on the issue of Zurich's duty to defend under the Commercial General Liability Part. Further, the District Court granted the parties permission to file second partial summary

judgment motions, this time on the issue of Zurich's duty to defend under the Abusive Acts Part.

Soon, the parties filed their cross-motions for partial summary judgment on coverage under the Abusive Acts Part. In another well-crafted opinion, the District Court again ruled for Zurich. First, the District Court determined, as the parties agreed, that the injuries alleged in the Child M Action resulted from an abusive act, thereby falling within the general ambit of the Abusive Acts Part. Second, however, the District Court concluded that the Prior Known Acts Exclusion negated Zurich's duty to defend because Child M explicitly alleged in the Complaint that Montville was on notice of abusive acts by Fennes before the Policy's effective date.

Montville now appeals the District Court's second partial summary judgment ruling. Importantly, Montville does not also appeal the first partial summary judgment ruling. This appeal is therefore limited to the question of whether the Policy's Abusive Acts Part—not its Commercial General Liability Part—obligates Zurich to defend Montville in the Child M Action.

II. JURISDICTION

The District Court had jurisdiction over this case under 28 U.S.C. § 1332. We have jurisdiction over this appeal under 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We exercise plenary review over a district court's order granting summary judgment. *Santini v. Fuentes*, 795 F.3d 410, 416 (3d Cir. 2015). Here, in conducting

such a plenary review of the District Court's second partial summary judgment ruling, we must construe all evidence in the light most favorable to Montville. *See id.* In doing so, summary judgment is appropriate only if there is "no genuine dispute as to any material fact and [Zurich] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if its existence or nonexistence "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of material fact is "genuine" if "a reasonable jury could return a verdict for [Montville]." *Id.* Zurich here bears the burden of identifying specific portions of the record that establish the absence of a genuine dispute of material fact. *See Santini*, 795 F.3d at 416. Accordingly, the District Court's summary judgment order is proper only if, construing the evidence in the light most favorable to Montville, we conclude that there is no genuine dispute of material fact and Zurich is due judgment as a matter of law. *See id.*

IV. DISCUSSION

On appeal, Montville asserts two arguments. First, Montville contends that the Complaint is rife with ambiguity, precluding its allegations from definitively falling within the ambit of the Prior Known Acts Exclusion. Second, Montville avers that the District Court violated prevailing law by ignoring evidence extrinsic to the Complaint that purportedly indicates that Montville did not know about Fennes's prior abusive acts. But both arguments are unavailing. We will therefore affirm the District Court's appealed summary judgment decision.

A. Relevant Law

As a federal court reviewing a case grounded on diversity jurisdiction, we are "required to apply the substantive law of the state whose laws govern the action." *Robertson v. Allied Signal*, 914 F.2d 360, 378 (3d Cir. 1990). Here, both parties agree that New Jersey substantive law applies to this dispute. Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), our task is thus to predict how the Supreme Court of New Jersey would rule if it were deciding this case. *See Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 92 (3d Cir. 2008). We therefore begin our analysis by reviewing New Jersey legal principles relevant to (1) the duty to defend and (2) insurance policy exclusions.

1. Duty to Defend

In New Jersey, the "duty to defend comes into being when the complaint states a claim constituting a risk insured against." *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1259 (N.J. 1992) (citation omitted). "Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy. When the two correspond, the duty to defend arises, irrespective of the claim's actual merit." *Id.*

"That the claims are poorly developed and almost sure to fail is irrelevant to the insurance company's initial duty to defend." *Id.* That is, the duty to defend "is not abrogated by the fact that the cause of action stated cannot be maintained against the insured either in law or in fact—in other words, because the cause is groundless, false or fraudulent." *Id.* (citation omitted). Instead, "[l]iability of the insured to the plaintiff is not the criterion; it is the allegation in the complaint

of a cause of action which, if sustained, will impose a liability covered by the policy." *Id.* (citation omitted).

"As a practical matter, the determination of an insurer's duty to defend requires review of the complaint with liberality to ascertain whether the insurer will be obligated to indemnify the insured 'if the allegations are sustained.'" *Abouzaid v. Mansard Gardens Assocs., LLC*, 23 A.3d 338, 346 (N.J. 2011) (citation omitted). "[I]f 'the complaint comprehends an injury which *may* be within the policy,' a duty to defend will be found." *Id.* (citation omitted). Put another way, "[i]f the complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor of coverage." *Voorhees*, 607 A.2d at 1259.

"Although courts generally look to the complaint to ascertain the duty to defend, the analysis is not necessarily limited to the facts asserted in the complaint." *Abouzaid*, 23 A.3d at 347 (citations omitted). "Thus, for example, an insurer's duty to provide a defense may also be triggered by 'facts indicating potential coverage that arise during the resolution of the underlying dispute.'" *Id.* (quoting *SL Indus. v. Am. Motorists Ins. Co.*, 607 A.2d 1266, 1272 (N.J. 1992)). "That notion is said to align with the expectations of insureds, who 'expect their coverage and defense benefits to be determined by the nature of the claim against them, not by the fortuity of how the plaintiff, a third party, chooses to phrase the complaint against the insured.'" *Id.* (quoting *SL Indus.*, 607 A.2d at 1272). That said, "the insurer has no duty to investigate possible ramifications of the underlying suit that could trigger coverage." *SL Indus.*, 607 A.2d at 1272.

2. Insurance Policy Exclusions

"Exclusionary clauses are presumptively valid and are enforced if they are 'specific, plain, clear, prominent, and not contrary to public policy.'" *Flomerfelt v. Cardiello*, 997 A.2d 991, 996 (N.J. 2010) (citations omitted). "If the words used in an exclusionary clause are clear and unambiguous, 'a court should not engage in a strained construction to support the imposition of liability.'" *Id.* (citations omitted).

"[I]n general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." *Id.* at 996–97 (citation omitted). "As a result, exclusions are ordinarily strictly construed against the insurer, and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." *Id.* at 997 (citation omitted).

"Nonetheless, courts must be careful not to disregard the 'clear import and intent' of a policy's exclusion." *Id.* (citation omitted). As a result, not all "far-fetched interpretation[s] of a policy exclusion [are] sufficient to create an ambiguity requiring coverage." *Id.* (citation omitted). "Rather, courts must evaluate whether, utilizing a 'fair interpretation' of the language, it is ambiguous." *Id.* (citation omitted).

B. Analysis

Armed with these legal principles, we now apply them to the facts of this case. In doing so, we individually assess each of Montville's two arguments on appeal: (1) that the Complaint is ambiguous enough that Child M's allegations do not definitively fall within the Prior Known Acts Exclusion and (2) that

the extrinsic evidence in the Child M Action indicates that Montville did not know about Fennes's abusive acts before the Policy's effective date. For the reasons that follow, we reject each of these arguments.

1. Ambiguity

Under New Jersey law, the crux of our analysis turns on whether the allegations in the Complaint correspond with the relevant language of the Policy. *Voorhees*, 607 A.2d at 1259. Montville accepts that but still contends that the Complaint's allegations are so ambiguous that we cannot conclusively deem them aligned with the language of the Prior Known Acts Exclusion. We, however, disagree because there is no ambiguity in the plain language of the Complaint when considered as a whole.

As an initial matter, Montville acknowledges that Child M makes the following allegations in the Complaint:

(1) Fennes, while employed by [Montville], "engaged in various negligent, careless, reckless[,] and/or intentional conduct, including but not limited to inappropriate abusive and/or sexual conduct with his infant students" and [Montville] was "on notice of said conduct."

(2) [Montville] was "on notice" "of said reckless and/or intentional conduct, including child abuse, both sexual and nonsexual" so as to trigger a requirement to report. . . . "

(3) [A]s a result of the "negligence, carelessness, recklessness[,] and/or intentional conduct" of the defendants [in the Child M Action], Child M suffered "injuries."

(4) Fennes "engaged in various acts of sexual molestation and/or child abuse against other infant students."

(5) [Montville] was "on notice of said conduct."

(6) Fennes "engaged in various acts of sexual molestation and/or child abuse against . . . his infant students."

Appellant's Br. 17–18 (citations and footnotes omitted). Montville's only argument in attempting to elude operation of the Prior Known Acts Exclusion is that Child M's use of terms like "abusive" is "vague, undefined, and subject to multiple interpretations," as the Complaint lacks an "enumeration of specific abusive acts." *Id.* at 18. For example, Montville posits that the Complaint could be read as simply alleging that Montville only knew Fennes had students sit on his lap in a platonic manner, presumably outside the ambit of the Prior Known Acts Exclusion. This purported ambiguity, as Montville sees it, demands interpretation in its favor. But the District Court rejected this argument and so do we.

A plain reading of the allegations in the Complaint unequivocally brings them within the ambit of the Prior Known Acts Exclusion. That exclusion, as discussed previously, relieves Zurich of the duty to defend only if the Child M Action (1) is attributable, even in part, (2) to abusive acts (3) about which Montville had knowledge (4) prior to July 2011. *See* App. 174. Montville either concedes or does not contest the first, third, and fourth elements of the exclusion. *See* Appellant's Br. 18 (quoting allegations from the Complaint that "as a result of the 'negligence, carelessness, recklessness[,] and/or intentional conduct' of

[Montville], Child M suffered 'injuries'" and that Montville was "'on notice' 'of said reckless and/or intentional conduct, including child abuse, both sexual and non-sexual'" (citations omitted)); App. 102–04 (the Complaint's stating that Fennes was a "known pedophile and child molester" and that Montville, "while on notice of said conduct [by September 2010 at the latest], . . . purposefully caused said acts to be concealed from potential future employers of [Fennes], including Cedar Hill").

At this stage, the only question is thus whether Child M's allegations of "abuse," *e.g.*, *id.* at 101, rise to the level of "abusive act[s]" as defined in the Policy, *id.* at 177. Indeed, they do.

As recounted previously, the Abusive Acts Part defines an "abusive act" as being, as relevant here, "any act . . . of actual . . . abuse or molestation done to any person, resulting in 'injury' to that person, including any act . . . of actual . . . sexual abuse or molestation . . . , by anyone who causes or attempts to cause the person to engage in a sexual act . . . if that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act." *Id.* Child M's allegations squarely fit this definition.[1]

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[1] Indeed, the allegations must fit the definition of "abusive act" for us to even get to this point of the analysis. *Id.* That is because, for us to even assess whether the Prior Known Acts Exclusion relieves Zurich of the duty to defend, we must first determine that the Abusive Acts Part as a whole applies. Montville, of course, does not contest that the Abusive Acts Part applies—and for good reason: if it does not apply at all, Zurich is not obligated to defend Montville. Critically, the Abusive Acts Part and the

Even if, as Montville now avers, "abus[e]" on its own is somehow vague, Appellant's Br. 17, all of the allegations in the Complaint taken together unambiguously bring Fennes's alleged conduct within the Policy's definition of "abusive act[s]," App. 177. Elsewhere in the Complaint, Child M alleges that Montville knew about Fennes's "inappropriate abusive and/or sexual conduct," "child abuse, both sexual and nonsexual," and "various acts of sexual molestation and/or child abuse against . . . infant students" and that this conduct caused her "severe personal injuries," including "great pain." *Id.* at 100–04. Of course, at the risk of stating the obvious, an "infant," *id.* at 101, cannot reasonably "apprais[e] the nature" of sexual abuse or molestation, *id.* at 177. Further, the allegation that Fennes committed "child abuse" of a "sexual" nature cannot be reasonably construed to simply mean that Fennes had children sit on his lap in a platonic manner, as Montville suggests. *Id.* at 100. On the whole, then, the Complaint's plain terms match the Policy's definition of an "abusive act" almost verbatim. *Id.* at 177. Because there is no ambiguity, there is no doubt to resolve in Montville's favor.

Accepting Montville's position would force us to run afoul of New Jersey law in two respects. First, it

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Prior Known Acts Exclusion within it operate using the same definition of "abusive act." *Id.* Thus, if the Complaint's allegations of Fennes's conduct do not rise to the level of being "abusive act[s]" within the Prior Known Acts Exclusion, they also do not fall within the Abusive Acts Part in general. *Id.* Put simply, as they relate to Fennes's conduct, either Child M's allegations are such that both the Abusive Acts Part and the Prior Known Acts Exclusion apply or neither applies. Either way, the result is the same: Zurich is not obligated to defend Montville in the Child M Action.

would require us to torture straightforward language to find ambiguity where it does not exist. That, the Supreme Court of New Jersey tells us, we are not to do. *See Longobardi v. Chubb Ins. Co. of N.J.*, 582 A.2d 1257, 1260 (N.J. 1990) ("[T]he words of an insurance policy should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability.").

Second, Montville would have us overlook and replace an important qualifier in the relevant legal standard. The Supreme Court of New Jersey instructs courts, when determining an insurer's duty to defend, to "review . . . the complaint with liberality." *Abouzaid*, 23 A.3d at 346 (emphasis added). But Montville would have us do the very opposite. At oral argument, its counsel urged, in various forms, that the Complaint is flawed in that its allegations are "with[out] specificity." Oral Arg. Audio at 14:08–14:10. That, however, is not the standard. Notably, Montville has not produced any case law in support of imputing its concocted qualifier. Since we are charged here with faithfully making an *Erie* prediction, we refuse to adopt Montville's position, which contradicts core principles of New Jersey's duty to defend analysis. As a result, we hold that Child M's allegations in the Complaint plainly fall within the ambit of the Prior Known Acts Exclusion.

2. Extrinsic Evidence

Seemingly anticipating this writing on the wall, Montville raises another argument on appeal. In particular, it contends that the District Court violated New Jersey law by ignoring extrinsic evidence—that

which emerged over the course of litigating the Child M Action, outside the four corners of the Complaint—which purportedly demonstrates that Montville did not know about Fennes's prior abusive acts. Montville obsesses over the fact that the District Court's second partial summary judgment ruling "failed to analyze, distinguish, or even acknowledge" *SL Industries*, which allows courts to consider such extrinsic evidence. Appellant's Br. 4. But a deeper study of the record reveals why the District Court did not mention the case—and, more importantly, why Montville's argument is dead on arrival now.

That is because Montville entirely failed to raise this argument in its second partial summary judgment motion before the District Court. That motion focused exclusively on comparing the "allegations contained in [the] Complaint" with the "[p]lain [l]anguage" of the Prior Known Acts Exclusion. Pl.'s Cross-Mot. for Summ. J. Br. 9–10, ECF No. 44-1, in *Montville v. Zurich*, No. 2-16-cv-04466 (D.N.J. filed Feb. 20, 2018). Curiously, the motion is wholly silent on extrinsic evidence and does not "even acknowledge" *SL Industries*. Appellant's Br. 4. It is no wonder, then, that the District Court also did not discuss extrinsic evidence or the case on which Montville now fixates.

At this stage, Montville's failure to raise this argument before the District Court renders it waived, as we have "consistently held that [we] will not consider issues that are raised for the first time on appeal." *Harris v. City of Phila.*, 35 F.3d 840, 845 (3d Cir. 1994) (collecting cases); *see Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018) ("It is well established that arguments not raised before the District Court are waived on appeal." (quoting *DIRECTV, Inc. v.*

Seijas, 508 F.3d 123, 125 n.1 (3d Cir. 2007), and citing *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997))). We therefore need not discuss the merits of Montville's extrinsic evidence argument.

In any event, we note that, even if we were to decide this argument on its merits, Montville has essentially conceded it in Zurich's favor. The Supreme Court of New Jersey informs us that the rationale behind turning to extrinsic evidence is "to align with the expectations of insureds, who 'expect their coverage and defense benefits to be determined by the nature of the claim against them.'" *Abouzaid*, 23 A.3d at 347 (quoting *SL Indus.*, 607 A.2d at 1272). When asked at oral argument whether "the nature of Child M's claims against [Montville] are generally that [it] knew about Fennes's . . . sexual molestation and abuse of students while he worked for [it]," Montville's counsel emphatically agreed. Oral Arg. Audio at 0:58–1:18. By conceding this portrayal of Child M's allegations, which fall undoubtedly within the Prior Known Acts Exclusion, Montville is left with only one reasonable expectation: that Zurich is not obligated to defend it in the Child M Action. Even if we were to turn to extrinsic evidence, our resolution of this coverage dispute would have to align with that expectation. Our outcome would thus be no different.

V. CONCLUSION

For the foregoing reasons, we rule that the allegations of the Complaint fall within the ambit of the Policy's Prior Known Acts Exclusion, thereby relieving Zurich of the duty to defend Montville in the Child M Action. We will hence affirm the District Court's appealed summary judgment order.

OPINION OF THE DISTRICT COURT OF NEW JERSEY (AUGUST 21, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

No. 2:16-cv-4466-KM-MAH

Before: Kevin MCNULTY, United States District Judge.

KEVIN MCNULTY, U.S.D.J.:

Now before the court are cross-motions for summary judgment by Montville Township Board of Education ("Montville") and its insurer, Zurich American Insurance Co. ("Zurich"). Montville has been sued in state court by Child M. Child M alleges that Montville employed Jason Fennes for twelve years, knew about sexual misconduct by Fennes, failed to notify authorities, and agreed not to tell potential future employers about that conduct to induce Fennes to resign. After he resigned from Montville in 2010,

Fennes began working for Cedar Hill Prep, where he allegedly sexually molested several students, including Child M. Child M claims that Montville's silence enabled and facilitated Fennes's abuse of her at Cedar Hill Prep.

Montville initially argued that Zurich was obligated to defend it against Child M's allegations under its General Commercial Liability ("GCL") policy. Zurich declined because the GCL policy excludes coverage of claims "arising from" or "relating in any way" to "abusive acts." In a prior opinion, I found that Zurich did not have a duty to defend Montville under the GCL policy. (ECF No. 22). Montville moved for reconsideration, which I denied. (ECF No. 37).

Montville's motion for reconsideration also asserted, for the first time, the argument that Zurich had a duty to defend under the Abusive Acts ("AA") provision of their policy. Montville insists that this provision has been in issue throughout the litigation, despite its previous statements to the contrary. I was reluctant to permit a school district to sacrifice rightful coverage based on a possible strategic misstep, but equally reluctant to decide an issue as to which Zurich had not been given a fair opportunity to respond. I therefore authorized Montville to file a new motion asserting that Zurich has a duty to defend it under the AA policy. (ECF No. 37). Zurich's duty to defend under the AA policy is thus addressed in these cross-motions for the first time.

I. Legal standards

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to

any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Kreschollek v. S. Stevedoring Co.,* 223 F.3d 202, 204 (3d Cir. 2000). In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. *See Boyle v. County of Allegheny Pennsylvania,* 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing that no genuine issue of material fact remains. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof . . . the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Once the moving party has met that threshold burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson,* 477 U.S. at 248; *see also* Fed. R. Civ. P. 56(c) (setting forth types of evidence on which nonmoving party must rely to support its assertion that genuine issues of material fact exist). "[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation,* 912 F.2d 654, 657 (3d Cir. 1990). If the nonmoving party has failed "to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial, . . . there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co.,* 972 F.2d 53, 55 (3d Cir. 1992) (quoting *Celotex,* 477 U.S. at 322-23).

When the parties file cross-motions for summary judgment, the governing standard "does not change." *Clevenger v. First Option Health Plan of N.J.,* 208 F. Supp. 2d 463, 468-69 (D.N.J. 2002) (citing *Weissman v. U.S.P.S.,* 19 F. Supp. 2d 254, 259 (D.N.J. 1998)). The court must consider the motions independently, in accordance with the principles outlined above. *Goldwell of N.J., Inc. v. KPSS, Inc.,* 622 F. Supp. 2d 168, 184 (D.N.J. 2009). That one of the cross-motions is denied does not imply that the other must be granted. For each motion, "the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made" but does not "weigh the evidence or make credibility determinations" because "these tasks are left to the fact-finder." *Pichler v. UNITE,* 542 F.3d 380, 386 (3d Cir. 2008) (internal quotations and citations omitted). Nonetheless, when material underlying facts are not in dispute, summary judgment is appropriate to dispose of insurance-coverage questions. *McMillan v. State Mut. Life Assur. Co.,* 922 F.2d 1073, 1074 (3d Cir. 1990).

II. Discussion

Zurich does not have a duty to defend Montville from Child M's claims under the AA policy. The Prior Known Acts exclusion to the AA policy denies coverage

for claims arising from "abusive acts" when the insured knew about the "abusive acts" prior to the policy's effective date.[1] Child M's complaint sufficiently alleges that Montville knew that Fennes had engaged in "abusive acts" during his tenure at Montville. Montville's liability is alleged to arise from, or to be attributable to, in whole or in part, its knowledge of those earlier abusive acts. Allegations, of course, are not proof, but in general the duty to defend is triggered by the nature of the allegations. Because prior known acts are alleged, the Prior Known Acts exclusion negates Zurich's duty to defend under the AA policy.

Where ambiguities exist in a complaint, policy, or exclusionary clause, those ambiguities are resolved in favor of insurance coverage. However, if a straightforward reading of the complaint and policy, including exclusions, denies coverage, the court will apply the clear meaning of the text. The court will not engage in a strained construction or indulge a far-fetched interpretation of a policy to find coverage.

For Zurich to have a duty to defend, the court must find that (1) Child M's allegations activate the AA policy coverage for suits arising from "abusive acts" and that (2) the Prior Known Acts exclusion does not negate that coverage under the circumstances of this case. Subsection II.A outlines the well-established

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[1] Some confusion has resulted from the use of shorthand terms. When I say "arising from" abusive acts, I mean to incorporate the broad definition of the policy exclusion: "Any claim or 'suit' based upon, arising out of or attributable, in whole or in part, to any 'abusive act' of which any insured, other than the insured actually committing the 'abusive act', has knowledge prior to the effective date of this Coverage Part." (ECF No. 14-5, ex. C, p. 66-67 (emphasis added)).

principles that guide the duty-to-defend analysis. Subsection II.B discusses the applicability of the AA policy to Child M's allegations. Subsection II.B addresses the Prior Known Acts exclusion to the AA policy.

A. Duty-to-Defend Principles

The duty-to-defend analysis is guided by well-established principles:

> "[T]he duty to defend comes into being when the complaint states a claim constituting a risk insured against." Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy. When the two correspond, the duty to defend arises, irrespective of the claim's actual merit. If the complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor of coverage. When multiple alternative causes of action are stated, the duty to defend will continue until every covered claim is eliminated.

Voorhees v. Preferred Mut. Ins., Co., 607 A.2d 1255, 1259 (N.J. 1992) (internal citations omitted).

Policy exclusions, which limit the scope of coverage provisions, are governed by the following interpretive principles:

> Exclusionary clauses are presumptively valid and are enforced if they are "specific, plain, clear, prominent, and not contrary to public policy." If the words used in an exclusionary clause are clear and unambiguous, "a court

> should not engage in a strained construction to support the imposition of liability."
>
> We have observed that "[i]n general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." As a result, exclusions are ordinarily strictly construed against the insurer, and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it[.]
>
> Nonetheless, courts must be careful not to disregard the "clear import and intent" of a policy's exclusion, and we do not suggest that "any far-fetched interpretation of a policy exclusion will be sufficient to create an ambiguity requiring coverage[.]" Rather, courts must evaluate whether, utilizing a "fair interpretation" of the language, it is ambiguous.

Flomerfelt v. Cardiello, 997 A.2d 991, 996-97 (N.J. 2010) (internal citations omitted).

B. Abusive Acts Coverage

The AA policy states that that Zurich "will pay 'loss' because of 'injury' resulting from an 'abusive act' to which this insurance applies." (ECF No. 14-5, ex. C, p. 67). The parties agree that Child M's allegations involve an injury resulting from an "abusive act." Montville posits that "Child M's allegations fall within the scope of the Abusive Act Coverage Part, which explicitly provides insurance for loss because

of an injury resulting from an abusive act. It is undisputed that Child M alleges that she suffered injury at the hands of Fennes." (ECF No. 44-1, p. 9). Zurich, in response, does not really dispute the scope of the Abusive Act Coverage (but cites the Prior Known Acts exclusion, discussed below). (ECF No. 42-1, p. 12).

I agree that Child M's allegations fall within the ambit of the AA coverage. The policy defines an "abusive act" as follows:

> "Abusive act" means any act or series of acts of actual or threatened abuse or molestation done to any person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person, resulting in "injury" to that person, by anyone who causes or attempts to cause the person to engage in a sexual act:
>
> a. Without the consent of or by threatening the person, placing the person in fear or asserting undue influence over the person;
>
> b. If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or
>
> c. By engaging in or attempting to engage in lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of any person.

(ECF No. 14-5, ex. C, p. 71).

Child M clearly alleges that she was subject to "abusive acts" by Fennes at Cedar Hill Prep and suffered an injury. The complaint alleges that Fennes "sexually assaulted, inappropriately touched, and otherwise abused" Child M at Cedar Hill Prep. (ECF No. 14-4, p. 20-21). Child M's suit therefore arises from allegations of "abusive acts" that were allegedly enabled by Montville's failure to report Fennes's sexual misconduct at Montville, resulting in his being hired by Cedar Hill.

C. Prior Known Acts Exclusion

The Prior Known Acts exclusion, however, negates Zurich's duty to defend Montville under the AA policy. The Prior Known Acts exclusion provides that there is no coverage under the AA policy for [a]ny claim or 'suit' based upon, arising out of or attributable, in whole or in part, to any 'abusive act' of which any insured, other than the insured actually committing the 'abusive act', has knowledge prior to the effective date of this Coverage Part." (ECF No. 14-5, ex. C, p. 66-67). The "effective date" of the abusive acts coverage part, all agree, is July 1, 2011.

The complaint clearly alleges that Fennes engaged in sexual misconduct before July 1, 2011, while he worked at Montville. Montville argues, however, that these were not prior known acts for purposes of the exclusion. Child M's complaint, says Montville, "does not allege with specificity that the Board had knowledge of any information which would clearly meet the definition of an 'abusive act' as used in the Abusive Act Coverage Part" prior to July 1, 2011. (ECF No. 44-1, p. 10).

This argument is unavailing. Child M's complaint alleges that Montville "was on notice of Fennes's "inappropriate abusive and/or sexual conduct with his infant students" and "failed to report . . . to the appropriate administrative agencies, local, county and state authorities as well as potential employers including Cedar Hill Prep." (ECF No. 14-4, ex. B, Count 9, ¶¶ 2-4). The complaint further alleges that Fennes, while an employee of Montville, "engaged in various acts of sexual molestation and/or child abuse against other infant students." (*Id.* Count 10, ¶ 3). It asserts that Montville "controlled the hiring, retention, supervision and cover-up on the heinous acts of molestation perpetrated by [Fennes]," and "caused [plaintiff's] exposure to [Fennes], a known pedophile and child molester. . . . " (*Id.* Count 11, ¶¶ 4, 6).

Montville argues that these allegations do not clearly set forth an "abusive act," as defined in the policy. Montville claims that the court has "no way of knowing what the Complaint was referencing when it stated that the Board was on notice of 'abusive and/or sexual conduct' and 'sexual molestation and/or child abuse.'" (ECF No. 44-1, p. 12). "For example, Child M might be alleging that the Board had knowledge of students sitting on Fennes' lap." (*Id.*). Montville claims that this "is plainly not what was contemplated by the Prior Known Acts Exclusion." *(Id.).*

I reject Montville's arguments.

First, Child M alleges that Montville was aware that Fennes had engaged in "sexual molestation" and "child abuse." Child M alleges that Montville knew Fennes was "a known pedophile and child molester." These allegations would not reasonably be construed to state that Fennes had children sit on his lap in a

platonic, non-sexual way. A straightforward reading of the complaint is that Montville was allegedly aware of "abusive acts" prior to the effective date of the policy. And the theory of liability is that Montville covered up such acts, permitting the abuse of Child M to occur at Cedar Hills.

Second, a comparison of the allegations about Fennes's time at Cedar Hills Prep and his time at Montville makes it fairly clear what is meant. Child M makes substantively the same allegations about Fennes regarding his time at Cedar Hill Prep and Montville. While at Cedar Hill Prep, Child M alleges, she was "sexually assaulted, inappropriately touched, and otherwise abused" by Fennes. (ECF No. 14-4, p. 20-21). Child M claims that Fennes was "a sexual predator, pedophile, and deviant." (*Id.* at 21). At Montville, Child M alleges that students were victims of Fennes's "sexual molestation" and "child abuse." These statements are sufficient to notify Montville of allegations that Fennes engaged in sexual misconduct toward children during his Montville employment.

It is true that exclusionary clauses are to be narrowly construed and that ambiguities in a complaint are resolved in favor of insurance coverage. *See Flomerfelt v. Cardiello,* 997 A.2d 991, 996-97 (N.J. 2010). Still, there must be a predicate ambiguity. *Id.* As the New Jersey Supreme Court stated in *Voorhees v. Preferred Mutual Insurance Co.,* "*[i]f the complaint is ambiguous,* doubts should be resolved in favor of the insured and thus in favor of coverage." 607 A.2d 1255, 1259 (N.J. 1992) (emphasis added); *cf. Longobardi v. Chubb Ins. Co. of N.J.,* 582 A.2d 1257, 1260 (N.J. 1990) ("[T]he words of an insurance policy should be given their ordinary meaning, and in the absence of

an ambiguity, a court should not engage in a strained construction to support the imposition of liability.").

Where there is no ambiguity, the court need not torture straightforward language to find coverage. The AA policy, the Prior Known Acts exclusion, and the complaint are clear and unambiguous. The complaint rests on the theory that Montville knew Fennes committed abusive acts while he was a teacher at Montville. Of course, Montville contests this, but if the insured's denial of liability controlled the issue, then there might rarely if ever be a duty to defend. It is generally the nature of the allegation that controls the insurer's duty to defend, and here the allegation is that Montville knew about the prior acts of molestation upon which its liability is premised.

III. Conclusion

Zurich does not have a duty to defend Montville against allegations that it knew of Fennes's abusive conduct at Montville before July 1, 2011, but nevertheless took steps that had the effect of facilitating Child M's molestation at Cedar Hill. Zurich's motion for summary judgment is granted and Montville's motion for summary judgment is denied.

An appropriate order accompanies this opinion. The clerk shall close the file.

/s/ Kevin Mcnulty
United States District Judge

Dated: August 21, 2018

ORDER OF THE DISTRICT COURT OF NEW JERSEY (AUGUST 21, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

No. 16-cv-4466-KM-MAH

Before: Kevin MCNULTY,
United States District Judge.

THIS MATTER having come before the Court on the motion for summary judgment of defendant Zurich American Insurance Co. (ECF No. 42); and the cross-motion for summary judgment of plaintiff Montville Township Board of Education (ECF No. 44); and the Court having reviewed the moving, opposition, and reply papers (ECF Nos. 42, 44, 45) without oral argument; for the reasons stated in the accompanying Opinion and good cause appearing therefor;

IT IS this 21st day of August, 2018,

ORDERED that defendant Zurich American Insurance Co.'s motion for summary judgment (ECF No. 42) is granted; and plaintiff Montville Township Board of Education's cross-motion for summary judgment (ECF No. 44) is denied.

/s/ Kevin Mcnulty
United States District Judge

OPINION OF THE DISTRICT COURT OF NEW JERSEY (JANUARY 19, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

Civ. No. 16-4466 (KM) (MAH)

Before: Kevin MCNULTY,
United States District Judge.

KEVIN MCNULTY, U.S.D.J.

Before the court is the motion of Montville Township Board of Education ("Montville") for reconsideration of my prior Opinion ("Op.", ECF no. 22) and Order (ECF no. 23). In that Opinion, I held that Montville's insurer, Zurich American Insurance Co. ("Zurich"), did not have a duty under the GCL Coverage Part of the policy to defend Montville against state-court claims brought against it by Child M. Child M alleges that Montville, while it employed Jason Fennec as a teacher for twelve years, knew about

abusive acts by Fennes, failed to notify the authorities, and agreed not to tell potential future employers about that conduct in order to induce Fennes to resign. In 2010, Fennes did resign, and went on to a position at Cedar Hill Prep, where he sexually abused a number of students. He was later criminally charged for acts of sexual abuse. Montville's silence, Child M claims, enabled and facilitated Fennes's abuse of her at Cedar Hill.

Montville sought a declaratory judgment by order to show cause, and has contended throughout that Zurich is obligated to defend it against Child M's allegations under the GCL Coverage Part of its general commercial liability ("GCL") policy. Zurich has declined to do so, based on, *inter alia,* the GCL

Coverage Part's exclusion of claims "arising from" or "relating in any way" to "abusive acts."

Taking the claims as presented by Montville, I considered whether Zurich's duty to defend under the GCL Coverage Part was vitiated by the abusive acts exclusion. The scope of the duty to defend, I held, is determined by the nature of the allegations against the insured—*i.e.*, the kind of claim being made. To simplify a bit, if the plaintiff does not allege a covered risk, the insurer has no duty to defend against the allegation. Montville's insistence that it was not actually guilty of any wrongdoing with respect to the abuse of students, I wrote, did not alter the nature of the claims being asserted, or the issue of whether the risk fell within the coverage of the GCL Coverage Part.

To some degree, Montville seems to request that I reconsider my disposition of the issues under the

GCL Coverage Part. I discuss that contention in Section II.B.1, *infra,* but reject it.

Primarily, however, Montville has switched its approach. Now it argues that it is entitled to defense costs (and presumably coverage) under a different part of the policy: the Abusive Acts ("AA") Coverage Part. Without really acknowledging the switch, Montville objects in substance that the bulk of the discussion in the prior Opinion is inapplicable to the AA Coverage Part. And no wonder—that was not the issue that Montville's papers, fairly read, presented to the Court.

The issue now before the Court is whether Montville's new position is cognizable on reconsideration. Citing a brief reference in its Reply and Opposition brief, and a head-scratching footnote in my Opinion where I attempted to make sense of that reference, Montville insists that—or rather, blusteringly acts as if—the AA Coverage Part issue has been in the case all along. Indeed, Montville's counsel appears to be trying to convince the author of the Opinion that his Opinion (which devoted a few sentences of a footnote to a version of the issue) '<u>focused</u> on the 'prior known acts' exclusion of the 'AA Coverage Part.'" ((Reconsideration Br. 7, ECF no. 31; emphasis added)

Still, I would not lightly deny an insured, and particularly a school district, the benefit of its insurance policy because its counsel's tactics were ill-considered, or even because I thought counsel had wasted the time and resources of its adversary and the Court. I will analyze the motion to reconsider, as it bears on the AA Coverage Part, in Section II.B.2, *infra.*

I. Standard on Motion for Reconsideration

The standards governing a motion for reconsideration are well settled. *See generally* D.N.J. Loc. Civ. R. 7.1(i). Reconsideration is an "extraordinary remedy," to be granted "sparingly." *NL Indus. Inc. v. Commercial Union Ins. Co.,* 935 F. Supp. 513, 516 (D.N.J. 1996). Generally, reconsideration is granted in three scenarios: (1) when there has been an intervening change in the law; (2) when new evidence has become available; or (3) when necessary to correct a clear error of law or to prevent manifest injustice. *See North River Ins. Co. v. CIGNA Reinsurance Co.,* 52 F.3d 1194, 1218 (3d Cir. 1995); Carmichael v. Everson, 2004 WL 1587894, at *1 (D.N.J. May 21, 2004). Local Rule 7.1(i) requires such a motion to specifically identify "the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked." *Id.; see also Egloff v. New Jersey Air Nat'l* Guard, 684 F. Supp. 1275, 1279 (D.N.J. 1988). Evidence or arguments that were available at the time of the original decision will not support a motion for reconsideration. *Damiano v. Sony Music Entm't, Inc.,* 975 F. Supp. 623, 636 (D.N.J. 1997); *see also North River Ins. Co.,* 52 F.3d at 1218; *Bapu Corp. v. Choice Hotels Intl, Inc.,* 2010 WL 5418972, at *4 (D.N.J. Dec. 23, 2010) (citing *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.,* 161 F. Supp. 2d 349, 352 (D.N.J. 2001)).

II. Discussion

For ease of reference, I repeat here my summary of the pertinent allegations of Child M's state-court complaint:

- Prior to working at Cedar Hill, Montville employed Fennes as a teacher and track coach at William Mason Elementary School. During the 12 years he worked at Montville, Fennes sexually abused minor students. (Compl. p. 11)
- Montville knew about, or was on notice of, such sexual abuse. Montville nevertheless failed to report Fennes to the appropriate authorities as required by law. (*Id.*)
- Montville entered into an agreement, dated May 4, 2010, with Fennes, in which Montville agreed to "limit the scope of information" it would communicate to potential employers "in exchange for" his resignation. (*Id.* at 12)
- Fennes "performed various acts of sexual molestation against" Child M (*Id.* at 5)
- But for Montville's failure to report and "provide pertinent and highly relevant information" about Fennes to potential employers, such as Cedar Hills, Child M would not have been sexually abused by Fennes. (*Id.* at 12-15)

(Op. 2-3)

In that action, Montville prevailed on a motion for summary judgment. That judgment, however, was for the most part reversed by the Appellate Division. *Child M. v. Fennes,* Docket No. A-0873-15T2, 2016 WL 4473253, 2016 N.J. Super. Unpub. LEXIS 1955, *2-*8 (App. Div. Aug. 25, 2016). My Opinion quoted at length from the Appellate Division's opinion. (Op. 6-10) (Montville's objection to my having done so is discussed at Section II.B.1, *infra.*)

A. Correction of Date, New Evidence

Before proceeding to the substance, I briefly consider two discrete subsidiary issues raised by the reconsideration motion.

1. Date correction

In the introductory paragraph of the Opinion, I wrote that that *"In 2012,* one of Fennes's alleged victims, Child M, a Cedar Hills student, sued (among others) Montville." (Op. 1; emphasis added) That sentence inaccurately telescopes the events. The original 2012 state-court complaint named only Fennes and Cedar Hill; Montville was added by amendment later, in 2015.

Montville makes much of what was clearly a slip of the pen; I did not misapprehend the facts. Two pages later, in the formal statement of facts, I described the procedural history accurately:

> In August 2012, Child M and her parents sued Fennes and Cedar Hill. On January 23, 2015, Child M filed a third amended complaint that named Fennes, Cedar Hill, Montville, and others as defendants.

(Op. 3)

The misstatement on page 1 had no effect on the Court's decision. Nevertheless, accuracy is important. Reconsideration is granted to the extent that I will order that the sentence on page 1 of the Opinion be amended to delete "In 2012," and to read in its amended form as follows: "One of Fennes's alleged victims, Child M, a Cedar Hills student, sued (among others) Montville."

2. New evidence

Montville proffers a document, dating from 2010 but "new" in the sense that it was obtained by Montville after I had filed my Opinion. (ECF no. 25, sealed) Because Montville represents that it did not possess the document, there is at least an argument that it could not have been expected to bring it to the Court's attention before. Zurich, however, disputes that this document was previously unavailable to Montville.

Because the document is sealed, I will not describe it in detail here. Suffice it to say that it reports the results of an investigation, concluded shortly before Fennes resigned. This document, says Montville, constitutes evidence that it did not have prior knowledge of abusive acts by Fennes. Even if I accepted Montville's contention at face value, however, this new evidence would not alter the basis for my prior decision.

First, the sealed document does not change the nature of Child M's allegations or the scope of the duty to defend under the GCL Coverage Part. At best, it would seem to be a counterweight to the evidence of Montville's liability. The fact remains that Child M's claims arise from and relate to acts of abuse, as established in my prior Opinion, and that Montville has not established that these are covered risks under the GCL Coverage Part.

Second, much of the substance of this document was described in the passage from the Appellate Division Opinion quoted in my Opinion. Possession of the document itself would only have incrementally supplemented what the Court considered in connection with the prior Opinion.

Reconsideration will therefore be denied to the extent it is based on this "new evidence."

B. Duty to Defend Under GCL and AA Coverage Parts

I proceed to the heart of Montville's motion. It is important to distinguish between two portions of the Zurich policy. I refer to (1) the GCL Coverage Part, which contains an exclusion for "abusive acts," and (2) the AA Coverage Part, which contains an exclusion for "prior known acts." Although Montville now focuses on (2), I must first discuss (1) for context.

1. GCL Coverage Part, with Abusive Act Exclusion

Montville, throughout the state and federal proceedings, has rested its case on the "GCL Coverage Part" of its General Commercial Liability policy with Zurich. This part broadly provides insurance for "bodily injury" caused by an "occurrence." As discussed in far more detail in my Opinion (Op. 14-15), this part excludes any claim for bodily injury "arising out of or relating in any way to an 'abusive act'" or "any loss, cost or expense arising out of or relating in any way to an 'abusive act." The definition of an abusive act (quoted at Op. 4-5) would reasonably encompass sexual abuse of a young child, but is much broader than that.

The question for the court—which was considering only the applicability of the abusive acts exclusion from the GCL Coverage Part—was this: Does the Child M state court litigation against Montville assert claims "arising out of or relating in any way to an 'abusive act"? I answered that question in the affirmative, discussing it at length and citing applicable law. I

found that the claimed liability of Montville, though indirect, arose from or related to acts of sexual abuse. The abusive acts exclusion from the GCL Coverage Part liability therefore applied. (Op. 14-21)

Montville objects strenuously that it did not know about any acts of sexual abuse by Fennes while they were happening, whether during or (especially) after his employment in Montville. That may be the foundation of a defense. As to the GCL Coverage Part's exclusion of Abusive Acts, however, Montville's knowledge is not especially relevant. It is the nature of the claim, not the insured's culpable mental state, that determines whether the claim implicates a covered risk. Montville's claimed lack of knowledge or culpability does not alter the nature of the claims, which arise from and relate in any way to sexual abuse of a minor. (*See* summary of Child M's claims in state court complaint at p. 3, *supra.*)[1]

Montville objects in particular to the Court's lengthy quotation from the opinion of the New Jersey Superior Court, Appellate Division, in *Child M. v. Fennes,* Docket No. A-0873-15T2, 2016 WL 4473253, 2016 N.J. Super. Unpub. LEXIS 1955, *2-8 (App. Div. Aug. 25, 2016). That court found that a reasonable jury could conclude from the evidence that Montville covered up abusive acts of which it knew or had reason to know.

My citation of the Appellate Division opinion did not, as Montville urges, constitute an invalid finding of fact that it knowingly covered up the abuse. Indeed, the Appellate Division's opinion itself did not

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[1] The AA Coverage Part, with its Prior Known Acts exclusion, is discussed in Section II.B.2, *infra.*

constitute such a finding; reviewing a grant of summary judgment, that court found only that the evidence, interpreted in the light most favorable to Child M, would permit a jury to make certain findings.[2]

I cited the Appellate Division case because it clarifies the nature of the allegations being asserted in Child M's state court litigation against Montville. Indeed, and a fortiori, it imposes the additional

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[2] Among those potential findings were

> (a) "[A]s of 2005, Montville knew that Fennes was engaged in inappropriate physical contact with female students. Among other things, Fennes had female students sit on his lap; allowed them to touch his legs, thighs and buttocks; kissed them and allowed them to kiss him; threatened them not to tell anyone; and told them they would get into trouble or he would not like them anymore or hold their hands if they told anyone."
>
> (b) Admonished by the administration, Fennes defiantly responded that he was an "affectionate person" and "was not going to stop cold turkey.
>
> (c) Three complaints were made to the New Jersey Department of Children and Families, Division of Youth and Family Services, and that complaints from parents continued, including one of Fennes patting a student on the buttocks and hugging her.
>
> (d) The principal warned Fennes in September 2008 that it was unacceptable to have physical contact with students, but eight months later saw three female students sitting in his lap.

(Op. 7-10 (quoting App. Div. Opinion)). The Appellate Division went on to relate that the district failed to follow up adequately, and agreed in connection with Fennes's resignation that it would disclose nothing to future employers except the positions he held and his dates of employment. (*Id.*)

condition that Child M's allegations have some evidentiary support.

"The duty to defend comes into being when the complaint states a claim constituting a risk insured against." (Op. 13-14) (emphasis added; citing *Voorhees v. Preferred Mut. Ins. Co,* 128 N.J. 165, 173-74 (1992)). The duty to defend is triggered by a claim which, if sustained, would require the insurer to indemnify the insured. This claim—that Montville knew about and covered up abuse—may not be sustained. Montville says the claim will fail, and offers evidence to that effect. But even if the claim were sustained, it would not set forth a covered risk under the GCL Coverage Part, so Zurich does not have a duty to defend under that Coverage Part.

A distinction is drawn between a groundless action and one, which measured by the pleadings, even if successful, would not be within the policy coverage. . . .

In 45 C.J.S., Insurance, s 933, p. 1056, the rule appears as follows:

> "The duty to defend should be determined from the language of the insurance contract and from the allegations in the petition or complaint in the action brought by the one injured or damaged against insured, and the insurer's denial of liability and refusal to defend after investigating the facts must be disregarded. The obligation to defend is to be determined when the action is brought, and not by the outcome of the action."

Danek v. Hommer, 28 N.J. Super. 68, 77, 100 A.2d 198, 202-03 (App. Div. 1953), *affd,* 15 N.J. 573, 105 A.2d 677 (1954).

Counsel point to one exception to, or refinement of, this principle. The duty to defend is not necessarily frozen by the complaint. The duty to defend may arise where facts extrinsic to the complaint in effect expand the claim, bringing the claim within the policy's coverage. *See Abouzaid v. Mansard Gardens Assocs., LLC,* 207 N.J. 67, 86 (2011) (where no covered claim appeared on face of complaint, but interrogatories revealed basis for covered claim, duty to defend was triggered); *SL Indus. v. Am. Motorists Ins. Co.,* 128 N.J. 188, 198 (1992) (even where complaint appears to allege no covered claim, plaintiff's later interrogatory responses may trigger duty to defend).

That exception is to be distinguished, however, from the defendant insured's simply saying that it will prevail on the merits and thereby negate some exclusion or limitation on coverage. That does not change the nature of the claims being asserted. *See P.D. v. Germantown Ins.* Co., 2015 N.J. Super. Unpub. LEXIS 1731, at *14-15 (App. Div. July 20, 2015). *State Farm Fire & Cas. Co. v. Gregory*, 2012 WL 2051960, 2012 N.J. Super. Unpub. LEXIS 1301, at *6 (App. Div. June 8, 2012).

Looking forward from the duty to defend to the coverage/indemnity phase, I add one caveat. As of now, Montville has not established that these claims involve a covered risk under the GCL Coverage Part. It might come about, however, based on events in the case and development of the record, that they are. Should Montville be found liable, the issue may be revisited.

2. AA Coverage Part

A second provision, an endorsement that the parties have deemed the Abusive Act ("AA") Coverage Part, to some degree fills the gap left by the abusive acts exclusion. For a premium, the AA Coverage Part insures against "'loss because of 'injury' resulting from an 'abusive act.'" The definitions of "abusive act" for purposes of the CGL Coverage Part and the AA Coverage Part are substantively similar.[3]

The AA Coverage Part, however, contains an exclusion of its own, deemed the "Prior Known Acts" exclusion. There is no coverage under the AA Coverage

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[3] The AA Coverage Part, however (because it grants, rather than excludes, coverage) would require that the abuse or molestation result in injury. With that caveat, the policy's definition of an abusive act is as follows:

> An "abusive act" means:
>
> any act or series of acts of actual or threatened abuse or molestation done to any person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person by anyone who causes or attempts to cause the person to engage in a sexual act:
>
> a. Without the consent of or by threatening the person, placing the person in fear or asserting undue influence over the person;
>
> b. If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or
>
> c. By engaging in or attempting to engage in lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of any person.

(Def. SUMF ¶ 16; Pl. Resp. SUMF ¶ 16)

Part for "any claim or 'suit' based upon, arising out of or attributable, in whole or in part, to any 'abusive act' of which any insured, other than the insured actually committing the 'abusive act', has knowledge prior to the effective date[4] of this Coverage Part." (Def. SUMF 18-20, quoting Policy § I.1.a., I.2.d., U-GL-1275-A CW (04/2006); Pl. Resp. SUMF ¶¶ 18-20; Policy § V.1, U-GL-1275-A CW (04/2006)

For purposes of reconsideration, it is important to consider the following question: Did my prior Opinion, in deciding the GCL Coverage Part issue, "overlook" an AA Coverage Part issue presented by Montville? Ultimately, I answer that question in the negative.

My Opinion was devoted to the issue of the GCL Coverage Part, because that was the issue presented by Montville. Montville relied all along on the GCL Part, not the AA Part. Now it is true that the Verified Complaint for declaratory judgment (ECF no. 1-1 at 20) included a citation to the AA Coverage Part. With the Verified Complaint, however, Montville filed an order to show cause, seeking declaratory relief. In its brief in support of the order to show cause, Montville placed no reliance on the AA Coverage Part, and all but conceded that the AA Coverage Part was inapplicable. The discussion in that brief was devoted to the GCL Coverage Part. And the final point of the Brief was entitled "E. The Fact That the Additional Zurich Abusive Act [AA] Coverage May Not Apply is Irrelevant." (OSC Br. p. 15, ECF no. 1-1)

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[4] The relevant "effective date," the parties seem to agree, would be July 1, 2011. The abuse of Child M is alleged to have taken place in 2012, during the 2011-12 renewed term of the policy.

After the case was removed to this Court, Montville filed its motion for summary judgment. Again, its Brief in support (ECF no. 14-3) relied solely on the GCL Coverage Part and the alleged inapplicability of the associated abusive acts exclusion. Once again, Montville virtually conceded that the AA Coverage Part did not apply, and disclaimed reliance on that part. The final point of Montville's summary judgment brief was entitled "F. The Fact That The Additional Zurich Abusive Act Coverage May Not Apply is Irrelevant." (Montville SJ Brief p. 21, ECF no. 14-3 at 26) The text of that point, set out in the margin,[5]

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[5] Here is Point F of Montville's summary judgment brief, in its entirety:

> F. The Fact That The Additional Zurich Abusive Act Coverage May Not Apply is Irrelevant
>
> > Zurich also disclaimed under the Abusive Act Coverage to the extent that Jason Fennes was not its employee and Child M was not its student. Additionally, Zurich refused coverage under the Abusive Act Coverage by alleging the Board was aware of prior claims or litigation involving Fennes and had prior knowledge of abusive acts *See* Edelstein Cert., Ex. E at pp. 12-14. While such information may be a basis for denying coverage under the Abusive Act Coverage, coverage still applies under the previously discussed sections of the Zurich policy [*i.e.,* the GCL Coverage Part].
> >
> > For these reasons, the blanket exclusion for sexual abuse does not apply. While not every claim may be covered, there are claims such as emotional distress, which if proven, would be a covered claim under the Zurich policy. It is beyond dispute that coverage is warranted based on the entirety of the Zurich Policy and the claims for which coverage is sought. As such, the Board is entitled to summary judgment as a matter of law.

confirms that Montville was not pressing the issue of the AA Coverage Part.

Zurich understandably responded to Montville's summary judgment motion on the basis of the GCL Coverage Part. It simultaneously cross-moved for summary judgment in its own favor on the same basis. (ECF no. 17)

Only thereafter, in its Reply Brief and Opposition, did Montville drop in a short reference to the AA Coverage Part as an alternative argument. (Reply Br. 11-12, ECF no. 20 at 15-16)[6] My Opinion briefly

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(Montville SJ Brief p. 21, ECF no. 14-3 at 26)

[6] Here is the relevant passage from the Reply Brief, in its entirety:

> In the event that this Court determines that there is a substantial nexus between the Board's actions and Fennes' acts (which the Board does not admit), the Board purchased an endorsement to the Policy entitled "Abusive Act Liability Coverage, Form" specifically for the purpose of covering the type of claim at issue in this case. *See* Edelstein Cert. Ex. C at Abusive Act Liability Coverage Form; Ex. A at 1120. The Abusive Act Liability Coverage Form states that Zurich will provide coverage for abusive acts. *See* Edelstein Cert. Ex. C at Abusive Act Liability Coverage Form. Zurich's disclaimer, based not only on the underlying CGL Policy, but also on the endorsement to the Policy, is not only wrong, but flies in the face of the Board's reasonable expectations as an insured. It is undisputed that the blanket exclusion for abusive acts was modified by the endorsement. The purpose of the endorsement is to provide coverage for abusive acts. None of the exclusions contained in the endorsement apply to the Board. Zurich cannot have it both ways. First it claims that they do not cover abusive acts and that Fennes' abusive act should be imputed to the Board to deny coverage. This is wrong. The Board's alleged negligent acts are separate and

addressed that alternative argument in a footnote. I reproduce that footnote in full in the margin.[7]

> apart from Fennes' abuse of Child M when she was a student at Cedar Hill. Next, Zurich argues that (although it was willing to take the Board's money for an endorsement to the Policy that covers abusive acts) the claims against the Board should not be covered because of an exclusion in the endorsement. That exclusion only operates to prevent coverage if the Board participated in the abusive act. The Board did not "participate" in the abusive act-it happened years later when Fennes was employed by a different school. The Board did not participate, direct or allow the abuse by Fennes. Zurich cannot twist the facts to fit them under an exclusion in order to disclaim coverage. The Board purchased an endorsement to cover claims for abusive acts exactly like the claims in this case. As such, there is no reasonable interpretation of the Policy that operates to prevent coverage, and Zurich should be ordered to defend the Board.

(Reply Br. 11-12, ECF no. 20)

[7] That footnote (Op. 13 n.9) reads, in its entirety, as follows:

> This [abusive acts] exclusion, cited above, is contained in the GCL Coverage Part, which does not really seem to be designed to cover sexual abuse at all. A question arises as to why Montville is attempting to shoehorn its claim into the GCL Coverage Part. After all, Montville purchased abusive-acts coverage separately in the AA Coverage Part. And it concedes that it purchased that AA coverage because the abusive-act exclusion in the CGL Coverage Part is essentially a "blanket exclusion." (Pl. Reply Br. 12)
>
> The explanation would seem to lie in the "prior known acts" exclusion of the AA Coverage Part. Montville cannot avail itself of the AA coverage it purchased, because Zurich did not agree to insure Montville for abusive acts it knew about <u>before</u> the

Now, in its reconsideration motion, Montville barely mentions the GCL Coverage Part, and has stacked its chips on the AA Coverage Part.[8] Rather

> effective date of the policy, *i.e.,* July 1, 2011. And Montville's prior knowledge is the very essence of Child M's claim against it.
>
> When Montville originally filed this coverage action in New Jersey Superior Court, it relied solely on the GCL Coverage Part. (ECF No. 1, Ex. A) It did the same in its motion for summary judgment in this Court. Now, in response to Zurich's cross-motion for summary judgment, Montville makes a terse claim of coverage under the AA Coverage Part. (Pl. Reply Br. 11-12) That contention lacks merit.
>
> Without citation, Montville states that the "prior known acts" exclusion applies only to abusive acts which it actually committed or participated in. (*Id.*) There is no such limitation in the language of the exclusion, however. The exclusion broadly applies to "any claim or 'suit' based upon, arising out of or attributable, in whole or part, to any 'abusive act' of which any insured . . . has knowledge prior to the effective date of this Coverage Part." (Def. SUMF ¶ 20; Pl. Resp. SUMF ¶ 20, quoting Policy § I.2.d, U-GL-1275-A CW (04/2006)) (emphasis added)). I therefore find that Zurich did not wrongfully disclaim under the AA Coverage Part.

[8] I am still uncertain of the answer to the question I posed in the footnote: why Montville previously confined itself to the GCL Coverage Part, which excludes abusive acts, and eschewed the AA Coverage Part, which covers them. I raise it because it is relevant to an issue that arises on any reconsideration motion: whether the party seeking reconsideration has a good reason for having failed to raise an argument before. On that point, Montville offers nothing. It is possible that Montville was simply trying to put as much daylight as possible between itself and any allegation of abuse. Now, facing denial of defense costs, Montville seems to be willing to accept coverage and defense under the AA Coverage Part.

than explain the switch, it seems to imply that it was relying on the AA Coverage Part all along. According to Montville, the Court erred in "holding that the Prior Known Acts exclusion applies to bar coverage under the abusive act [AA] coverage part." (Reconsideration Reply Br. 2, ECF no. 31) In a section entitled "The Court's Key Determination" Montville states that the Court 'focused on the 'prior known acts' exclusion of the 'AA Coverage Part.'" (Reconsideration Motion Br. 7, ECF no. 24-1 at 7; emphasis added)

That footnote has yielded more to Montville's reading than I can find there. My Opinion did not "focus" on the Prior Known Acts exclusion, or even the AA Coverage Part, because Montville itself had not focused on it. The footnote, quoted *supra,* addressed the brief reference to the AA Coverage Part in Montville's Reply and Opposition. In that footnote, I expressed puzzlement as to why Montville had relied on the GCL Coverage Part to the virtual exclusion of the AA Coverage Part, which expressly covers acts of abuse. The "explanation," I speculated—*i.e.*, the explanation for Montville's position—"would seem to lie in the 'prior known acts' exclusion of the AA Coverage Part." (*See* Op. 13 n.9) That explanation, of course, was taken directly from Montville's own statements in its brief's that allegations of its prior knowledge of abuse "may be a basis for denying coverage under the Abusive Act Coverage," a concession that was accompanied by an immediate pivot back to the GCL Coverage part. (*See* n.5, *supra.*)

Nor did Montville's short discussion in the Reply and Opposition make a straightforward argument that the Prior Known Facts exemption did not apply because Montville lacked prior knowledge. Rather,

Montville made a different argument, one that did not, strictly speaking, involve prior knowledge as such. No exclusion from the AA Coverage Part would apply, it said, because such an exclusion "only operates to prevent coverage if the Board participated in the abusive act." (The Reply Brief passage is quoted at n.5, above.) That—the argument that Montville actually made with respect to the AA Coverage Part—is the argument I addressed in the footnote.

The Prior Known Acts exclusion negates coverage under the AA Coverage Part for "any claim or 'suit' based upon, arising out of or attributable, in whole or in part, to any 'abusive act' of which any insured, other than the insured actually committing the 'abusive act', has knowledge prior to the effective date of this Coverage Part." (Policy § I. 2.d., U-GL-1275-A CW (04/2006) (emphasis added). Thus, I stated in the footnote, Zurich did not wrongfully disclaim AA Coverage Part defense and coverage based on Montville's "non-participation" argument. And frankly even that argument—which is distinct from the "lack of prior knowledge" argument Montville is making now—was undeveloped and sketchily explained.

So set aside Montville's position that the Court somehow overlooked its previously-presented argument that its defense costs are recoverable under the AA Coverage Part and are not excluded by the AA Part's Prior Known Acts exclusion because Montville had no such prior knowledge. I nevertheless consider other grounds for reconsideration.

There has been no intervening change in the law, and the proffered new evidence, as stated above, does nothing to undermine the Court's reasoning. That leaves reconsideration when necessary to correct a

clear error of law or to prevent manifest injustice. *See* Section I, *supra,* and cases cited. Assessment of that issue requires the Court to consider Montville's belated contentions to some degree.

Ordinarily, I might simply do so, employing a summary judgment standard. That would be manifestly unfair to Zurich, from a procedural point of view. At best, Montville offers a fig-leaf argument that it cited the AA Coverage Part in its Complaint and in its Reply Brief/Opposition on summary judgment. That is something, but it is not much. Zurich was not placed on fair notice that it would have to respond to such arguments. Even assuming that these arguments were asserted in some form, by placing them in a Reply and Opposition to Cross-Motion, Montville's counsel ensured that Zurich would not have the opportunity to respond in the ordinary course. *See* Loc. Civ. R. 7.1(h) ("No reply brief in support of the cross-motion shall be served and filed without leave of the assigned district or magistrate judge.")

The alternative that makes the most sense is this. I will treat the prior decision as a partial grant of summary judgment on the issue of the duty to defend under the GCL Coverage Part. I will grant the motion for reconsideration in the narrowest sense—*i.e.*, I will consider (I do not say "reconsider") the question of Zurich's duty to defend under the AA Coverage Part. If Zurich contests that issue, it may file a succinct, second motion for partial summary judgment. That motion and any opposition may cite exhibits previously filed, and counsel need not resubmit them. Counsel are directed to confer within 5 days and submit a letter proposing an agreed schedule for motion papers, responses, and reply briefs. If there is a cross-motion,

it shall take the form of a simple mirror-image notice of motion; it shall not be the occasion for a separate round of briefing. Counsel should not anticipate that any request for a surreply will be granted.

III. Conclusion

For the foregoing reasons, Montville's motion for reconsideration is granted to the following extent. The court will consider Zurich's duty to defend under the AA Coverage Part. Zurich, assuming it contests that issue, shall file a motion for summary judgment on a schedule to be agreed by the parties, as outlined above. The motion is otherwise DENIED.

/s/ Kevin Mcnulty
United States District Judge

Dated: January 19, 2018

ORDER OF THE DISTRICT COURT OF NEW JERSEY (JANUARY 19, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

Civ. No. 16-4466 (KM) (MAH)

Before: Kevin MCNULTY, U.S.D.J.

The plaintiff, Montville Township Board of Education ("Montville"), having filed a motion (ECF no. 24) with sealed exhibit (ECF no. 25) for reconsideration of the Court's earlier opinion and order (ECF nos. 22, 23); and the defendant, Zurich American Insurance Company ("Zurich") having filed a response in opposition (ECF no. 30); and Montville having filed a reply (ECF no. 31); and the Court having considered the submissions and the entire case file without oral argument; for the reasons stated in the accompanying Opinion, and good cause appearing therefor;

IT IS this 19th day of January, 2018

ORDERED as follows:

1. Montville's motion for reconsideration (ECF no. 24) is GRANTED IN PART AND DENIED IN PART. The court will entertain a motion for summary judgment from Zurich, confined to the duty to defend under the AA Coverage Part, on a schedule to be agreed to by the parties within 5 days, as described in more detail in the accompanying Opinion.

2. The Court's prior Opinion (ECF no. 22) is amended as follows: On page 1, the words "In 2012" are deleted from the sixth sentence, which shall now read: "One of Fennes's alleged victims, Child M, a Cedar Hill student, sued (among others) Montville."

3. The motion (ECF no. 24) is otherwise DENIED.

/s/ Kevin Mcnulty
United States District Judge

OPINION OF THE DISTRICT COURT OF NEW JERSEY (JUNE 1, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

Civ. No. 16-4466 (KM) (MAH)

Before: Kevin MCNULTY,
United States District Judge.

KEVIN MCNULTY, U.S.D.J.

This is an insurance coverage dispute between an insured, Montville Township Board of Education ("Montville"), and its insurer, Zurich American Insurance Co. ("Zurich").[1] For twelve years, Montville employed Jason Fennes as a teacher. In June 2010, Fennes resigned. About two years later, while

[1] Zurich says that the real party in interest is its subsidiary, American Guarantee and Liability Insurance Company ("AGLIC"). Like the parties, I treat AGLIC and Zurich as one and the same.

working at another school, Cedar Hill Prep ("Cedar Hill"), Fennes was arrested and indicted. The charges were that he had sexually abused a number of Montville students between 2005 and 2008, and a Cedar Hill student in 2010 and 2011. In 2012, one of Fennes's alleged victims, Child M, a Cedar Hill student, sued (among others) Montville. She alleges that Montville not only knew about Fennes's inappropriate conduct and failed to notify the authorities, but also agreed not to tell potential future employers about that conduct in order to induce Fennes to resign. Montville, she claims, thus enabled and facilitated Fennes's acts of abuse at Cedar Hill. Montville says that Zurich is obligated to defend it against these allegations under its general commercial liability ("GCL") policy. Zurich has declined to do so based on a coverage exception for "abusive acts."

Now before the Court are cross-motions for summary judgment on the issue of Zurich's duty to defend Montville in the Child M litigation. For the reasons stated below, I will deny Montville's motion but grant Zurich's. Because the claims asserted against Montville by Child M are not covered by Montville's policy, Zurich has no duty to defend Montville.

I. Background[2]

Below is a statement of the factual and procedural posture of this case, as well as the underlying Child M lawsuit. The parties generally agree as to the terms of their insurance contract and the allegations of Child M's complaint, although each draws a different legal conclusion from those facts.

A. Child M Sues Montville

Montville employed Fennes as a first-grade teacher from September 1998 to June 30, 2010. After his

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2 Citations to the record are as follows:

"Pl. Br."—Montville's Brief In Support of its Motion for Summary Judgment, ECF No. 14-3

"Pl. Reply Br."—Montville's Brief in Further Support for its Motion For

Summary Judgement and in Opposition to Zurich's Cross-Motion for Summary Judgment, ECF No. 20

"Pl. SUMF"—Montville's Statement of Material Undisputed Facts, ECF No. 14-2

"Def. Resp. SUMF"—Zurich Response to Montville's Statement of Material, Undisputed Facts, ECF No. 17-3

"Def. SUMF"—Montville's Statement of Material Undisputed Facts, ECF No. 17-2

"Pl. Resp. SUMF"—Zurich's Response to Montville's Statement of Material Undisputed Facts, ECF No. 20-1

"Compl."—Third Amended Complaint in Child M, et al. v. Cedar Hill Prep., et al, attached as Exhibit B to the Declaration of Stephen J. Edelstein, Esq., ECF No. 14-4

"Policy"—Commercial General Liability Insurance Liability Policy issued to Montville for the period of July 1, 2011, to July 1, 2012, attached as Exhibit C to the Declaration of Stephen J. Edelstein, Esq., ECF No. 14-5

resignation, he was hired by Cedar Hills, where he also worked as a teacher. In March 2012, while employed by Cedar Hills, Fennes was arrested for sexually abusing a Montville student in 2005. Montville notified Zurich of the potential for a claim, and Zurich responded with a general reservation of rights. (Pl. SUMF ¶¶ 5-8 Def. Resp. SUMF ¶¶ 5-8)

In August 2012, Child M and her parents sued Fennes and Cedar Hill.[3] On January 23, 2015, Child M filed a third amended complaint that named Fennes, Cedar Hill, Montville, and others as defendants. In that complaint, Child M alleges that Fennes, her teacher, sexually abused her in February 2012. She was then six years old. (Pl. SUMF ¶¶ 13; Def. Resp. SUMF ¶ 13; Compl. p.1)

As to Montville, here are the pertinent allegations of the Child M complaint:

- Prior to working at Cedar Hill, Montville employed Fennes as a teacher and track coach at William Mason Elementary School. During the 12 years he worked at Montville, Fennes sexually abused minor students. (Compl. p. 11)
- Montville knew about, or was on notice of, such sexual abuse. Montville nevertheless failed to report Fennes to the appropriate authorities as required by law. (*Id.*)
- Montville entered into an agreement, dated May 4, 2010, with Fennes, in which Montville agreed

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[3] Two years later, in August 2014, Cedar Hill sued Montville in a separate action (presumably for indemnity and contribution, although the record is unclear). (Pl. SUMF ¶¶ 9-11) Def. Resp. SUMF ¶¶ 9-11)

to "limit the scope of information" it would communicate to potential employers "in exchange for" his resignation. (*Id.* at 12)

- Fennes "performed various acts of sexual molestation against" Child M. (*Id.* at 5)
- But for Montville's failure to report and "provide pertinent and highly relevant information" about Fennes to potential employers, such as Cedar Hills, Child M would not have been sexually abused by Fennes. (*Id.* at 12-15)

Based on the same allegations, Cedar Hill filed a cross-claim against Montville for contribution and indemnification.[4] (Pl. SUMF ¶ 14; Def. Resp. SUMF ¶ 14)

B. Montville's Insurance Policy

Child M's allegations potentially implicate two coverage parts of Montville's General Commercial Liability ("GCL") policy with Zurich.

The first is the "GCL Coverage Part." This part broadly provides insurance for "bodily injury" caused by an "occurrence." A "bodily injury" is a "bodily injury, sickness or disease sustained by a person. This includes mental anguish, mental injury, shock, fright or death resulting from bodily injury, sickness,

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[4] Child M's complaint does not plead specific causes of action. The parties seem to agree, however, that Child M intends to assert claims for negligence and intentional or negligent misrepresentation. *See Child M. v. Fennes,* Docket No. A-0873-15T2, 2016 N.J. Super. Unpub. LEXIS 1955 (App. Div. Aug. 25, 2016) (affirming and reversing in part trial court's grant of summary judgment on Child M's negligence and intentional or negligent misrepresentation claims against Montville).

or disease." Excluded from coverage, however, is any claim for bodily injury "arising out of or relating in any way to an 'abusive act'" or "any loss, cost or expense arising out of or relating in any way to an 'abusive act." (Def. SUMF ¶¶ 12-13, 15; Pl. Resp. SUMF ¶¶ 12-13, 15; Policy at U-GL-1250-A CW 09/05).

An "abusive act" means:

> any act or series of acts of actual or threatened abuse or molestation done to any person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person by anyone who causes or attempts to cause the person to engage in a sexual act:
>
> a Without the consent of or by threatening the person, placing the person in fear or asserting undue influence over the person;
>
> b. If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or
>
> c. By engaging in or attempting to engage in lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of any person.

(Def. SUMF ¶ 16; Pl. Resp. SUMF ¶ 16)

A second provision, the Abusive Act ("AA") Coverage Part, does provide insurance for "loss because of 'injury' resulting from an 'abusive act.'" The definitions of "abusive act" in the CGL Coverage Part and the AA Coverage Part are identical, with one excep-

tion: the AA Coverage Part definition (because it grants, rather than excludes, coverage) requires that the abuse or molestation result in injury.[5] The AA Coverage Part, however, contains an exclusion of its own. There is no coverage under the AA Coverage Part for "any claim or 'suit' based upon, arising out of or attributable, in whole or in part, to any 'abusive act' of which any insured, other than the insured actually committing the 'abusive act', has knowledge prior to the effective date of this Coverage Part."[6] (Def. SUMF ¶¶ 18-20, quoting Policy § I.1.a., 1.2.d., U-GL-1275-A CW (04/2006); Pl. Resp. SUMF ¶¶ 18-20; Policy § V.1, U-GL-1275-A CW (04/2006) The effective date of the policy at issue in this case, CPO 3701598-07, is July 1, 2011. (Policy p.1 U-GL-D-1115-B CW (09/04)[7]

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[5] Injury here means essentially the same thing as "bodily injury" as defined in the GCL Coverage part. (Policy § V.3, U-GL-1275-ACW (04/2006) ("Injury' means physical injury, sickness, disease mental anguish, mental injury, shock or fright or death of the person(s) who is the subject of the abusive act.")

[6] A third provision, the Alleged Participant Coverage Part, provides coverage to the insured person (not, *e.g.,* a school district) actually committing the abuse. (Def. SUMF ¶¶ 21-23; Pl. Resp. SUMF ¶¶ 21-23) The Alleged Participant Coverage Part is not at issue in this case.

[7] That is the only policy at issue here because Child M alleges that she was sexually abused in February 2012. For there to be coverage under either the CGL Coverage Part or the Abusive Act Coverage Part, there must be "bodily injury" caused by an "occurrence" or an "abusive act" resulting in an "injury" during a policy year. (Policy § I.1.b(2), CG 00 01 12 07; § I.1.b., U-GL-1275-A CW (04/2006). Montville challenges Zurich's disclaimer of its duty to defend under the July 2011-July 2012 policy.

C. Zurich Disclaims a Duty to Defend

About a week after Child M filed her third amended complaint, on January 29, 2015, Zurich sent Montville a letter disclaiming and reserving its rights under the CGL and AA Coverage Parts. As Zurich saw things, it had no obligation to defend or indemnify Montville under the GCL Coverage Part because any "bodily injury" suffered by Child M arose out of or related to "abusive acts." As for the AA Coverage Part, Zurich observed that Child M alleged that Montville knew about prior abusive acts committed by Fennes against Montville students but failed to report to them to the proper authorities or disclose them to potential employers. That allegation, according to Zurich, brought Child M's lawsuit within the "prior known abusive acts" exclusion of the AA Coverage Part. (Def. SUMF ¶¶ 25-26; Pl. Resp. SUMF ¶¶ 25-26)

For the same reasons, Zurich again stated that it had no duty to defend Montville in two more disclaimer letters, dated March 6, 2015, and April 8, 2015. (Def. SUMF ¶ 27; Pl. Resp. SUMF ¶ 27)

D. The Child M Litigation Proceeds

On August 14, 2015, Montville filed a motion for summary judgment in the Child M litigation. Although Montville succeeded in obtaining dismissal of all claims against it, the Appellate Division reversed that summary judgment ruling in part.

With some understatement, the Appellate Division called the facts of the case "troubling" and summarized them thus:

> Viewed in a light most favorable to plaintiffs and Cedar Hill, the record reveals that as

of 2005, Montville knew that Fennes was engaged in inappropriate physical contact with female students. Among other things, Fennes had female students sit on his lap; allowed them to touch his legs, thighs and buttocks; kissed them and allowed them to kiss him; threatened them not to tell anyone; and told them they would get into trouble or he would not like them anymore or hold their hands if they told anyone. Fennes received several warnings from his supervisors that his conduct was inappropriate and must be corrected, but Fennes responded that he was an "affectionate person and [cannot] change" and "was not going to stop cold turkey."

Fennes' inappropriate conduct continued despite his supervisors' warnings and three reports to the New Jersey Department of Children and Families, Division of Youth and Family Services (Division) about his inappropriate conduct made prior to his suspension in March 2010. The first report was on June 20, 2008 by an anonymous caller. Although the Division determined the allegation of child abuse was unfounded and closed the case, the principal of Williams Mason, Stephanie Adams, met with Fennes in September 2008, and warned him that his conduct was "inappropriate and unacceptable" and that "under no conditions was it appropriate" to have physical contact with students.

Fennes did not heed Adams' warning because eight months later, on June 5, 2009, she entered his classroom and saw three female students sitting on his lap. Adams also received a message from a staff member reporting a similar encounter with Fennes, and a letter from a parent reporting that Fennes had inappropriately touched her daughter. On July 14, 2009, Adams contacted the Division. She reported what she saw on June 5, 2009, and what the staff member said, but did not mention the parent's letter. Adams also indicated that "[t]he children didn't disclose any sexual abuse." The Division concluded that no action was required and closed the case.

On July 15, 2009, Adams issued a letter of reprimand to Fennes and advised him she was recommending the withholding of his salary increment for the 2009-2010 school year. On August 20, 2009, Montville notified Fennes that his salary increment for the 2009-2010 school year was being withheld because of his "inappropriate interactions with students in [his] classroom."

The salary increment withholding did not deter Fennes because on March 1, 2010, a parent reported to Montville that she and other parents had observed and were concerned about his inappropriate physical contact with female students. The parent "implored [Montville] to have this situation investigated immediately for the safety of our children." Thereafter, on March 11, 2010,

a third report about Fennes was made to the Division by an anonymous parent. The Division concluded the allegations were "unfounded" and closed the case.

On March 12, 2010, Montville suspended Fennes from his teaching position with pay and began an investigation. During the investigation, Montville received new reports about Fennes' inappropriate physical contact with female students. For example, a parent reported that Fennes constantly held his daughter's hand, picked her up to hug her, and sent her text messages even after he asked Fennes to stop sending them. Another parent reported that a student saw Fennes holding a female student's hand, patting her on the buttocks, and hugging her. A third parent reported that many parents were very concerned about the welfare of a female student after observing Fennes' inappropriate behavior with her. The parent also warned Montville that "God forbid [Fennes] hurts a child in the future, the entire school system will have charges pressed against them for not taking the appropriate actions in seeing [Fennes] removed from the classroom and as a track coach." A grandparent reported Fennes' inappropriate conduct with her granddaughter and stated, "I beg [Montville] to really look into this thoroughly before something very serious happens."

Montville also received a letter from a teenaged student who was coached by Fennes reporting his inappropriate conduct with

"[her] little sister." The student said that her sister went to Fennes' home, where he had a room upstairs that "had all children decorations in it" and "a shelf filled with toys" and the sister "acted like it was her room[.]" Montville also received statements from numerous William Mason staff members about their interactions with Fennes and their observations of his inappropriate physical contact with female students.

Montville never reported this new information to the Division and never filed tenure charges against Fennes. Instead, on May 14, 2010, Montville and Fennes entered into an Agreement and Release, wherein the parties agreed that Fennes would resign, effective June 30, 2010, and never seek employment with Montville "in perpetuity" (the Agreement). Regarding references to future employers, Montville agreed to the following:

> Upon direct inquiry by any future employers, [Montville] or its agents will provide the dates of [] Fennes['] employment with [Montville], the position he held in the District, including coaching positions, and that his last day of employment . . . was June 30, 2010. No further information will be provided. All calls from prospective employers will be directed to the Superintendent or his/her designee.

[(Emphasis added.)]

The Agreement also provided that "[t]he parties acknowledge that because tenure charges were not filed against [] Fennes, his resignation does not fall within the reporting requirements of N.J.A.C. 6A:9-17.4."

On May 14, 2010, Fennes resigned, effective June 30, 2010. On August 13, 2010, he applied for employment with Cedar Hill as a first-grade teacher. Nandini Menon, the owner/director of Cedar Hill, interviewed Fennes and later obtained his list of references, which did not include anyone employed by Montville. Menon admitted that she contacted Montville to verify his dates of employment and only asked for and received those dates. Menon also admitted that she never asked Montville for any documentation about Fennes; never asked Montville any questions beyond verifying Fennes' dates of employment; did not recall the name or title of the person to whom she spoke or verified this person had the authority to provide information about Fennes; never questioned the fact that Fennes did not provide references from persons employed by Montville; and never asked Fennes for references from Montville colleagues or supervisors.

Fennes began teaching at Cedar Hill in September 2010. On October 19, 2010, Cedar Hill received information that: Fennes was the subject of many parental complaints while employed with Montville; Fennes had been investigated by the Division; and Fennes resigned in anticipation of being terminated

> for inappropriate behavior around children. Cedar Hill did not contact Montville about this information and permitted Fennes to continue working there.
>
> In February 2012, Fennes allegedly sexually abused Child M. He was subsequently indicted for sexually abusing and endangering the welfare of Child M. and several female students from Montville, and his teaching certificate was suspended.

Child M. v. Fennes, Docket No. A-0873-15T2, 2016 N.J. Super. Unpub. LEXIS 1955, *2-8 (App. Div. Aug. 25, 2016) (alterations and emphasis in original).

On this record, the Appellate Division ruled that Montville "had a duty to take active steps to lessen the risk of harm to the female children by reporting Fennes to the Division and the Board Examiners." *Id.* at *14. As to the issue of causation, the court concluded that "[a] reasonable jury could conclude that Montville negligently failed to take steps that would have deterred or prevented Fennes from obtaining employment at another elementary school and negligently shielded him the disclosure of his deviant conduct with female students." *Id.* at *17. Because Cedar Hills never asked for additional information about Fennes's character, however, the Appellate Division affirmed the trial court's dismissal of Child M's claims against Montville to the extent they were based on an intentional or negligent misrepresentation theory. *Id.* at *17-18.

E. This Case

While the Appellate Division appeal was pending, on June 22, 2016, Montville filed this coverage action

against Zurich. Originally, this action took the form of an Order to Show Cause in New Jersey Superior Court seeking a declaration that Zurich owed Montville a duty to defend it under the CGL Coverage Part. In July 2016, Zurich removed the case to this federal court on grounds of diversity jurisdiction. *See* 28 U.S.C. § 1332. On July 29, 2016, Zurich answered the complaint. (ECF No. 1, Ex. B.; ECF No. 3)

On August 23, 2016 Oust two days before the Appellate Division decision, as it happened), the parties submitted to this Court a joint scheduling order in which they proposed trifurcation of the case. Because the duty to defend is broader than and prior to the duty to indemnify, the parties agreed that litigation of the duty to defend should occur first. (ECF No. 8)

Montville filed in this Court a motion for partial summary judgment regarding the duty to defend on November 22, 2016. Zurich cross-moved for summary judgment on December 16, 2016. (ECF Nos. 14, 17, 20)

In January 2017, Montville represented in a letter to this Court that an appeal of the Appellate Division's decision to the New Jersey Supreme Court had been concluded (by implication, in Child M's favor)[8] and that a state-court trial of the Child M case was likely to be scheduled soon. (ECF No. 21)

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8 Neither WestLaw nor LexisAdvance indicates any subsequent history for the Appellate Division decision, however.

II. Discussion

A. Summary Judgment Standard

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (summary judgment is appropriate where "there is no genuine issue of material fact to be resolved and the moving party is entitled to judgment as a matter of law."); *Alcoa, Inc. v. U.S.,* 509 F.3d 173, 175 (3d Cir. 2007). Summary judgment is desirable because it eliminates unfounded claims without resort to a costly and lengthy trial, *Celotex,* 477 U.S. at 327, but a court should grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

When the parties file cross-motions for summary judgment, the governing standard "does not change." *Clevenger v. First Option Health Plan of N.J.,* 208 F. Supp. 2d 463, 468-69 (D.N.J. 2002) (citing *Weissman v. U.S.P.S.,* 19 F. Supp. 2d 254 (D. N.J. 1998)). The court must consider the motions independently, in accordance with the principles outlined above. *Goldwell of N.J., Inc. v. KPSS, Inc.,* 622 F. Supp. 2d 168, 184 (D.N.J. 2009); *Williams v. Philadelphia Housing Auth.,* 834 F. Supp. 794, 797 (E.D. Pa. 1993), *affd,* 27 F.3d 560 (3d Cir. 1994). That one of the cross-motions is denied does not imply that the other must be granted. For each motion, "the court construes facts and draws

inferences in favor of the party against whom the motion under consideration is made" but does not "weigh the evidence or make credibility determinations" because "these tasks are left for the fact-finder." *Pichler v. UNITE,* 542 F.3d 380, 386 (3d Cir. 2008) (internal quotation and citations omitted).

B. Analysis

There is only one question in this case: Does the Child M state court litigation against Montville assert claims "arising out of or in any way relating to an 'abusive act'"?[9] If so, Zurich does not have a duty

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[9] This exclusion, cited above, is contained in the GCL Coverage Part, which does not really seem to be designed to cover sexual abuse at all. A question arises as to why Montville is attempting to shoehorn its claim into the GCL Coverage Part. After all, Montville purchased abusive acts coverage separately in the AA Coverage Part. And it concedes that it purchased that AA coverage because the abusive act exclusion in the CGL Coverage Part is essentially a "blanket exclusion." (Pl. Reply. Br. 12)

The explanation would seem to lie in the "prior known acts" exclusion of the AA Coverage Part. Montville cannot avail itself of the AA coverage it purchased, because Zurich did not agree to insure Montville for abusive acts it knew about before the effective date of the policy, *i.e.,* July 1, 2011. And Montville's prior knowledge is the very essence of Child M's claim against it.

When Montville originally filed this coverage action in New Jersey Superior Court, it relied solely on the GCL Coverage Part. (ECF No. 1, Ex. A) It did the same in its motion for summary judgment in this Court. Now, in response to Zurich's cross-motion for summary judgment, Montville makes a terse claim of coverage under the AA Coverage Part. (Pl. Reply Br. 11-12) That contention lacks merit.

Without citation, Montville states that the "prior known acts" exclusion applies only to abusive acts which it actually committed or participated in. (*Id.)* There is no such limitation in the language of the exclusion, however. The exclusion broadly

to defend Montville in that case; if not, Zurich does have a duty to defend.

Guiding the duty-to-defend analysis are some well-established principles:

> "[T]he duty to defend comes into being when the complaint states a claim constituting a risk insured against." Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy. When the two correspond, the duty to defend arises, irrespective of the claim's actual merit. If the complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor of coverage. When multiple alternatives causes of action are stated, the duty to defend will continue until every covered claim is eliminated.

Voorhees v. Preferred Mut. Ins., Co., 128 N.J. 165, 173-174 (1992) (internal citations omitted).'[10]

Because this cases hinges on the meaning of an exclusion contained in a general commercial liability policy, the following principles of interpretation apply:

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applies to "any claim or 'suit' based upon, arising out of or attributable, in whole or part, to any 'abusive act' of which any insured . . . has knowledge prior to the effective date of this Coverage Part." (Def. SUMF ¶ 20; Pl. Resp. SUMF ¶ 20, quoting Policy § I.2.d, U-GL-1275-A CW (04/2006)) (emphasis added)). I therefore find that Zurich did not wrongfully disclaim under the AA Coverage Part.

10 The parties do not dispute that New Jersey law governs the interpretation of this insurance contract.

> Exclusionary clauses are presumptively valid and are enforced if they are "specific, plain, clear, prominent, and not contrary to public policy." If the words used in an exclusionary clause are clear and unambiguous, "a court should not engage in a strained construction to support the imposition of liability."
>
> We have observed that "[i]n general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." As a result, exclusions are ordinarily strictly construed against the insurer, and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it[.]
>
> Nonetheless, courts must be careful not to disregard the "clear import and intent" of a policy's exclusion, and we do not suggest that "any far-fetched interpretation of a policy exclusion will be sufficient to create an ambiguity requiring coverage," Rather, courts must evaluate whether, utilizing a "fair interpretation" of the language, it is ambiguous.

Flomerfelt v. Cardiello, 202 N.J. 432, 441-43 (2010) (internal citations omitted).

The CGL Coverage Part broadly provides insurance for claims of "bodily injury." Everyone agrees that Child M has alleged a bodily injury. (Pl. SUMF ¶ 9; Def. Resp. SUMF ¶ 9) And Child M has alleged that the cause of that bodily injury was an "act or

series of acts of actual or threatened abuse or molestation" by Fennes. (Compl. p. 5 (alleging that Fennes "performed various acts of sexual molestation against" Child M)) What remains is a question of interpretation: Do Montville's alleged acts or omissions, while not abusive acts themselves, nevertheless "arise out of" or "relate to" Fennes's abusive acts?

Surely they do. The GCL Coverage Part states in plain and ordinary language that it excludes claims of bodily injury "[a] arising out of or [b] in any way relating to an 'abusive act.'" Phrase [a) has a broad, well-accepted meaning: "The critical phrase 'arising out of,' which frequently appears in insurance policies, has been interpreted expansively by New Jersey courts in insurance coverage litigation." *Am. Motorists Ins. Co. v. L-C-A Sales* Co., 155 N.J. 29, 35-56 (1998) (noting that "arising out of" has been defined to mean conduct "originating from," "growing out of," having a "substantial nexus to," "connected with," "had its origins in," "flowed from," or "incident to," to excluded act) (quoting *Records v. Aetna Life & Cas. Ins.,* 294 N.J. Super. 463, 468 (App. Div. 1996) and *Allstate Ins. Co. v. Moraca,* 244 N.J. Super. 5, 13 n.1 (App. Div. 1990)). Phrase [b] is even broader. It applies to any claim for bodily injury that <u>in any way relates to</u> an abusive act. The allegations here are that, but for Montville's failures, Child M would not have suffered sexual abuse. Montville allegedly knew that Fennes had abused Montville children and (at best) did nothing or (at worst) took steps to conceal his conduct from potential employers. Those allegations against Montville "arise out of," "originate from," "grow out of," have a "substantial nexus to," "connect with," "have their origins in," "flow from," or are "incident

to," Fennes's abusive acts. More generally, they "relate to" abusive acts, not just in "any way," but in every way that matters.

Montville cannot really maintain that its potential liability in the Child M litigation does not relate in any way to abusive acts. Montville's alleged knowledge of, and silence about, Fennes's abusive acts against Montville students are alleged to have facilitated Fennes's predations at Cedar Hill. To be sure, Montville did not itself commit the acts of abuse against Child M—it is a school district, not a person. But the policy language contains no basis to carve out cases in which the insured's liability arises from its own negligent or intentional conduct which enabled or contributed to a natural person's commission of an abusive act.[11]

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[11] Montville cites *Nationwide Mut. Fire Ins. Co. u. Pipher,* 140 F.3d 222 (3d Cir. 1998), which has some factual parallels to this case but does not involve the same interpretive issue. In *Pipher,* the insured, a landlord, allegedly was negligent in hiring a painter who killed a tenant. The case rested, not on the definition of an "abusive act," but on the definition of an "occurrence." An insurable occurrence is essentially an accident; the definition reflects a general wariness about insuring a party against its own intentional acts. The Court of Appeals recognized that the direct cause of the tenant's death was not an accident, but a third party's intentional act; nevertheless, judged from the perspective of the insured landlord, the insured risk was one of negligence. The rule, said the Third Circuit, is that "it is the intentional conduct of the insured which precludes coverage, not the acts of third parties." *Id.* at 226. Thus, applying Pennsylvania law, the Third Circuit ruled that the term "occurrence" "includes bodily injury or death which is directly caused by the intentional act of a third party, but which is also attributable to the negligence of the insured." *Id.* at 227.

This case, by contrast, involves neither Pennsylvania law nor the meaning of "occurrence." Whether or not sexual abuse is an

A related line of argument emphasizes that Fennes was not employed by Montville when he allegedly abused Child M. "Abusive acts," however, are not defined to include only those committed against Montville students. Far from it: An abusive act is "any act or series of acts of actual or threatened abuse or molestation done to any person by anyone." (Def. SUMF ¶ 16; Pl. Resp. SUMF ¶ 16) Any claim for bodily injury "arising out of or in any way relating to an abusive act" is thus excluded from coverage without reference to the identity of the assailant or victim, their relation to each other, or their relation to Montville. For purposes of the abusive-acts exclusion, it does not matter that Montville no longer employed Fennes or that Child M was not a Montville student.

Montville also leans heavily on the lapse of two years (or more) between Montville's alleged acts or omissions and Fennes's abusive acts at Cedar Hill. That gap, Montville says, belies any "close causal connection and temporal relationship" or "substantial nexus" between its negligent conduct and the abusive acts that caused of Child M's injuries. Thus, it claims, Zurich cannot show that Child M's injuries "arose out of the abusive act exclusion. One short answer, of course, is that the Appellate Division has already ruled as a matter of law that a jury could

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"occurrence"—and no one seems to be disputing that issue—it is explicitly excluded from coverage under the GCL Coverage Part. That exclusion for "abusive acts" makes no distinction between intentional or negligent abusive acts of Montville, its employees, its agents, or third parties. It simply eliminates all abusive-acts coverage from the GCL Part, relegating it to a separately-purchased AA line of coverage that deals with it specifically (and which, for entirely separate reasons, does not apply here).

find proximate cause under these circumstances. *Child M. v. Fennes,* 2016 N.J. Super. Unpub. LEXIS 1955, *17.

But to really understand what Montville means—and why it is mistaken—requires a discussion of *Flomerfelt v. Cardiello,* 202 N.J. 432 (2010), which Montville cites in support of its argument. In *Flomerfelt,* the New Jersey Supreme Court considered the meaning of "arising out of in a policy exclusion when a "claim for a personal injury asserts multiple possible causes and theories for recovery against the insured," some of which are covered but others not. *Id.* at 454. The plaintiff in the underlying suit in *Flomerfelt* overdosed on alcohol and drugs at a party held by the defendant at his parents' home. The plaintiff sued the defendant for giving her drugs and alcohol and not promptly calling for help when she was found unconscious. The defendant tendered his defense to the carrier of his parents' homeowner's policy. Although plaintiff's complaint referred to both drugs and alcohol, the insurer disclaimed a duty to defend because the policy expressly excluded one of those two causes: claims "arising out of the use, . . . transfer or possession" of controlled substances. The defendant then sought a declaration that the insurer was obligated to defend and indemnify him. *Id.* at 437-39.

The Court ruled in favor of the insured. It conceded that prior cases had deemed the phrase "arising out of to be "clear and unambiguous" when used in an exclusion. Nevertheless, the Court said, its usual equivalents—"originating from," "growing out of," or having a "substantial nexus"—may apply differently when the actual cause of a plaintiff's injury is unclear. *Id.* at 454. "Originating from" and "growing out of," for

example, might exclude coverage only if the plaintiffs drug use had "a close causal connection and a temporal relationship in which the injury is part of a chain of events that began with the use of a drug at a party." *Id.* at 455. "A substantial nexus," on the other hand, might broadly exclude coverage if the drug use was merely "part of interrelated or concurrent causes" of the plaintiff's injury. *Id.* The *Flornerfelt* plaintiff's complaint, moreover, did not specify the precise cause—whether drug use, alcohol use, both, or something else—of her injuries. Applying the usual rules that ambiguity is construed against the insurer and that the duty to defend continues until all potentially covered claims are resolved, the court concluded that the insurer had a duty to defend.

The case of Montville and Child M is plagued by no such imprecisions or ambiguities. The terms of the exclusion here are "specific, plain, clear, prominent, and not contrary to public policy." *Id.* at 441. There is no special circumstance rendering the meaning of "arising out of or in any way related to" ambiguous and requiring that the phrase be construed against Zurich.[12]

Nor is there any dispute about the actual cause of Child M's injuries. The complaint alleges just one: Fennes allegedly "sexually assaulted, inappropriately touched, and otherwise abused" Child M, which caused "severe personal injuries." (Compl. 2, 5, 12-15).

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[12] Indeed, as to public policy, Zurich raises the opposite argument. Failing to exclude coverage of persons or entities that are complicit in sexual abuse, it says, would violate public policy. Because I ultimately find that Zurich has no duty to defend Montville in the Child M. litigation, I do not reach that argument.

The problem tackled by *Flomerfelt* what to do when "claim for a personal injury asserts multiple possible causes"—is not present in this case. "Abusive acts" are the sole cause of the injury here, and the entire case arises from them. *Flomerfelt's* discussion of the possible meanings of "arising out of" does not control the straightforward issue of interpretation in this case.

To reiterate, it does not matter, as Montville frequently suggests, that Fennes actually committed the abusive acts while Montville only created the risk that those acts would occur. That Child M seeks to recover from more than one defendant based on more than one theory of liability is not the same thing as saying that more than one cause, one covered and one not, combined to inflict an indivisible injury. That principle—that a court should consider the cause of the injury, not disparate theories of liability, when interpreting "arising out of" language in an exclusion—is implied in much of the case law on this issue.

Here is one example, from the New Jersey Supreme Court. In the underlying suit in *Memorial Properties, LLC v. Zurich Am. Ins. Co.,* 210 N.J. 512 (2012), the defendants, the manager and owner of a cemetery and crematory, were accused of intentionally or negligently allowing a dentist and a "master embalmer" to dissect, harvest, and sell parts of plaintiffs' decedents' corpses. One of defendants' insurance policies included an exclusionary clause that denied coverage for claims of bodily injury "arising out of" the "improper handling" of human remains. "Improper handling" was defined as, *inter alia,* "[f]ailure to bury, cremate or properly dispose of a 'deceased body.'"

Defendants claimed that the negligence claims against them fell outside the "improper handling" exclusionary clause, so the insurer had a duty to defend. *Id.* at 518-22.

The court disagreed. True, the manager and owner did not themselves commit any act of desecration. But the allegation that they knowingly allowed the dentist and others access to the decedents' remains—that they played an enabling role in the illegal harvesting scheme—fell "squarely within the parameters of the exclusionary clause." *Id.* at 529. And so, too, did the negligence claim, because "if, as alleged by the families of decedents, negligence in the care or custody of the decedents' remains exposed those remains to illegal harvesting, then the emotional harm consequently inflicted upon the families would 'arise out of [defendants'] negligence in failing to 'properly dispose' of their decedents' bodies." *Id.* at 529-30 (emphasis added). Thus, ruled the court, plaintiffs alleged no covered claim, and the insurer did not have a duty to defend.

For purposes of argument, I can even assume that *Flomerfelt* may apply in a case where there is only one cause of a plaintiffs injury. Montville still fails to account for the language immediately following the phrase "arising out of." *Flomerfelt,* 202 N.J. at 452 ("In some cases, an exclusion itself may add other language to the phrase 'arising out of that will assist in the analysis. . . . In interpreting such language, courts separately consider the meaning of each phrase and then collectively analyze the intent of the exclusion to decide whether the complaint falls within its scope.") The exclusion here also encompasses claims for bodily injury "in any way relating to"

to abusive acts. From that broad formulation there is no escape.[13]

Interpreted as a whole, the phrase "arising out of or in any way relating to" is broad enough to capture allegations that Montville's failure to alert the proper authorities created a risk that Fennes

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[13] Montville has a partial fallback position. It suggests that Zurich must defend it from any claim of intentional or negligent infliction of emotional distress ("IIED" or "NIED") under *Abouzaid v. Mansard Gardens Assocs., LLC,* 207 N.J. 67 (2011). Such a claim, Montville seems to say, is independent any of Fennes's abusive acts but still covered as a claim for "bodily injury."

As explained elsewhere in this Opinion, Montville cannot so easily divorce its alleged conduct from Fennes's abusive acts. And even if it could, *Abouzaid* would still be inapposite. The issue in *Abouzaid* was whether, under a "bodily injury" clause, an insurer is obligated to defend its insured for a claim of NIED that did not allege physical injury. Because NIED claims require distress that is extreme, the court ruled, the insurer should presume physical sequelae until the issue of physical injury definitively drops out of the case. The TIED and NEID claims here, though, allege both physical and emotional injuries, and stem from the allegation that Fennes "performed various acts of sexual molestation" on Child M. (Compl. pp. 5, 11-15 (incorporating allegations against Fennes and alleging that Montville's negligence or misrepresentations caused Child M. "extreme emotional distress," as well as "severe personal injuries.") Zurich therefore has no duty to defend Montville from an *Abouzaid-type* emotional distress claim.

I note in passing that such an emotional distress claim, if asserted, might nevertheless have fallen within the definition of abusive acts. That definition includes *threatened* acts of abuse or molestation, which are excluded from coverage. *Cf. Abouzaid,* at 88 ("[A] policy providing coverage for claims of 'bodily injury' will be understood to require a defense from the filing of a [negligent infliction of emotional distress] complaint unless such a defense is specifically excluded by other contract language.").

would abuse future students. It is also broad enough to capture allegations that Montville virtually knew that Fennes would abuse students at other schools when it agreed to keep mum on his past abusive acts in exchange for his resignation.

Comparing the entire language of the exclusion to Child M's allegations, I have no difficulty finding a sufficiently close causal connection between Montville's misrepresentations or negligence and Fennes's abusive, injury-causing acts. As the Appellate Division has already ruled, a properly instructed jury could find proximate cause on these facts. *Child M v. Fennes,* 2016 N.J. Super. Unpub. LEXIS 1955, *17. By either reporting Fennes to the authorities, or at least by not concealing his acts of abuse from Cedar Hills, which hired him, Montville allegedly made the abuse of Child M possible, despite being in a position to prevent it. Abusive acts—those of which Montville was aware from 1998-2010, or those which occurred later, in 2010-2012—are the foundation of Montville's liability to Child M. A lapse of two years is a factual circumstance, not a statute of repose; if the allegations of the underlying complaint are correct, when Montville acted as it did, it knew or should have known that, late or soon, abuse was likely to follow.

In short, the terms of the abusive act exclusion are "clear and unambiguous," and I will not "engage in a strained construction" to support coverage. *Flomerfelt* 202 N.J. at 442. Comparing the Montville's policy to the complaint, there is no doubt that the parties expected and intended to exclude coverage for such claims under the GCL Coverage Part.

[* * *]

To recap: Montville's policy with Zurich unambiguously excludes claims for bodily injury that arise out of or in any way relate to abusive acts. Child M alleges that Fennes sexually abused or molested her, and that Montville knew that he had done the same to previous students. The claim is that if Montville had reported Fennes to the appropriate authorities or told potential employers what it knew, Child M would not have been abused. Setting the terms of the policy alongside Child M's complaint, I must conclude that such allegations arise out of are related to abusive acts, and therefore are well within the bounds of the "abusive act" exclusion. Zurich has no duty to defend Montville.

III. Conclusion

For the foregoing reasons, Montville's motion for summary judgment is DENIED, and Zurich's cross-motion for summary judgment is GRANTED.

/s/ Kevin Mcnulty
United States District Judge

Dated: June 1, 2017

ORDER OF THE DISTRICT COURT OF NEW JERSEY (JUNE 1, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

Civ. No. 16-4466 (KM) (MAH)

Before: Kevin MCNULTY,
United States District Judge.

KEVIN MCNULTY, U.S.D.J.

THIS MATTER having come before the Court on cross motions for summary judgment filed by Plaintiff Montville Township Board of Education ("Montville") (ECF No 14) and Defendant American Guarantee & Liability Insurance Co. (ECF No. 17) (incorrectly pled as Zurich American Insurance in the Complaint) ("AGLIC"), pursuant to Federal Rule of Civil Procedure 56; and the Court having considered without oral argument the moving, opposition, and reply papers of the parties' motions for summary judgment

and statements of material undisputed facts (ECF Nos. 14-2, 14-3, 17-1, 17-2, 17-3,20,20-1); for the reasons set forth in the accompanying Opinion, and for good cause shown:

ORDERED that Montville's motion for summary judgment is DENIED; and it is further

ORDERED AGLIC's motion for summary judgment is GRANTED; and it is further

ORDERED that AGLIC has no obligation to defend Montville or reimburse legal fees to Montville related to the matter entitled Child *M., minor by her g/a/l v. Jason Fennes, et al*, Dkt. No. MID-L-6011-12 (the "Child M action"); and it is further

ORDERED that AGLIC has no obligation to indemnify Montville with regard to the Child M action; and it is further

ORDERED that the complaint (ECF No. 1) is dismissed WITH PREJUDICE.

The clerk shall close the file.

/s/ Kevin Mcnulty
United States District Judge

NOTICE OF APPEAL TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT (SEPTEMBER 18, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

Docket No. 2:16-cv-04466-KM-MAH

Before: Kevin MCNULTY,
United States District Judge.

Notice is hereby given that Plaintiff, Montville Township Board of Education, appeals to the United States Court of Appeals for the Third Circuit from the Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Cross-Motion for Summary Judgment of the United States District Court, District of New Jersey, entered in this action on August 21, 2018.

Montville Township Board of
Education, Appellant

On behalf of Appellant:

Weiner Law Group LLP

By: /s/ Stephen J. Edelstein
629 Parsippany Road
Parsippany, New Jersey 07054
(973) 403-1100

Dated: September 18, 2018

BRIEF ON BEHALF OF PLAINTIFF MONTVILLE TOWNSHIP BOARD OF EDUCATION IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER OF JUNE 1, 2017 (JUNE 15, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONTVILLE TOWNSHIP BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

Civil Action No. 2:16-cv-04466-KM-MAH

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(973) 301-0001
Attorneys for Plaintiff,
Montville Township Board of Education

PRELIMINARY STATEMENT

Unlike many, this is a motion for reconsideration in which there actually is additional evidence, not previously before the Court, which came into the possession of Plaintiff's counsel on June 12, 2017, eleven days after the Court's Opinion and Order. That document, which contains critical information, is filed (under seal) in connection with this motion.

For the reasons set forth in this Brief and in the accompanying Certification of Stephen J. Edelstein, Esq., the Montville Township Board of Education ("Board") seeks reconsideration of the Honorable Kevin McNulty, U.S.D.J.'s Opinion and Order of June 1, 2017 denying the Board's Motion for Summary Judgment and granting the Cross-Motion for Summary Judgment filed by Defendant American Guarantee & Liability Insurance Company, a wholly owned subsidiary of Zurich American Insurance Company ("Zurich"), Once reconsidered, the Board urges either an outright reversal of the Order or, in the alternative, a plenary hearing to determine the state of the Insured's knowledge of "abusive acts" prior to July 1, 2011.

The factual history of the underlying events which give rise to the claim for coverage by the Board is complex, spanning more than a decade, and including District-level personnel action, multiple law suits, all still unresolved, an Appellate Division Opinion, multiple investigations by the New Jersey Institutional Abuse Investigation Unit ("IAIU"), and criminal charges. There is a significant volume of material to digest, and, because of the relevant language in the insurance policy at issue, there is a complicated chronology of events which must be described accurately.

In its June 1, 2017 written Opinion, reflected in an Order of the same date, the Court made some critical errors in reciting what actually took place and then in applying the policy language and the applicable law to those erroneous factual conclusions. In this Brief, we will identify and explain the sources of these errors and how they led to legal conclusions that must be reexamined.

PROCEDURAL HISTORY

The Board relies upon the extensive procedural history set forth in the papers submitted in support of its Motion for Summary Judgment.

In brief, on November 22, 2016, the Board filed a Motion for Summary Judgment on the issue of Zurich's duty to defend the Board in the Child M Lawsuit. On December 16, 2016, Zurich filed a Cross-Motion for Summary Judgment. On January 13, 2017, the Board filed its Reply Brief in Further Support of Its Motion for Summary Judgment and In Opposition To Zurich's Cross-Motion. On June 1, 2017, the Honorable Kevin McNulty, U.S.D.J. ("Judge McNulty"), issued a written Opinion denying the Board's Motion for Summary Judgment and granting Zurich's Cross-Motion for Summary Judgment. The Board now files this timely. Motion for Reconsideration seeking reconsideration of Judge McNulty's June 1, 2017 decision.

LEGAL ARGUMENT

POINT I

THE COURT SHOULD GRANT THE BOARD'S MOTION FOR RECONSIDERATION BECAUSE CRITICAL ERRORS IN RECITING THE FACTS LED TO INCORRECT LEGAL CONCLUSIONS. IN ADDITION, NEW EVIDENCE SHOWS THAT THE BOARD HAD NO KNOWLEDGE OF ABUSIVE ACTS PRIOR TO JULY 1, 2011.

A. The Applicable Standard of Review

L. Civ. R. 7.1(i) governs motions for reconsideration. A District Court exercises discretion on the issue of whether to grant a motion for reconsideration. *N. River Ins. Co. v. Cigna Reins. Co.*, 52 F.3d 1194, 1203 (3d Cir. 1995). Motions for reconsideration should only be filed to correct manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906 (3rd Cir. 1985). As a general matter, parties seeking reconsideration must show "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . or (3) the need to correct a clear error of law or fact or to prevent manifest injustice?" *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Pursuant to L. Civ. R. 7.1(i), parties moving for reconsideration must set forth the matter or controlling decisions which the parties believe the Judge has overlooked.

Reconsideration is justified when the "dispositive factual matters or controlling decisions of law . . . were presented to, but not considered by, the court in the

course of making the decision at issue." *Yurecko v. Port Auth. Trans-Hudson Corp.*, 279 F.Supp.2d 606, 609 (D.N.J. 2003). *See also United States v. Compaction Sys. Corp.*, 88 F.Supp.2d 339, 345 (D.N.J. 1999). ("Only where the court has overlooked matters that, if considered by the court, might reasonably have resulted in a different legal conclusion, will it entertain such a motion.") The party seeking "must show more than a disagreement with the Court's decision." *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990). Further, the moving party's burden requires more than a mere "recapitulation of the cases and arguments considered by the court before rendering its original decision[.]" *Ibid.* (internal quotation marks omitted).

For the reasons set for *infra*, these standards are met here.

B. The Definition of "Abusive Act" Is Clearly Stated in the Policy. In Addition, the Policy Must Be Construed Liberally in Favor of Coverage.

At all relevant times, Zurich insured the Board under a commercial general liability policy (the "Policy"). *See* Judge McNulty's Opinion at p. 4. The Policy provides for insurance for bodily injury caused by an occurrence, and it defines bodily injury as a "bodily injury, sickness or disease sustained by a person," including "mental anguish, mental injury, shock, fright or death resulting from bodily injury, sickness, or disease." *Ibid.*

While claims for bodily injury arising out of "Abusive Acts" are excluded from coverage in the GCL Coverage Part, it is undisputed that the Board purchased an Endorsement entitled "Abusive Act Liability Coverage Form" ("Endorsement") which

explicitly provides for insurance for "loss because of 'injury' resulting from an 'abusive act'". *See* Judge McNulty's Opinion at p. 5.

i. "Abusive Acts" Defined.

Quoted at length in the Court's Opinion from the Policy, "abusive acts" are defined as "any act or series of acts or actual or threatened abuse or molestation done to any person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person by anyone who causes or attempts to cause the person to engage in a sexual act: (a) without the consent of or by threatening the person, placing the person in fear or asserting undue influence over the person; (b) If that person is incapable of appraising . . . engag[ing] in the sexual act; or (c) By . . . lewd exposure . . . ." [emphasis added]. In other words, "acts of actual or threatened sexual abuse or molestation" are required to meet the policy's definition.[1]

ii. Construction of the Policy Language

It is the prevailing law, however, that insureds should not be subjected to technical encumbrances or to hidden pitfalls, and their policies should be construed liberally in their favor to the end that coverage is afforded "to the full extent that any fair interpretation will allow." *See Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 482 (1961). This doctrine has been applied to all forms of insurance contracts. *See, e.g.*, *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 601-603

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[1] There is no contention here of any act of lewd or indecent exposure.

(2001) (discussing reasonable expectations under boat owner's insurance policy); *Doto v. Russo*, 140 N.J. 544, 556-559 (1995) (addressing insured's reasonable expectations under a commercial-umbrella liability policy related to underinsured motorist coverage); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 338-39 (1985) (applying doctrine in the context of professional liability). It is well settled that where a policy's terms are ambiguous, "they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations." *See Flomerfelt v. Cardiello*, 202 N.J. 432, 441 (2010) (citing *Doto*, *supra*, 140 N.J. 544 (1995)).

In this legal context, the Court's conclusion that Montville knew of abusive acts by Fennes prior to July 1, 2011 must be re-examined. Once re-examined, that factual conclusion, which was the basis for invalidating the coverage, must either be overruled outright or become the subject of a plenary hearing.

POINT II

THE COURT ERRED IN FINDING THAT THE BOARD HAD KNOWLEDGE OF ABUSIVE ACTS PRIOR TO THE POLICY PERIOD BEGINNING JULY 1, 2011. THAT ERROR LED TO THE LEGAL CONCLUSION THAT THE ABUSIVE ACTS COVERAGE WAS INVALID WHEN, IN FACT, IT WAS VALID

A. The Court's Key Determination.

The Court's Opinion concludes that the Board had knowledge of "Abusive Acts," as defined by the Policy, prior to the effective Policy date of July 1, 2011. This is a critical determination, because Judge McNulty's Opinion states:

> There is only one question in this case: Does the Child M state court litigation against Montville assert claims "arising out of or in any way relating to an 'abusive act'"? If so, Zurich does not have a duty to defend Montville in that case; if not, Zurich does have a duty to defend.

See Judge McNulty's Opinion at p. 13. Even though Montville purchased Abusive Acts coverage, the Court focused on the "prior known acts" exclusion of the "AA Coverage Part." *Id.* at n. 9. The Court reasons that, "Montville cannot avail itself of the AA coverage it purchased, because Zurich did not agree to insure Montville for abusive acts it knew about before the effective date of the policy, *i.e.*, July 1, 2011." *Ibid.* The Court emphasizes that "Montville's prior knowledge is the very essence of Child M's claim against it." *Ibid.* The Court noted that:

> The exclusion broadly applies to "any claim or 'suit' based upon, arising out of or attributable, in whole or part, to any 'abusive act' of which any insured . . . has knowledge prior to the effective date of this Coverage Part." I therefore find that Zurich did not wrongfully disclaim under the AA Coverage Part. *Ibid.* (Emphasis in original.)

Further in the Opinion, the Court states, "Montville cannot really maintain that its potential liability in the Child M litigation does not relate in any way to abusive acts. Montville's alleged knowledge of, and silence about Fennes' abusive acts against Montville students are alleged to have facilitated Fennes' predations at Cedar Hill." *Id.* at p. 15. At the end of the Opinion, Judge McNulty states, "Abusive

acts—those of which Montville was aware from 1998 to 2010, or those which occurred later, in 2010-2012—are the foundation of Montville's liability to Child M." *Id.* at p. 21.

B. The Errors and New Evidence Requiring Reconsideration.

This sweeping conclusion is false and unsupported by the factual record.

On the very first page of the Opinion, the Court states, "[i]n 2012, one of Fennes' alleged victims, Child M, a Cedar Hill student, sued (among others) Montville." *See* Judge McNulty's Opinion at p. 1. This is incorrect, and although the correct date is used later in the Opinion, it is unclear what import the Court has placed on this misstatement.

The fact is that as of 2012, Montville had absolutely no knowledge of any Child M. suit. On or about August 30, 2012, Child M filed a complaint against Cedar Hill Prep School and Fennes, alleging that Child M suffered bodily injury at the hands of Fennes, when he was an employee of Cedar Hill, on or about February 21, 2012. The Board was not a party to this action, and the allegations of the original Child M Complaint were directed only at Cedar Hill and Fennes. The Board had no knowledge of the Child M action or of its allegations until August, 2014, when Cedar Hill first asserted claims against the Board in a separate action known as *Cedar Hill Prep School v. Montville Township Public Schools and Montville Board of Education*, Docket No. Mid-L-4842-14. Child M did not assert claims against the Board until January 23, 2015, through the filing of a

Third Amended Complaint. *See* SJE Cert. at Exhibit B.[2]

But most importantly, although aware of some children sitting on his lap, a very occasional kiss on the cheek, and some hand holding (all of which the District took appropriate steps to abate), Montville did not have knowledge of anything remotely meeting the policy definition of "Abusive Acts" prior to July 1, 2011.

i. The Court's Emphasis on the Allegations of the Complaint Is Misplaced.

The Complaint filed by Child M, taken broadly, alleges that the Board was aware that Fennes had committed abusive acts. But this mere allegation is not determinative of coverage. Instead, the Court has a duty to consider all of the facts in the record, including those outside the Complaint.

In *SL Indus. v. Am. Motorists Ins. Co.*, the New Jersey Supreme Court addressed the issue of "whether the duty to defend is triggered by facts indicating potential coverage that arise during the resolution of the underlying dispute." *SL Indus. v. Am. Motorists Ins. Co.*, 128 N.J. 188, 198-199 (1992). In its reasoning, the Court opined that, "[i]nsureds expect their coverage and defense benefits to be determined by the nature of the claim against them, not by the fortuity of how the plaintiff, a third party, chooses to phrase the complaint against the insured." *Ibid.* The Court explained that, "[t]o allow the insurance company 'to

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[2] Except as otherwise noted, references to the SJE Cert. are to the Certification of Stephen J. Edelstein, Esq., previously submitted in connection with the Motion for Summary Judgment.

construct a formal fortress of the third party's pleadings and to retreat behind its walls, thereby successfully ignoring true but unpleaded facts within its knowledge that require it, under the insurance policy, to conduct the putative insured's defense' would not be fair." *Ibid.* (citing *Associated Indem. v. Insurance Co. of N. Am.*, 68 Ill. App. 3d 807 (1979)). The Court emphasized that, "[m]any states agree that the duty to defend is triggered not only by the allegations in the complaint, but by the later discovery of relevant facts." *Id.* at 199. It further stated, "[t]he insurer cannot safely assume that the limits of its duties to defend are fixed by the allegations a third party chooses to put into his complaint, since an insurer's duty is measured by the facts." *Ibid.* (citing J.A. Appleman, 7C *Insurance Law and Practice* § 4683, at 56 (Berdal ed. 1979)). The Court maintained that "[o]ur holding is in accord with most insureds' objectively-reasonable expectations" and concluded that "facts outside the complaint may trigger the duty to defend." *Id.* at 198.

Other New Jersey Courts have consistently followed the holding in *SL Indus. v. Am. Motorists Ins. Co. See Columbus Farmers Mkt., LLC v. Farm Family Cas. Ins. Co.*, 2006 U.S. Dist. LEXIS 92448 *27 (D.N.J. Dec. 21, 2006) ("analysis of the allegations is not limited to the complaint, itself, but rather 'facts outside the complaint may trigger the duty to defend.'"). *See* Certification of Susan S. Hodges, Esq., Exhibit A. The Third Circuit has also reached the same conclusion. *See Alexander v. Nat'l. Fire Ins.*, 454 F.3d 214, 220 (3d Cir. 2006). In *Alexander*, the Court held:

> In determining whether an insurance company has a duty to defend under the terms of its policy, we are not limited to the facts and allegations contained within the four corners of the underlying complaint; rather, "facts outside the complaint may trigger the duty to defend." *SL Indus., Inc. v. Am. Motorists Ins. Co.*, 128 NJ. 188 (1992) . . . .
>
> Accordingly, it is proper to consider evidence not set forth in the underlying litigation in determining whether [the insurance company] owed any duties to the [insured] in [the underlying] litigation.

Referencing the Court's "broad holding" in *SL Indus. v. Am. Motorists Ins. Co.*, the New Jersey Appellate Division has held that "the duty to defend is not necessarily limited to what is set forth in the complaint." *Jolley v. Marquess*, 393 NJ. Super. 255, 271-272 (App. Div. 2007) (citing *SL Indus. v. Am. Motorists Ins. Co.*, 128 NJ. at 198-199). Moreover, the Appellate Division has determined that "[t]here is legal support for [the insured's] reliance on 'extrinsic facts' to bring [the third party's] allegations within the terms of the [insurance] policy. *Estate of Hart v. Singer*, 2008 N.J. Super. Unpub. LEXIS 2109 *11-12 (App. Div. Nov. 28, 2008) (citing *Jolley v. Marquess*, 393 N.J. Super. at 271.)) *See* Certification of Susan S. Hodges, Esq., Exhibit B.

When the external facts in this case are examined, it is clear that the Board did not have knowledge and could not have had knowledge of "abusive acts," as defined, prior to July 1, 2011.

ii. The District Court's Emphasis on the Appellate Division's Version of the Facts Is Also Misplaced.

The Court cites, verbatim, nearly four (4) pages of the Appellate Division's reversal of the lower court's decision granting the Board's Motion for Summary Judgment in the Child M Lawsuit. The Opinion states that, "Montville knew that Fennes was engaged in inappropriate physical contact with female students." *See* Judge McNulty's Opinion at p. 7. However, the term "inappropriate physical contact" is not the same as the defined term "Abusive Acts."

The Court opines, "[t]he claim is that if Montville had reported Fennes to the appropriate authorities or told potential employers what it knew, Child M would not have been abused," *Id.* at p. 22. As will be seen in Section iii, *infra*, this is not the case. Contrary to the Appellate Division's version of the facts, Montville and its employees did report their concerns about Fennes' conduct to DYFS in June 2008, July 2009, and March 2010. The Institution Abuse Investigation Unit's investigation and conclusions are discussed in Section iii.

iii. Newly Acquired Evidence That Requires Reconsideration.

Montville was always aware of its duty to report abusive acts to the insurer. For example, as soon as Montville learned of Fennes's indictment in 2012, it promptly reported that fact to Zurich. The allegations in the Child M case were also properly and promptly reported to Zurich.

As set forth in the Certification of Stephen Edelstein, Esq. ("Edelstein Cert.") filed under seal on June 15, 2017, counsel is now in possession of the 30 page IAIU investigation summary and conclusions. *See* Edelstein Cert. at Exhibit A.

That 30 page report details a very extensive IAIU investigation which took place between March and May of 2010. The Court will recall that Fennes resigned in May of 2010, effective June 30, 2010.

Not previously available to counsel or to the Court, the "Recommendations" and "Investigative Findings" are so important that they are quoted here at length:

> Recommendation:
>
> Investigative Observations
>
> No students were harmed. Seven students reported the AP[3] sitting at his desk during a movie and two students reported the AP sitting with the students on the carpet. Six students reported also sitting at their desk. Four students report the AP keeping his shoes on while watching movies and five student witness (sic) reported keeping their shoes on while watching a movie. Only two students reported keeping their shoes off while watching a movie. Two students reported keeping their shoes off and rubbing each other's feet. Eight students reported that nobody in the class rubs each others feet. Ten out of eleven students reported that the AP allows the kids to sit on his lap.

[3] Accused Party

Thirteen students reported that the AP does not share his lip balm with students and twenty two students reported that the AP does not rub lotion on the student's legs. One out of fourteen female students reported seeing a female student wearing a sports bra during track practice. Sixteen students reported that they have never seen the AP coming inside the girl's locker room. Six out of eight students reported that the AP gives them a ride in his care with their parent's permission. Twenty one students reported that the AP never told them to wear a bathing suit to school. Random students reported that they have worn bathing suits when they participated in water game activities. Four staff reported they have never seen the AP or the kids taking their shoes off while watching a movie. The staff reported that they have seen the kids sitting on the carpet or at their desk while watching a movie but they have never seen the AP sitting on the carpet with the kids. The staff reported that they have never seen the AP offering the students his lip balm, rubbing lotion on their legs or the AP telling the kids to come to school in bathing suits. One out of three staff reported seeing the AP allowing students to sit on his lap. Two parents were interviewed. One parent reported seeing kids sitting on the AP's lap; however other parent did not see students sitting on the AP's lap. Both parents reported that they have never seen the AP sitting on carpet, rubbing the student's feet or putting lotion

on their legs. Furthermore, both parents reported that they have never seen student wearing sports bra's (sic) to practice but they both gave the AP permission to transport their kids in his car. The available information did not meet the statutory requirements to find sexual abuse.

Investigative Findings

Sexual Abuse/Substantial Risk of Sexual Injury is unfounded regarding the Teacher, Jason Fennes's actions in accordance with N.J.S.A. 9:6-8.21, as' the Institutional Abuse Investigation Unit's review herein is solely investigative.

Remedial Actions

It is the understanding of this office that the following two (2) remedial actions were taken at the time of the investigation:

1. On March 11, 2010 the School Principal, Dr. Stephany Adams informed the IAIU investigator that the teacher Jason Fennes was suspended without pay pending the outcome of the investigation.
2. On May 11, 2010 the IAIU investigator completed an exit interview with the School Principal Dr. Stephany Adams. Dr. Adams informed the IAIU investigator that depending on the outcome of the IAIU investigation the Board will determine Mr. Fennes future employment.

Since the allegation of sexual abuse is unfounded, the School District is not required

> to take any disciplinary or other personnel action against the teacher Jason Fennes.

[emphasis added]

Given this report, its findings, and its conclusions, it is impossible, on the record before the Court, that the Board had information which would remotely meet the policy definition of an "Abusive Act."

This document alone requires that the Motion for Reconsideration be granted.

POINT III

THE COURT SHOULD EITHER REVERSE ITS ORDER ENTIRELY, GRANTING SUMMARY JUDGMENT IN FAVOR OF THE BOARD, OR, AT THE VERY LEASE, DENY BOTH MOTIONS AND SCHEDULE A PLENARY HEARING ON THE STATE OF THE BOARD'S KNOWLEDGE AS OF JULY 1, 2011.

It is well settled that summary judgment is proper if the pleadings, discovery, disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Significantly, only a factual dispute that might affect the outcome of the action can preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if a reasonable jury could return a verdict in favor of the non-movant with regard to that issue. *Id.* The Court's function on summary judgment is not to weigh evidence or to make credibility determinations. *Boyle v. Cray. of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998). Rather, the Court should determine

whether the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

A close reading of the June 1, 2017 Opinion suggests that the Court's determination that Zurich has no duty to defend the Board is based on knowledge which the Judge believes the Board possessed prior to the Policy period beginning July 1, 2011. As set forth above, the Board had no such knowledge, nor, as the IAN report indicates, could it have had such knowledge.

However, if the Court does not accept the Board's purported facts as true, it must, at the very least, reverse its decision in part and deny Zurich's Cross-Motion for Summary Judgment. The Court is not permitted to weigh evidence or to make credibility determinations on summary judgment motions. *Boyle v. Cnty. of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998). Accordingly, if the Court feels it is necessary to determine whether the Board had knowledge of any "Abusive Acts," as defined by the Policy, prior to July 1, 2011, then it must deny Zurich's Cross-Motion for Summary Judgment. This factual dispute undoubtedly affects the outcome of the action, because it is this alleged knowledge which the Judge determined relieved Zurich of its duty to defend the Board. The Court cannot simply accept the Appellate Division's distorted version of the facts as true on a dispositive motion. Rather, the parties must be afforded the opportunity to further develop the facts through ongoing investigations and discovery.

CONCLUSION

For the reasons set forth above, the Board respectfully requests that the Court grant the motion for reconsideration and reverse its June 1, 2017 decision and determine that Zurich has a duty to defend the Board for claims arising out of the Child M Lawsuit.

Respectfully submitted,

Schwartz Simon
Edelstein & Celso LLC
Attorneys for Plaintiff,
Montville-Township
Board of Education

By: /s/ Stephen J. Edelstein

VERIFIED COMPLAINT FOR DECLARATORY RELIEF (JUNE 21, 2016)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION MORRIS COUNTY

MONTVILLE TOWNSHIP
BOARD OF EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

Docket No. MOR

Plaintiff Montville Township Board of Education ("the Montville Board"), by and through its attorneys Schwartz Simon Edelstein & Celso LLC, complains of and seeks declaratory relief against Defendants Zurich American Insurance Company ("ZAIC" or "Zurich"), as follows:

PARTIES

1. Plaintiff Montville Township Board of Education, is a public school district and is organized pursuant to N.J.S.A. 18A:10-1, et seq., with its principal place of business located at 86 River Road, Montville, New Jersey.

2. Defendant Zurich American Insurance Company, is an insurance company located at One Liberty Plaza, 165 Broadway, 32nd Floor, New York, New York. It is licensed to provide insurance products in the State of New Jersey and does business in the State of New Jersey.

JURISDICTION AND VENUE

3. This action is brought pursuant to the provisions of the New Jersey Uniform Declaratory Judgement Act, N.J.S.A. 2A:16-50 et seq. The Chancery Division of the Superior Court of New Jersey, Morris County, has jurisdiction of this action, pursuant, inter alia, to R. 4:42-3.

FACTS RELEVANT TO ALL COUNTS

4. Jason Fennes ("Fennes") was employed by the Montville Board as an elementary school teacher from on or about September 1, 1998 until on or about June 30, 2010.

5. On or about September 1, 2010, Fennes began employment with the Cedar Hill Prep School ("Cedar Hill").

6. On or about February 22, 2012, Cedar Hill terminated Fennes as an employee.

7. In or about March of 2012, Fennes was indicted for events which are alleged to have taken place in 2005 and were unrelated to his employment with Cedar Hill.

8. Although not aware of any claims at that time, based solely on the fact of the indictment, the Montville Board sent notice to Zurich of the possibility of claims by unknown persons against the Montville Board and

Fennes during his time of employment with Montville in compliance with the Policies.

9. Thereafter, on or about August 30, 2012, Plaintiffs Child M. and her parents, R.M. and Z.P. ("Plaintiffs") filed the action known as Child M. et al. v. Cedar Hill Prep, et al. ("the Child M. Complaint"), alleging in it bodily injury suffered by Child M. at the hands of Fennes, while he was an employee of Cedar Hill. [1]

10. The Child M. Complaint alleged a triggering event to have occurred on or about February 21, 2012.

11. The allegations of the original Complaint were directed only at Cedar Hill and Fennes. Following various procedural maneuvers against the Montville Board which were begun by Cedar Hill in or about July 24, 2014, on or about January 22, 2015, Child M. filed a direct claim against the Montville Board alleging that it had failed to take appropriate action when made aware of alleged inappropriate conduct of Fennes while employed by the Montville Board. Child M. alleged that the Montville Board had entered into a Settlement Agreement under which the Montville Board agreed to provide only limited information in response to employment reference inquiries related to Fennes. Child M. alleged that the Montville Board's conduct in connection with Fennes led to the bodily injuries suffered by Child M.

12. On or about February 2, 2015, Cedar Hill filed a cross claim against the Montville Board for contribution and indemnification.

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[1] All references are to documents attached to the Certification of Stephen J. Edelstein, Esquire submitted herewith.

ALLEGATIONS AGAINST THE BOARD

13. In the Third Amended Complaint, filed on January 22, 2015, Child M. makes four (4) specific claims against the Montville Board:

- The Ninth Count alleges that the Montville Board, while allegedly on notice of Fennes' negligent, careless, reckless and/or intentional conduct, including child abuse, both sexual and non-sexual, failed to report same to the proper authorities in violation of N.J.S.A. 9:6-8.14.
- The Tenth Count alleges that the Montville Board negligently, carelessly, recklessly and/or intentionally entered into an agreement with Fennes, dated May 14, 2010, in which it agreed to limit the scope of information to be revealed and/or communicated to potential future employers of Fennes in exchange for Fennes' resignation.
- The Eleventh Count alleges that the Montville Board's conduct, both intentional and unintentional, caused Child M. to suffer severe emotional distress.
- The Twelfth Count alleges that the Montville Board's complained of conduct directly caused the parents, RM. and Z.P., to lose the services of their daughter, Child M.

14. As stated above, Cedar Hill then filed cross-claims against the Montville Board for the above outlined conduct and also for contribution from co-defendants pursuant to the Joint Tortfeasors Contribution Act, N.J.S.A. 2A:53A-1, et seq., and for indemnification.

CLAIMS UNDER THE INSURANCE POLICIES

15. The alleged incident between Fennes and Child M ("the Incident"), which triggered the Complaint, and everything in the litigation which followed, took place in February 2012.

16. The Montville Board had no knowledge of the Incident or of the Child M. litigation until mid-2014, when Cedar Hill first asserted claims against it.

17. However, on or about March 5, 2012, the Board received notice that Fennes had been arrested and charged with crimes for events which allegedly occurred in 2005 related to a Montville student. As a result of having received that information, on or about March 6, 2012 the Board notified its insurance broker, Polaris Galaxy Insurance, LLC, to "notify our insurance carriers of this potential claim . . . ." Polaris notified Zurich.

The Zurich Policy

18. For the policy period July 1, 2011 to July 1, 2012, the Board was insured by Zurich American Insurance Company under a Commercial General Liability Insurance Policy ("CGL Policy" or "Zurich Policy"), Policy CPO 3701598-07. The CGL Policy requires Zurich to indemnify and defend the Board for bodily injury claims. This is the applicable Zurich Policy, since it is an occurrence policy.

19. When the claim was submitted to Zurich, it was denied, *inter alia*, on the basis that the Zurich Policy excluded abusive acts.

20. However, Zurich failed to recognize that the Montville Board had purchased and paid for an endorsement entitled "Abusive Act Liability Coverage, Form." *Id.*

21. The "Abusive Act Liability Coverage Form" states that Zurich, "will pay 'loss' because of 'injury' resulting from an 'abusive act' to which this insurance applies." *Id.* at Abusive Act Liability Coverage.

22. The Zurich Policy defines "Abusive Act" as:

> Any act or series of acts of actual or threatened abuse or molestation done to any person, resulting in "injury" to that person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person, resulting in "injury" to that person, by anyone who causes or attempts to cause the person to engage in a sexual act. *Id.* at Section V, Abusive Act Liability Coverage.

23. The Board has been insured under policies issued by Zurich or its subsidiary continuously since July 2004 through the present, and the Board has paid all required premiums under the policies.

24. The claim that was asserted for bodily injury was a covered claim under Zurich Policy.

25. Despite their denials, Zurich has an obligation to provide the Board with a defense to the Child M. Lawsuit.

26. Despite their denials, Zurich has an obligation to indemnify the Board for the claims made in the Child M. lawsuit.

FIRST COUNT
(Declaratory Judgment for Defense and Indemnity against Zurich)

27. The Board repeats the allegations of Paragraphs I through 26 of the Complaint as if set forth fully at length herein.

28. Pursuant to the terms of the CGL Policy, which is an occurrence policy, Zurich is obligated to provide defense and indemnity to the Board for the allegations in the Third Amended Complaint and the cross-claims by Cedar Hill.

29. The claims against the Board allege "bodily injuries" suffered by Child M in 2012 but not alleged against the Board until 2014.

30. The Third Amended Complaint states that the Board's actions or inaction directly led to Child M.'s alleged injuries.

31. The Zurich Policy specifically provides coverage for "abusive acts" similar in nature to the alleged acts that led to the "bodily injuries" suffered by Child M.

32. Zurich has refused and failed to meet its obligations to defend the Board for any claim against it in the Child M. Lawsuit.

33. Zurich has also refused and failed to meet its obligations to indemnify the Board for any claim against it in the Child M. Lawsuit.

34. By its conduct, as alleged, Zurich has breached its duties to the Board under the relevant policies of insurance.

35. Immediate declaratory relief is necessary to prevent the Board from incurring additional unreimbursed defense costs, attorneys' fees and any potential judgment for the allegations contained in the Child M. Lawsuit.

WHEREFORE, Plaintiff, Montville Township Board of Education, demands that the Court enter an immediate declaratory judgment against Defendant, Zurich, as follows:

A. Declaring that Defendant, Zurich, is obligated to provide defense to the Board for the allegations contained in the Child M. Lawsuit, including the cross-claims of Co-Defendant, Cedar Hill;

B. Declaring that Defendant, Zurich, is obligated to provide indemnity to the Board for any sums that become due and owing from the Board to Plaintiff's as a result of the allegations contained in the Child M. Lawsuit;

C. Ordering Defendant, Zurich, to reimburse the Board for all attorneys' fees and defense costs expended to date in defense of the Child M. Lawsuit;

D. Awarding costs of suit, interest and counsel fees; and

E. Such other relief that the Court deems just and proper.

SECOND COUNT
(Breach of Implied Covenant of Good Faith and Fair Dealing against Zurich)

36. The Board repeats the allegations of Paragraphs 1 through 35 of the Complaint as if set forth fully at length herein.

37. Under the CGL Policy, Zurich is obligated to honor the duty of good faith and fair dealing, which is implied in all contracts.

38. To the extent that Zurich's conduct in failing to provide defense and indemnity to the Board does not violate an express provision of the CGL Policy, Zurich's conduct violates the implied covenant of good faith and fair dealing.

39. As a result of Zurich's breach of the implied covenant of good faith and fair dealing, the Board has and will continue to suffer damages.

WHEREFORE, Plaintiff, Montville Township Board of Education, demands judgment against Defendant, Zurich, as follows:

A. Awarding compensatory and consequential damages sustained by the Board as a result of Defendant, Zurich's breach of the implied covenant of good faith and fair dealing;

B. Awarding costs of suit, interest and counsel fees; and

C. Such other relief that this Court deems just and proper.

Schwartz Simon
Edelstein & Celso LLC
Attorneys for Plaintiff
Montville Township Board of Education

By: /s/ Stephen J. Edelstein

Dated: June 21, 2016

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:5-1, Stephen J. Edelstein, Esq., is hereby designated as trial counsel for Plaintiff in the within matter.

Schwartz Simon
Edelstein & Celso LLC
Attorneys for Plaintiff
Montville Township Board of Education

By: /s/ Stephen J. Edelstein

Dated: June 21, 2016

CERTIFICATION PURSUANT TO RULE 4:5-1

Pursuant to R. 4:5-1, I hereby certify to the best of my knowledge that the matter in controversy is not the subject of any other action pending in any other court, or of a pending arbitration proceeding, however, the Montville Board of Education is a party to Child M a minor by her g/a/l/ R.M. and R.M. and Z.P., individually, v. Jason Fennes, Cedar Hill Prep School et al, Superior Court of New Jersey, Morris County, Docket No. L-6011-12. In that action, Child M. a minor by her g/a/l R.M. and R.M. and Z.P. individually and Cedar Hill Prep School seek damages against the Montville Board of Education. The Montville Board of Education successfully obtained summary judgment on all counts of the underlying complaint by Child M and Cedar Hill Prep School on September 18, 2015. Child M and Cedar Hill Prep have filed an appeal. The denial of coverage in that case by Zurich is the basis for the claims in this Verified Complaint. I further certify that the action is not the subject to any other action pending in any Court or the subject of a pending arbitration proceeding. No other action or arbitration is contemplated at this time. I know of no other party who should be joined in this action

Schwartz Simon
Edelstein & Celso LLC
Attorneys for Plaintiff
Montville Township Board of Education

By: /s/ Stephen J. Edelstein

Dated: June 21, 2016

CERTIFICATION PURSUANT TO RULE 4:5-1(B)(3)

I hereby-certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future in accordance with Rule l:38-7(b).

I certify that the foregoing statement is true, and I am aware that if the foregoing statement is willfully false, I am subject to punishment.

Schwartz Simon
Edelstein & Celso LLC
Attorneys for Plaintiff
Montville Township Board of Education

By: /s/ Stephen J. Edelstein

Dated: June 21, 2016

VERIFICATION

JAMES T. TEVIS, of full age, being duly sworn according to the law and upon his oath, hereby swears and affirms the following:

1. I am the Business Administrator of the Montville Township Board of Education (the "Board"), the Plaintiff. I make this Certification of Verification on behalf of and with full authority for the Board.

2. The allegations contained in the Complaint by the Board are true to the best of my personal knowledge, information and belief, and the Complaint is made in truth and good faith for the causes set forth therein.

3. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ James T. Tevis
Business Administrator
Montville Township Board of Education

Dated: 6/21/16

THIRD AMENDED COMPLAINT (JANUARY 23, 2015)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION–MIDDLESEX COUNTY

CHILD M, a minor by her g/a/l and
R.M. and Z.P., Individually,

Plaintiffs,

v.

JASON FENNES, CEDAR HILL PREP SCHOOL, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION and JOHN DOE(S) #1-5, 6-10, 11-15 (inclusive, fictitiously named defendants), ABC CORPS #1-5, 6-10, 11-15 (inclusive, fictitiously named defendants) jointly & severally,

Defendants.

Docket No: MID-L.6011-12

Civil Action

Plaintiffs, CHILD M, a minor by her g/a/l R.M, and R.M. and Z.P., Individually, residing. at 18 Forest Glen Drive, in the Borough of Highland Park, County of Middlesex, and State of New Jersey by way of complaint against the defendants, says:

FIRST COUNT

1. The plaintiff, CHILD M, is minor, who resides at 113 Forest Glen Drive, in the Borough of Highland Park, County of Middlesex, and State of New Jersey, whose date of birth is April 5, 2005.

2. In or about February, 2012, the plaintiff, CHILD M, was a student, invitee, and/or was otherwise permitted on the premises of and was in the care and custody of defendants, JASON FENNES, CEDAR HILL PREP SCHOOL and JOHN DOE(S) #1-10, (inclusive, fictitiously named defendants hereinafter referred to as "JOHN DOES" for the sake of brevity), while attending school at the CEDAR HILL PREP SCHOOL, County of Somerset and State of New Jersey.

3. At the time and place aforesaid, the defendants, CEDAR HILL PREP SCHOOL and JOHN DOES were the owners, property managers and/or were otherwise in control and possession of said premises and were tiny responsible for the hiring and supervision of the employees/teachers working therein.

4. At the aforesaid time and place, defendants, CEDAR HILL PREP and JOHN DOES, did negligently and carelessly fail to maintain, provide and otherwise ensure a safe area for the children and general student body to attend school, by vicariously causing and allowing the plaintiff to be sexually assaulted, inappropriately touched, and otherwise abused by the defendant, JASON FENNEL is teacher in their employ, working on their behalf and otherwise retained, hired, approved and supervised by the defendants, CEDAR HILL PREP SCHOOL and JOHN DOES.

5. Defendants, CEDAR HILL PREP SCHOOL and/or JOHN DOES, were under a duty to take rea-

sonable action, both precautionary and remedial in nature, to provide for the safety of the students and those members of the general public who might be attending school or otherwise traveling upon said premises and chemise knew or should have known of the dangerous situation and more specifically the defendant, JASON FENNES' history as a sexual predator, pedophile, and deviant, and taken such action as necessary to rectify or discover the dangerous situation, but failed to do so.

6. Defendants, CEDAR HILL PREP SCHOOL and/or JOHN DOES, felled and neglected to take such reasonable action to so provide for the safety of the plaintiff, others so situated and the general public, thereby causing physical and mental injury to the plaintiff, CHILD M.

7. Defendants, CEDAR HILL PREP SCHOOL and/or JOHN DOES failed to maintain and provide a reasonably gate environment for the plaintiff and other students to attend school and otherwise utilize the scholastic facilities for the purposes for which they were intended, thereby causing the plaintiff to incur injury and damages.

8. Defendants, CEDAR HILL PREP SCHOOL and/or JOHN DOES, had a duty to take reasonable action to prevent harm from coming to the plaintiff and others so situated, and to rectify any dangerous condition present upon its premises as aforesaid.

9. Defendant, CEDAR HILL PREP SCHOOL and/or JOHN DOES, failed to take any reasonable action to warn the plaintiff and/or others under their cart and stewardship and/or the general public or

parents of the student body of the aforesaid dangerous situation.

10. As a result of the negligence and carelessness of the defendants, their employees, staff and/or representatives, as aforesaid, plaintiff, CHILD M, sustained severe personal injuries, both temporary and permanent in nature; has and will endure great pain; has and will be prevented from attending to her normal affairs; has incurred medical and other expenses and has been otherwise damaged.

WHEREFORE, infant plaintiff, CHILD M, a minor by her guardian ad item, CHILD M, a minor by her g/a/l R.M., and R.M. and Z.P., Individually, demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL and JOHN DOES, jointly and severally, for damages, together with interest, attorneys fees and costs of suit

SECOND COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First, Count of this Complaint, but for the sake of brevity the same are not set forth herein at length.

2. At the time of the aforesaid incident, defendant, JASON FENNES, was an agent, servant, and/or employee of the defendants, CEDAR. HILL PREP SCHOOL and/or JOHN DOES, and was otherwise acting in the course and scope of his employment and/or agency.

[sic, point 3 missing]

4. Defendant, CEDAR HILL PREP SCHOOL and/or JOHN DOES, is thus vicariously liable for the negligence of JASON FENNES.

5. As a result of the negligence and carelessness of the defendants, and each of them, plaintiff, CHILD M, sustained severe personal injuries both temporary and immanent in nature; has and will endure great pain; has and will be prevented from attending to her normal affairs; has incurred medical and other expenses; and has been otherwise damaged.

WHEREFORE, infant plaintiff, CHILD M, a minor by her g/a/l R.M., and R.M. and Z.P., Individually, demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES and ABC CORPS, jointly and severally, for damage; together with interest, attorneys fees and costs of suit.

THIRD COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First and Second Counts of this Complaint, but for the sake of brevity the same are not set forth *herein* at length.

2. In or about February, 2012, the plaintiff, CHILD M, was a student at the CEDAR HILL PREP SCHOOL operated by defendants JOHN DOES and/or ABC CORPS.

3. At the same time and place aforesaid, the defendant, JASON RENNES, was employed by the defendants, CEDAR HILL PREP SCHOOL, as a teacher.

4. In or about February, 2012, the defendant, JASON FENNES, performed various acts of sexual molestation against the plaintiff, CHILD M. While the acts of sexual molestation were occurring, the plaintiff was powerless.

5. At all times mentioned herein, the defendants, CEDAR HILL PREP SCHOOL and/or JOHN DOES, controlled the hiring, retention and supervision of defendant, JASON

6. The acts of defendant were done willfully, maliciously, outrageously, deliberately, and purposely with the intention to inflict emotional distress upon plaintiff and/or were done in reckless disregard of the probability of causing plaintiff emotional distress, and these acts did in fact result in severe and extreme emotional distress.

7. As a direct and proximate result of the defendants' acts, plaintiff was caused to incur severe and grievous mental and emotional suffering, fright, anguish, shock, nervousness, anxiety and plaintiff continues to be fearful, anxious, and nervous.

8. As a direct and proximate result of the defendants' acts, plaintiff was caused to obtain medical and psychiatric treatment, which medical and psychiatric treatment will continue for an Indeterminable length of time.

WHEREFORE, infant plain CHILD M, a minor by her g/a/l R.M., and R.M. and Z.P., Individually, demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES and ABC CORPS. jointly and severally, for compensatory and punitive damages, together with interest, attorneys fees and costs of suit.

FOURTH COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First through Third Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length.

2. At all times mentioned herein, defendants, CEDAR HILL PREP SCHOOL, JOHN DOES and/or ABC CORPS was a duly organized and existing in the County of Somerset, State of New Jersey, and operated, conducted and controlled the CEDAR HILL PREP SCHOOL at which the plaintiff, CHILD M. was a pupil.

3. At all times mentioned herein, defendants, CEDAR HILL PREP SCHOOL, JOHN DOES and/or ABC CORPS controlled the hiring, retention and supervision of defendant, JASON FENNES, a teacher in the school the plaintiff attended.

4. The defendants, CEDAR HILL PREP SCHOOL JOHN DOES, and/or ABC CORPS by and through their servants, agents and employees, were aware of the defendant, JASON FENNES' acts of sexual molestation against the plaintiff.

5. The defendants, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS, negligently failed to take all reasonable measures to protect the health, safety and well being of the plaintiff and that negligence is a proximate cause of the plaintiff's emotional and economic injuries.

6. Defendants, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS, were negligent in hiring, retaining and supervising of the defendant, JASON FENNES, and that negligence is a proximate cause of the plaintiffs emotional and economic injuries.

7. Defendants, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS., are vicariously liable for defendant, JASON FENNES' actions and said actions are a proximate cause of the plaintiff's emotional and economic injuries.

8. As a result of the actions of the defendant, the plaintiff has suffered permanent physical, emotional and economic harm and will require ongoing mental health counseling in order to overcome the emotional distress and trauma that she has endured.

WHEREFORE, infant plaintiff, CHILD M. a minor by her R.M., and R.M. and Z.P., Individually, demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES and ABC CORPS. jointly and severally, for compensatory and punitive damages, together with interest, attorneys fees and costs of suit,

FIFTH COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the Fire through Fourth Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length.

2. As a result of the intentional conduct of the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS, the plaintiff has sustained serious and permanent emotional distress and mental anguish,

WHEREFORE, infant plaintiff, CHILD M, a minor by her g/a/l R.M,, and R.M. and Z.P. Individually, demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES and ABC CORPS, jointly and severally, for

compensatory and punitive damages, together with interest, attorneys fees and costs of suit.

SIXTH COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First through Fifth Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length.

2. As a result of the negligent conduct of the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS, the plaintiff has sustained serious and permanent emotional distress and mental anguish.

WHEREFORE, infant plaintiff, CHILD M, a minor by her g/a/l R.M., and R.M. and Z.F., Individually demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES and ABC CORPS. jointly and severally, *for* compensatory and punitive damages, together with interest, attorneys fees and costs of suit.

SEVENTH COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First through Sixth Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length.

2. At all times mentioned herein, the defendant, JASON FENNES, was an employee of the defendants, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS, where without any reasonable provocation, he did willfully, wantonly and with malice afterthought assault the plaintiff, CHILD M.

3. At all times mentioned herein, defendant, JASON FENNES, was an employee of the defendant, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS, was on the premises of the defendants, CEDAR HILL PREP SCHOOL, JOHN DOES, and/or ABC CORPS, without any reasonable provocation he did negligently assault the plaintiff, CHILD M.

4. As a result of the said intentional and/or negligent acts of the defendant, JASON FENNES, as aforesaid, the plaintiff, CHILD M, was seriously and permanently injured and maimed, endured and will continue to endure great pain; has been and will be compelled to expend large sums of money for physicians and other help in an attempt to cure herself of said injuries; has been and will be prevented from attending to her normal business and social affairs and has been otherwise damaged.

WHEREFORE, infant plaintiff, CHILD M, a minor by her g/a/l R.M., and R.M. and Z.P., Individually, demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES and ABC CORPS. jointly and severally, for damages, together with interest, attorneys fees and costs of suit.

EIGHTH COUNT
Violation of 20 U.S.C. § 1681

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First through Seventh Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length,

2. The above-described conduct by defendants., JASON FENNES, CEDAR HILL PREP SCHOOL,

JOHN DOES, and/or AEC CORPS, under color of state law deprived the plaintiff, CHILD M, of her rights under Title IX of the Education Amendments of 1972.

3. Title IX of the Education Amendments of 1972, 20 U.S.C.S. § 1681 et seq,, provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education *program* or activity receiving federal financial assistance, *See Davis v, Monroe County Bd. of Educ.,* 526 U.S. 629, 638 (1999).

4. Sexual harassment is a form of discrimination for purposes of Title IX of the Education Amendments of 1972, 20 U.S.C.S. § 1681 et seq., and Title IX proscribes harassment with sufficient clarity to serve as a basis for a damages action. *Id.*, at 649-650. Moreover, an implied private right of action exists under Title IX of the Education Amendments of 1972, 20 U.S.C.S., § 1681 et. seq., and money damages are available in such suits. *id.* at 639.

5. Thus, a recipient of federal education funds may be liable in damages under Title IX of the Education Amendments of 1972, 20 U.S.C.S., § 1681 et seq., where an official of the school district, who at a minimum has authority to institute corrective measures on the district's behalf, has actual notice of, and is deliberately indifferent to, the district employee's severe, pervasive, and objectively offensive sexual harassment.

6. Upon information and belief, the CEDAR HILL PREP SCHOOL, is a recipient of federal education funding.

7. NAN MENON, as the acting onsite administrator/principal of the CEDAR HILL PREP SCHOOL, was an appropriate official of the school district, who at a minimum had authority to institute corrective measures on CHILD M'S behalf.

8. NAN MENON had actual knowledge of JASON FENNES' sexual harassment of the plaintiff, CHILD M, and given the particular foots of this case, her inactions also amounted to deliberate Indifference.

9. Defendant, FENNES' sexual harassment of CHILD M was so severe, pervasive and objectively offensive that CHILD M was deprived of her constitutional right to a safe learning environment, free from sexual harassment, and the educational opportunities or benefits provided by the school.

WHEREFORE, infant plaintiff; CHILD M, a minor by her g/a/l R.M., and R.M., and Z.P., Individually, demand judgment against the defendants, JASON FENNES, CEDAR HILL PREP SCHOOL, JOHN DOES and ABC CORPS. jointly and severally, for compensatory and punitive damages along with all recoverable attorneys fees and costs of suit.

NINTH COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First through Eighth Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length.

2. Prior to defendant, JASON FENNES' employment with defendant, CEDAR HILLS PREP SCHOOL, defendant, JASON FENNES was an agent, servant, and/or employee of the defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP

PUBLIC SCHOOLS, MONTVILLE TOWNSHIP BOARD OF EDUCATION and during his (12) twelve year employ, as a teacher and track coach, engaged in various negligent, careless, reckless and/or intentional conduct, including but not limited to inappropriate abusive and/or sexual conduct with his infant students.

3. Defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS and/or MONTVILLE BOARD OF EDUCATION, while on notice of said conduct, negligently, carelessly, recklessly and/or intentionally, failed to report same to the appropriate administrative agencies, local, county and state authorities as well as potential employers including Cedar Hill Prep.

4. Defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS and/or MONTVILLE BOARD OF EDUCATION, while on notice of said negligent, careless, reckless and/or intentional conduct, including child abuse, both sexual and nonsexual, failed to report same in violation of N.J.S.A. 9:6-8.14.

5. As a result of the negligence, carelessness, recklessness and/or intentional conduct of the defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, plaintiff, CHILD M, sustained severe personal injuries both temporary and permanent in nature; has and will endure great pain; has and will be prevented from attending to her normal affairs; has incurred medical and other expenses; and has been otherwise damaged.

WHEREFORE, infant plaintiff, CHILD M, a minor by her g/a/l R.M., and R.M. and Z.P., Individually, demand judgment against the defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, jointly and severally, for damages, together with interest, attorneys' *fees* and costs of suit.

TENTH COUNT

1. Plaintiff hereby repeats and *incorporates* each and every allegation contained in the First through the Ninth Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length,

2. Prior to defendant, JASON FENNES' employment with defendant, CEDAR HILLS PREP SCHOOL, defendant JASON FENNES was employed by defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, as a teacher and track coach.

3. In the course of defendant, JASON FENNES' employment with WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, defendant JASON FENNES engaged in various acts of sexual Molestation and/or child abuse against other infant students.

4. The defendants WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, while on notice of said conduct, by and through their servants, agents and employees, failed to appropri-

ately avail, disperse and take all reasonable measures necessary to make such action known to all appropriate agencies, local, county and state officials and purposefully caused said acts to be concealed from potential future employers of defendant, JASON FENNES, including Cedar Hill Prep so as to endanger the welfare, health, safety of Plaintiff, CHILD M and others similarly situated.

5. Specifically, defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, JOHN DOES 10-15 AND ABC CORPS, 10-15 negligently, carelessly, recklessly and/or intentionally entered into an agreement, dated May 14, 2010, with defendant, JASON FENNES, wherein they agreed to limit the wept of information to be revealed and/or communicated by defendants WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION to potential future employers of defendant JASON FENNES in exchange for defendant JASON FENNES' resignation from their employ,

6. As a direct and proximate result of the defendants' WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS and MONTVILLE BOARD OF EDUCATION's acts and/or omissions, plaintiff CHILD M was caused to incur damages, including but limited to severe personal injuries both temporary and permanent in nature,

WHEREFORE, infant plaintiff, CHILD M, a minor by her g/a/l R.M., and R.M. and Z.P., Individually, demand judgment against the defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE

TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, jointly and severally, for compensatory and punitive damages, together with interest, attorneys fees and costs of suit,

ELEVENTH COUNT

1. Plaintiff hereby repeats and incorporates each and every allegation contained in the First through the Tenth Counts of this Complaint, but for the sake of brevity the same are not set forth herein at length.

2. Prior to defendant, JASON FENNES' employment with defendant, CEDAR HILLS PREP SCHOOL, defendant JASON FENNES was employed by defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, as a teacher and track coach.

3. In the course of defendant, JASON FENNES' employment with WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OP EDUCATION, defendant JASON FENNES engaged in various acts of sexual molestation and/or child abuse against with his infant students.

4. At all times mentioned herein, the defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, controlled the hiring, retention, supervision and cover-up of heinous acts of molestation perpetrated by the defendant, JASON FENNES,

5. The acts of defendant(s) were done willfully, maliciously deliberately, and purposely with the inten-

tion to misinform and/or mislead potential employers including Cedar Hill Prep and inflict emotional distress upon infant students and/or were done in reckless disregard of the probability of causing the infant students emotional distress, and these acts did in fact result in severe and extreme emotional distress to Plaintiff CHILD M.

6. As a result of the negligence, carelessness, recklessness and/or intentional conduct of the defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, including the failure to provide pertinent and highly relevant information to potential future employers of defendant JASON FENNES, thereby caused plaintiff; CHILD M's exposure to defendant JASON FENNES, a known pedophile and child molester, causing plaintiff, CHILD M to suffer seven personal injuries both temporary and permanent in nature; endure great pain; medical and other expenses; and be otherwise damaged.

WHEREFORE, infant plaintiff, CHILD M, a minor by her g/a/l R.M., and R.M, and Z.P., Individually, demand judgment against the defendants, WILLIAM MASON ELEMENTARY SCHOOL, MONTVILLE TOWNSHIP PUBLIC SCHOOLS, MONTVILLE BOARD OF EDUCATION, jointly and severally, for punitive damages, together with interest, attorneys fees and costs of suit.

TWELFTH COUNT

1. Plaintiff hereby repeats and incorporates each and *every* allegation contained in the First through the Twelfth Counts of this Complaint, but for the

sake of brevity the same are not set forth herein at length.

2. At all relevant times herein the plaintiffs, R.M. and Z.P., individually, were and are the natural mother, guardian ad litem, and father of the infant plaintiff; CHILD M. and as such are entitled to her services, society and are responsible for her safety, health and well-being.

3. As a direct and proximate result of the negligence of the defendants as aforesaid, plaintiffs, R.M. and Z.P., individually, have lost and will in the future lose the services and society of their daughter, the infant plaintiff CHILD M.

WHEREFORE, the plaintiffs, R.M. and Z.P., individually, demand judgment against the defendants, either jointly, severally, or in the alternative for damages together with interest, attorneys fees and costs of suit.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as to all issues.

DESIGNATION OF TRIAL COUNSEL

JOHN M. VLASAC, II, ESQ is hereby designated as trial counsel in the within litigation.

DEMAND FOR DISCOVERY

Pursuant to R. 4:17-1(b)(i), plaintiff hereby demands of the defendants, certified answers to Uniform Interrogatories, Form C and Form C(2), within sixty days from the date of service of this complaint.

DEMAND FOR PRODUCTION OF DOCUMENTS

Pursuant to R. 4:10-2, et seq,, and R. 4:18-1 specifically, plaintiffs hereby demands that the defendants, provide copies of all discoverable materials within thirty (30) days after the service of this complaint.

If the defendant believes something is not discoverable, please identify the item or information and state why it is not discoverable. If the Item cannot be copied, please state what it is so a mutually convenient date and time: can be agreed upon for inspection or reproduction of the item.

1. The entire contents of any investigation file or files and any other documentary material in your possession which supports or relates to the allegations of defendant's answer (excluding references to mental impressions, conclusions or opinions representing the value or merit of the claim or defense or respecting strategy or tactics and privileged communications to and from counsel),

2. Any and all statements concerning this action, as defined by Rule 4:10.2 from any witnesses Including any statements from the parties herein, or their respective agents, servants or employees.

3. Copies of all photographs of the parties involved, equipment involved, scene of accident or any other photos which defendant intends to use in discovery or at the time of eat. Also, give the name and address of the photographer.

4. Any and all documents containing the name and home business address of all individuals contacted as potential witnesses.

5. Names and addresses of any expert witnesses consulted and attach hereto copies of any reports received from experts with a copy of their *curriculum vitae.*

6. A copy of all insurance policies under which the defendant is provided coverage for the incident which is the subject matter of the complaint.

DEMAND FOR INSURANCE DISCOVERY

Pursuant to R. 4:18, plaintiff hereby demands that the defendants, produce the following documents for inspection and copying at the office of John M, Vlasac, Jr., Esquire, Viasac & Shmaruk, 467 Middlesex Avenue, Metuchen, New Jersey, within the time provided by R. 4:18(b):

1. On the date of the incident, indicate whether the worker of defendant's property had a liability insurance policy and, if so, set forth the name of the insurance company, the policy number, the effective date, the policy limits and attach a copy of the declarations page.

2. On the date of the incident, indicate whether the owner of defendant's property had any excess coverage including a personal liability catastrophe umbrella and, if so, set forth the name of the insurance company. the policy number, the effective date, the policy limits and attach a copy of the declarations page.

ZURICH INSURANCE POLICY, RELEVANT EXCERPTS

COMMERCIAL GENERAL LIABILITY COVERAGE PART DECLARATION

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY

Policy Number CPO 3701598-07
Named Insured: Pooled Insurance Program of
Policy Period: Coverage begins 07-01-2011 at 12:01 A.M.; Coverage ends 07-01-2012 at 12:01 A.M.
Producer Name: Willis of New Jersey, Inc.
Producer No. 03024-000

Item 1. Business Description: Institution
Item 2. Limits of Insurance

General Aggregate Limit	$2.000,000
Products-Completed Operations Aggregate-Limit	$2.000,000
Each Occurrence Limit	$1,000,000
Damage to Premises Rented To You Limit	$1,000,000 (Any one Premises)
Medical Expense Limit	$1,000,000 (Any one Person)
Personal and Advertising Injury Limit	$1,000,000 (Any one Person or organization)

Item 3, Retroactive Date: (CG 00 02 Only)

This insurance does not apply to "bodily Injury", "Property damage" or "personal and advertising Injury" which occurs before the Retroactive Date, if any, shown here:

NONE

Item 4. Form of Business and Location Premises

Form of Business: INSTITUTION

Location of All Premises You Own. Rent or Occupy: See Schedule of Locations

Item 5. Schedule of Forms and Endorsements

Form(s) and Endorsement(s) made a part of this Policy at time of Issue: *See* Schedule of Forms and Endorsements

Item 6. Premiums

Coverage Part Premium: $ Included

Other Premium:

Total Premium: $ Included

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

COMMERCIAL GENERAL LIABILITY CG 00 01 04 13

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II–Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V–Definitions.

Section I–Coverages

Coverage A–Bodily Injury and Property Damage Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate

any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III–Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments–Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II–Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy

period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II–Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II–Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages

to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph (1), (2) or (3) above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is

not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

ABUSIVE ACT LIABILITY COVERAGE FORM

Various provisions In this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what Is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations,

and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this Insurance.

The word Insured" means any person or organization qualifying as such under Section II-Who-Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V-Definitions.

Section I-Coverages Abusive Act Liability

1. Insuring Agreement

a Will pay "loss" because of "injury" resulting from an "abusive act" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" for "loss" resulting from the "abusive act". However, we will have no duty to defend the insured against any "suit" for "loss" to which this insurance does not apply. We may, at our discretion, investigate and settle any claim or "suit" that may result. But:

(1) The amount we will pay for "loss" is limited as described in Section III-Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of Insurance In the payment of "loss"

No other obligation or liability to pay "losses" or perform acts and services or pay any other amounts Is covered unless explicitly provided for under Supplementary Payments or Special Supplementary Payments.

b. This insurance applies only if:

(1) The "injury" caused by an "abusive act" begins during a "policy year" within the "policy period"; and

(2) The "abusive act" that causes the "injury" begins during the same "policy year".

c. "injury" caused by an :abusive act" which begins during any "policy year" Includes any continuation, change or resumption of that "injury" from the same "abusive act" after the end of that "policy year." Only the Limits of Insurance of the "policy year" In which the "abusive act" begins will apply to all such loss" because of "Injury" occurring during and subsequent to that "policy year".

d. "Loss" because of "Injury" Includes loss" claimed by any person or organization for care, loss of services, or death resulting at any time from the "Injury".

2. Exclusions

This insurance does not apply to:

a. "Injury" for which the Insured Is obligated to pay 'loss' by reason of the assumption of liability under any contract or agreement, except and then only to the extent that the insured would have been liable in the absence of such contract or agreement;

b. Any claim made or "suit" brought by you or on your behalf or in the name or right of any insured, provided, however, this exclusion will not apply to any claim made or "suit" brought by a 'Volunteer';

c. Any claim or "suit" based upon, arising out of or attributable, in whole or in part. to any "abusive act" that was alleged in or formed the basis of any litigation or claim that was pending at any time prior to the effective date of this Coverage Part;

d. Any claim or "suit" based upon, arising out of or attributable, in whole or in part, to any "abusive act" of which any insured. Other than any insured actually committing the "abusive act", has knowledge prior to the effective date of this Coverage Part;

e. Any obligation of the Insured under a workers compensation, disability benefits or unemployment compensation

f. Any "abusive act" committed by an "employees" or "Volunteer" with a prior criminal conviction for an "abusive act";

g. Any person who actually or allegedly participated in. directed or knowingly allowed any "abusive act".

3. Supplementary Payments

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we-Incur.

b. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance, We do not have to furnish these bonds,

c. All reasonable expenses incurred by the insured at our request to assist us in the

investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

d. All costs taxed against the insured In the "suit".

e. Prejudgment Interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of Insurance, we will not pay any prejudgment interest based on that period of time after the offer.

f. All Interest on the full amount of any Judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that Is within the applicable limit of insurance.

These payments will not reduce the limits of Insurance.

4. Special Supplementary Payments

In addition to payments noted In Supplementary Payments above, we will reimburse you, only with respect to any claim or "suit" for an "abusive act" to which this insurance applies, for the following expenses you Incur:

a. Your reasonable expenses incurred in conducting an Internal Investigation of or counseling relating to allegations of an "abusive act"; and

b. Your reasonable expenses in retaining the services of a media consultant or public rela-

tions professional in response to Allegations of an "abusive act".

These reimbursements will not reduce the Limits of Insurance. However, the most we will reimburse you for the sum of all such expenses, regardless of the number of "abusive acts", claimants, claims, 'suits' or insureds, is the Special Supplementary Payment Limit shown in the Abusive Act Liability Coverage Form Declarations. We have no obligation to arrange for any of these services or pay any of the service providers on your behalf.

Section II-Who Is An Insured

Each of the following is an insured:

1. You, but only with respect to the conduct of your business described in the Abusive Act Liability Coverage Form Declarations;
2. Your "employees", directors, officers, trustees, clergy, wardens, deacons, elders, teachers, members of the vestry. members of the board of trustees, members of standing committees, members of the board of governors or members of the board of education, but only while any of these persons is performing duties in the conduct of your business described in the Abusive Act Liability Coverage Form Declarations. And
3. Any "volunteer", but only while performing, with your consent, duties in the conduct of your business described in the Abusive Act Liability Coverage Form Declarations.

Section III-Limits of Insurance

1. The Limits of Insurance shown in the Abusive Act Liability Coverage Form Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Actual, alleged or threatened "abusive acts";

c. Claims made or "suits" brought; or

d. Persons or organizations making claims or bringing "suits".

2. The Aggregate Limit Is the most we will pay for the sum of all "loss" covered under this Coverage Part with respect to any one. "Policy year,"

3. Subject to above, the Each Abusive Act Limit Is the most we will pay for the sum of all "loss" because of Injury" from any one "abusive act". If any "abusive act" or 'Injury" resulting from that "abusive act" occurs In more than one policy or "policy year" that we have issued to you, we will pay the "loss" arising from such "abusive act" from the limits of Insurance of just the one "policy year" In which the "abusive act" began. Should you not be able to determine exactly which "policy year" was in effect when the "abusive act" began, you can designate the "policy year" that you reasonably believe was in effect at the beginning of the "abusive act" "loss". We will pay all such "loss" from only the limits of Insurance of that designated "policy year".

We will only pay "loss" In excess of the Each Abusive Act Retention shown In the Abusive Act Liability Coverage Form Declarations.

Section IV-Conditions

1. Bankruptcy

Bankruptcy or Insolvency of the Insured or of the Insured's estate will not relieve us of our obligations under this Coverage Part. However, this provision shall not affect our ability to invoke any applicable statute of Limitations statute of repose or similar statute, common law principle or court rule on behalf of the insured.

2. Duties In The Event of Abusive Act, Claim or Suit

a. You will, as a condition precedent to your rights under this Coverage Part, give to us notice In writing of any "abusive act" or "Injury" which may result In a claim or "suit". To the extant possible, notice should include:

(1) How, when and where the "abusive act" took place;

(2) The names and addresses of any Injured persons and any witnesses; and

(3) The nature and description of any "Injury" arising out of the "abusive act".

b. If a claim Is made or 'suit" Is brought against any Insured, you must;

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to It that we receive written notice of the claim or "suit' as soon as practicable.

c. You will, as a condition precedent to your .rights under this Coverage Part:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received In connection with the claim or "suit";

(2) Authorize us to obtain records and other Information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right. against any person or organization which may be liable to the Insured because of "Injury" to which this Insurance may also apply.

d. No Insured will, except at that Insured's own cost, voluntarily make a payment, assume any obligation, or Incur any expenses, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To Join us as a party or otherwise bring us Into a claim or "suit" seeking "loss" from an Insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final Judgment against an Insured, but we will not be liable for any amount that is not payable under the terms of this Coverage Part or that is in excess of the applicable limit of insurance. An agreed settlement means a settlement

and release of liability signed by us, the Insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectable Insurance is available to the Insured for a "loss" covered under this Coverage Part, our obligations ere limited as follows:

a. Primary Insurance

This insurance Is .primary when no other valid and collectible Insurance is available to the Insured for a "loss" we cover under this insurance.

b. Excess Insurance

Subject to c. below, if other valid and collectable Insurance Is available to the Insured for a "loss" we cover under this Insurance, this Insurance is excess over that Insurance. When this insurance Is excess, we will have no duty to defend the Insured against any "suit" If any other insurer has a duty to defend the Insured against that "suit". if no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers. We will pay only our share of the amount of "loss", If any, that exceeds the total amount that all such other Insurance would pay for the "loss" In the absence of this insurance.

At our request, you will provide us with detailed Information regarding all other Insurance policies that have been issued to you as well as all other policies under which you could potentially seek coverage If you chose to do so. Also, at our request, you will tender any claim or "suit" that we designate to any Insurer(s) that we designate, and cooperate with us In seeking coverage (Including contribution

and/or Indemnification of any amounts that we pay under this policy) for such claim or "suit" from such Insurer(s).

c. Non-Cumulation of Insurance

In no event may the Limit of Insurance available under this policy be combined in any manner with the limits of insurance of any other insurance written by us or any of our affiliates.

These provisions do not apply to policies expressly written to be excess of this policy.

5. Representations

By accepting this policy, you agree the statements contained In the application and any documents or information submitted with It are true, accurate and complete, and that we have Issued this Coverage Part in reliance upon those statements.

6. Separation of Insureds

Except with respect to the Limits of Insurance and any rights or duties specifically assigned In this Coverage Part to the first Named Insured, this insurance applies:

a. As If each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

7. Transfer of Rights of Recovery Against Others to Us

if the Insured has the right to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us: The insured

must do nothing after the "loss" to Impair them. At our request, the insured will bring litigation or other proceedings, or transfer those rights to us and help us to enforce them.

8. When live Do Not Renew

If we decide not to renew this Coverage Part, we will mall or deliver to you written notice of the non-renewal no less than 30 days before the expiration date. If notice Is mailed, proof of mailing will be sufficient proof of notice.

Section V-Definitions

1. "Abusive a:ct" means any act or series of acts of actual or threatened abuse or molestation done to any person, resulting in "'injury" to that person, including any act or series of acts of actual. or threatened sexual abuse or molestation done to any person, resulting in "injury" to that person, by anyone who causes or attempts to cause the person to engage in a sexual act:

a. Without the consent of or by threatening the person. Placing the person in fear or asserting undue influence over the person;

b. If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or

c. By engaging in or attempting to engage in lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of any person.

All interrelated or continuous "abusive acts" committed by one person or persons acting in concert, shall be deemed to be one "abusive act".

2. "Employee" means a person employed by the insured for compensation and Includes a "leased worker". "Employee" does not Include a 'temporary worker".

3. "Injury" means physical Injury, sickness, disease, mental anguish, mental injury, shock or fright or death of the person(s) who Is the subject of an "abusive act".

4. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor Leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

5. "Loss" means those sums that the insured is legally obligated to pay as damages, provided, however, that "loss" will not Include:

a. Taxes, fines or penalties;

b. Any damages awarded for punitive or exemplary purposes or any damages for which the amount Is determined by the application of a multiplier, where such amounts are not Insurable under applicable law; or

c. Any other sums that are uninsurable under the applicable law.

All claims or "suits" based upon or arising out of or In any way involving the same or related "abusive act" or the same or related series of "abusive acts", shall be deemed to be a single "loss".

6. "Policy period" means the period of time from the effective date to the expiration date shown in the Abusive Acts Liability Coverage Form Declarations or to any earlier date of termination.

7. "Policy year" means the period of one year following the effective date of this policy or any anniversary thereof or, if the time between the effective date or any anniversary thereof and the termination of the "policy period" is less than one year. such lesser period.

8. "Suit" means a civil proceeding In which damages because of "Injury" to which this Insurance applies are alleged. "Suit" Includes:

a. An arbitration proceeding In which such damages are claimed end to which the Insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding In which such damages are claimed and to which the Insured submits with our consent.

9. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on ·leave or to meet seasonable or short-term workload conditions.

10. "Volunteer" means a person who Is now your "employee" and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and Is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

LETTER FROM JAMES T. TEVIS
TO LINDA D'ALESSIO
(MARCH 6, 2012)

Montville Township Public Schools
86 River Road • Montville, NJ 07045 • (973) 331-7100 (Phone) • (973) 316-4643 (Fax)

James T. Tevis
School Business Administrator/
Board Secretary

Barbara Staada
Assistant to the Business Administrator/
Board Secretary

Linda D'Alessio
Polaris Galaxy Insurance, LLC
777 Terrace Avenue
Hasbrouck Heights, NJ 07604

Dear Linda:

The district received notification yesterday, March 5, 2012 that a former William Mason elementary school teacher, Mr. Jason Fennes, has been arrested and charged with criminal sexual conduct and endangering the welfare of a minor, both in the second degree. The allegation dates back to 2005 and the victim is a former student of his at the William Mason elementary school in Montville. Mr. Fennes resigned from district effective June 30, 2010.

Please notify our insurance carriers of this potential claim and call me with any questions you may have.

Sincerely yours,

James T. Tevis
School Business Administrator

LETTER FROM JAMES T. TEVIS TO LINDA D'ALESSIO (SEPTEMBER 2, 2014)

Montville Township Public Schools

86 River Road • Montville, NJ 07045 • (973) 331-7100 (Phone) • (973) 316-4643 (Fax)

James T. Tevis
School Business Administrator/
Board Secretary

Barbara Staada
Assistant to the Business Administrator/
Board Secretary

Linda D'Alessio
Polaris Galaxy Insurance, LLC
777 Terrace Avenue
Hasbrouck Heights, NJ 07604

Dear Linda:

On March 6, 2012, I informed you that a former Montville Township school district teacher, Jason Fennes, had recently been arrested and charged with criminal sexual conduct and endangering the welfare of a minor, both in the second degree. You had placed the districts insurance carriers on notice of a potential claim nod the attached determination was received by Allied World.

The district has now received the attached Complaint that was filed by Cedar · Hill Prep School against the Montville Township Public Schools. Cedar Hill Prep is currently facing a lawsuit by the parents of a student who has alleged abuse by Fennes while he was a teacher at that school, after his resignation from our district on June 30, 2010.

Please notify our insurance carriers of this actual claim and call me with any questions you may have.

Sincerely Mr.

/s/ James T. Tevis
School Business Administrator

LETTER FROM JAROD HOLTZ, ESQ. TO MR. JAMES TEVIS (MARCH 9, 2012)

Mr. James Tevis
Montville Township Public Schools
86 River Road
Montville, NJ 07045

Re: Our Insured: Montville Township Public Schools
Claim No.: 912-0118721
Claimants: Unknown Minor Child

Dear Mr. Tevis:

This will serve to acknowledge receipt of notice of the above claim that constitutes our first notice of the above referenced matter. I am the individual who will be handling this claim. Please forward any future correspondence directly to me. Please be advised that we are reviewing this matter and will advise you of our coverage evaluation as soon as possible. As the above claim may potentially implicate other policies, please place all primary and excess carriers on notice of the above claim and provide us with the contact and policy information for those carriers.

Due to the limited information we have received to date relative to this matter, our company must generally reserve its rights under any insurance policies that may have been issued to Pooled Insurance Program

of New Jersey (Montville Township Public Schools) by American Guarantee and Liability Insurance Company. Nothing contained herein, and an actions on the part of the company in investigating these matters should be construed as an admission of coverage or as a waiver of any right or defense that may be available to our company under the terms and conditions of the policies or applicable law.

Best regards,
American Guaranteed and Liability Insurance Company

/s/ Jarod Holtz

Jarod Holtz, Esq
Mass Litigation Claims Specialist
Zurich North American Insurance
1400 American Lane
Schaumburg, IL 60196
847 413-5521
847 605-7811
jarod.holtz@zurichnn.com

LETTER FROM ALEXANDRA T. ROWE TO JAMES T. TEVIS (JANUARY 29, 2015)

James T. Tevis
School Business Administrator/Board Secretary
Montville Township Public Schools
86 River Road
Montville, NJ 07045

Re: Insured: Montville Board of Education
Matter: Cedar Hill Prep School v. Montville Township Public Schools and Montville Board of Education;
Child M v. Fennes, et al.
Claim No.: 9120118721

Dear Mr. Tevis:

We write with regard to the request for coverage by the Montville Township Public Schools, Montville Board of Education, and the William Mason Elementary School with regard to two lawsuits alleging Montville is liable for the sexual molestation committed by a former Montville teacher. For the reasons set forth below, Zurich American Insurance Company ("ZAIC") and American Guarantee & Liability Insurance Company ("AGLIC," and with ZAIC, "Zurich") deny any obligation to defend or indemnify Montville in relation to the two lawsuits.

I. THE COMPLAINTS

This claim arises out of two lawsuits related to the alleged sexual molestation of "Child M." The lawsuit entitled *Child M v. Jason Fennes. et al.,* was brought in the Superior Court of New Jersey, Law Division, Middlesex County, under docket number MID-L-6011-12 (the "Child M Action"). The Child M action was brought by the child plaintiff and her parents against Jason Fennes, who is the alleged perpetrator of the sexual molestation; Cedar Hill Prep School ("CHPS"); Montville Township Public Schools ("MTPS"); Montville Board of Education ("MBOE"); and the William Mason Elementary School ("WMES," and collectively with MIPS and MBOE, "Montville"). The lawsuit entitled *Cedar Hill Prep School* v. *Montville Township Public Schools and Montville Board of Education* was also brought in the Superior Court of New Jersey, Law Division, Middlesex County, under docket number MID-L-4842-14 (the "CHPS Action"). CHPS is the only plaintiff, and the MIPS and MBOE are the only defendants in the CHPS Action.

The complaints in the Child M Action and the CHPS Action (the "Child M Complaint" and "CHPS Complaint," respectively, and collectively the "Complaints") generally allege the same facts with regard to Montville's complicity in the alleged molestation. The Complaints allege that Jason Fennes was a teacher at the WMES from September 1 998 to June 2010. The Complaints further allege that during his tenure., Montville was made aware of improper and inappropriate sexual conduct with minor students perpetrated by Fennes as a teacher and track coach. They assert that Montville failed to report the sexual abuse to the proper authorities. The Complaints state

that Montville suspended Fennes in March 2010. They allege that Montville then entered into a settlement agreement with him pursuant to which he resigned his teaching position. The Complaints state that no exchange for his resignation, Montville agreed that if any of Fennes' future employers asked for a reference, Montville would only provide Fennes' dates of employment.

The CHPS Complaint alleges that after Fennes resigned from his teaching position with Montville, he applied for a teaching position with CHPS. The CHPS Complaint also alleges that, as part of its due diligence, CHPS contacted Montville regarding Fennes, and was only provided with information regarding his teaching positions and dates of employment. The Complaints state that Fennes was hired by CHPS in September 2010. They state that Child M was a student in Fennes' class for the 201 1-12 school year. The Complaints state that Child M reported that Fennes sexually molested her in February 2012.

The CHPS Complaint contains two counts against MTPS and MBOE. In the first count. and based on the allegations discussed above, CHPS asserts that Fennes was hired by the CHPS because the MTPS and MBOE "failed to take appropriate action upon receipt of notice and information concerning inappropriate sexual conduct on the part of Jason Fennes towards his students and track athletes that he coached." The first count further alleges that MTPS and MBOE wrongfully entered into the settlement agreement whereby they agreed to provide no information regarding Fennes' misconduct. CHPS asserts that it hired Fennes as a result of the MTPS and MBOE's wrongful conduct, and demands contribution from the

MTPS and MBOE pursuant to New Jersey's Joint Tortfeasor's Contribution Act.

In CHPS's second count, CHPS alleges that the MTPS and MBOE acted in a careless and negligent manner, which resulted in personal injuries to Child M. CHPS asserts that its liability is secondary and vicarious to that of the MTPS and MBOE, and seeks indemnity from the MTPS and MBOE.

With regard to the Child M Complaint, the first eight counts relate to Fennes' alleged molestation of Child M, and CHPS's alleged acts and omissions with regard to Fennes' actions. The ninth and tenth counts allege that Fennes was an employee of Montville. and that during his tenure as a teacher and track coach he engaged in negligent, careless, reckless and/or intentional conduct, including inappropriate abusive and/or sexual conduct with his students. The Child M Complaint further alleges that Montville was on notice of such improper conduct, and failed to report it to the proper agencies and authorities in violation of N.J.S.A. § 9:6-8.14, N.J.S.A. § 18A:6 et seq., and N.J.S.A § l8A:29 et seq. The ninth and tenth counts state that Child M sustained personal injuries as a result of Montville's negligence, carelessness, recklessness. and/or intentional conduct. The eleventh count states that Child M was injured as a result of Montville's settlement agreement with Fennes in which Montville agreed to limit the information it would reveal regarding Fennes' prior misconduct in exchange for his resignation from Montville's employ. The twelfth count asserts that Montville controlled the hiring and retention of Fennes, covered-up his acts, and willfully caused and/or acted with reckless disregard for the possibility that their actions would cause

emotional distress, and that as a result of such conduct caused Child M to suffer severe personal injuries.

II. THE ZURICH PRIMARY POLICIES

Montville qualifies as a named insured under the following policies issued by ZAIC:

- CPO 3701598-00; 7/1/04-7/1/05 ("'04-05 ZAIC Policy");
- CPO 3701598-01; 7/1/05-7/1/06 ("'05-06 ZAIC Policy");
- CPO 3701598-02; 7/1/06-7/1/07 ("'06-07 ZAIC Policy");
- CPO 3701598-03; 7/1/07-7/1/08 ("'07-08 ZAIC Policy");
- CPO 3701598-04; 7/1/08-7/1/09 ("'08-09 ZAIC Policy," and collectively, the "ZAIC Policies").

The ZAIC Policies each have a $IM each occurrence limit and a $2M aggregate limit. Montville also qualifies as a named insured under the following policies issued by AGLIC:

- CPO 3701598-05; 7/1/09-7/1/10 ("'09-10 AGLIC Policy")
- CPO 3701598-06; 7/1/10-7/1/11 ("'10-11 AGLIC Policy")
- CPO 3701598-07; 7/1/1 1-7/1/12 ("'11-12 AGLIC Policy")
- CPO 3701598-08; 7/1/12-7/1/13 ("'12-13 AGLIC Policy")
- CPO 3701598-09; 7/1/13-7/1/14 ("13-14 AGLIC Policy")

- CPO 3701598-10; 7/1/14-7/1/15 ("14-15 AGLIC Policy," and collectively, the "AGLIC Policies").

The AGLIC Policies' CGL parts each have a $JM per occurrence limit, and a $2M aggregate limit. The AGLIC Policies' abusive act liability coverage parts each have a $1M each abusive act limit and a $2M abusive act aggregate limit. The AGLIC Policies' abusive act alleged participant coverage has a $IM alleged participant each abusive act limit and a $2M alleged participant aggregate limit.

The ZAIC Policies and the AGLIC Policies have the following relevant provisions in the Commercial General Liability Coverage Form:[1]

Section I-Coverages

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily

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[1] The '04-05 ZAIC Policy contains Form CG 00 01 10 01. The '05:-06, '06-07, and '07-08 ZAIC Policies contain Form CG 00 OJ 12 04. The '08-09 ZAIC Policy and AGLIC Policies, with the exception of the '14-15 AGLIC Policy, contain Form CG 00 01 12 07. The '14-15 AGLIC Policy contains Form CG 00 01 04 13. All forms have the same relevant policy language.

injury" or "property damage" to which this insurance does not apply. . . .

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period;. . . .

[* * *]

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. . . .

[* * *]

Section V-Definitions

13."Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The ZAIC Policies and the AGLIC Policies contain the following endorsement entitled "Bodily Injury Redefined" (U-GL-1055-A CW (12/01)) that states:

> The definition of "bodily injury" in SECTION V-DEFINITION is replaced by the following:

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person. This includes mental anguish, mental injury, shock, fright or death resulting from bodily injury, sickness or disease.

The ZAIC Policies and AGLIC Policies, with the exception of the '13-14 and '14-15 AGLIC Policies, each contain an endorsement entitled "Title 18A– Defense Reimbursement ("Title 18A Endorsement"). Each of the Title 18A Endorsements are substantially similar to the Title 18A Endorsement contained in the '04-05 ZAIC Policy that states:

The following is added to Section I-COVERAGE, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 1. Insuring Agreement:

f. We shall reimburse those sums that the insured becomes legally obligated to pay by reasons imposed by the New Jersey compiled statutes know as Title 18A: 16:6, 1 8A: 16-6.1 and 18A: 12-20 including any amendments or revisions thereto.

The most we will pay fat the sum of all claims for reimbursement shall be $50,000 in any one policy period. The Limits of Insurance do not apply to this defense reimbursement expenses.

The AGLIC Policies also contain an endorsement entitled "Abusive Act Liability Exclusion" (U-GL-1250-ACW (09/05) («Abusive Act Exclusion") that states:

A. The following exclusion is added to paragraph 2. Exclusion of Section I-Coverage A-Bodily Injury And Property Damages Liabi-

lity and paragraph 2. Exclusion of Section I-Coverage B-Personal And Advertising Injury Liability:

1. This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of or relating in any way to an "abusive act"; or

2. Any loss, cost or expense arising out of or relating in any way to an "abusive act".

B. For purposes of this .endorsement, the following additional definition applies:

1. "Abusive act" means any act or series of acts of actual or threatened abuse or molestation done to any person, including any act or series of acts of actual or threatened sexual abuse or molestation done to any person by anyone who causes or attempts to cause the person to engage in a sexual act:

a. Without the consent of or by threatening the person, placing the person in fear or asserting undue influence over the person;

b. If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or

c. By engaging in or attempting to engage in lewd exposure of the body

done with intent to arouse or to satisfy the sexual desire of any person.

The AGUC Policies also contain an endorsement entitled "Abusive Act Liability Coverage Form" (U-GL-1275-A CW (04/06) ("Abusive Act Coverage") that states:

Section I-Coverages Abusive Act Liability

1. Insuring Agreement

a Will pay "loss" because of "injury" resulting from an "abusive act" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" for "loss" resulting from the "abusive act". However, we will have no duty to defend the insured against any "suit" for "loss" to which this insurance does not apply. We may, at our discretion, investigate and settle any claim or "suit" that may result. . . .

[* * *]

b. This insurance applies only if:

(1) The "injury" caused by an "abusive act" begins during a "policy year" within the "policy period"; and

(2) The "abusive act" that causes the "injury" begins during the same "policy year".

[* * *]

2. Exclusions

This insurance does not apply to:

c. Any claim or "suit" based upon, arising out of or attributable, in whole or in part. to any "abusive act" that was alleged in or formed the basis of any litigation or claim that was pending at any time prior to the effective date of this Coverage Part;

[* * *]

d. Any claim or "suit" based upon, arising out of or attributable, in whole or in part, to any "abusive act" of which any insured. Other than any insured actually committing the "abusive act", has knowledge prior to the effective date of this Coverage Part;

[* * *]

g. Any person who actually or allegedly participated in. directed or knowingly allowed any "abusive act".

Section II-Who Is An Insured

Each of the following is an insured:

1. You, but only with respect to the conduct of your business described in the Abusive Act Liability Coverage Form Declarations;

2. Your "employees", directors, officers, trustees, clergy, wardens, deacons, elders, teachers, members of the vestry. members of the board of trustees, members of standing committees, members of the board of governors or members of the board of education, but only while any of these persons is performing duties in the conduct of your

business described in the Abusive Act Liability Coverage Form Declarations.

Section V-Definitions

1. "Abusive a:ct" means any act or series of acts of actual or threatened abuse or molestation done to any person, resulting in "'injury" to that person, including any act or series of acts of actual. or threatened sexual abuse or molestation done to any person, resulting in "injury" to that person, by anyone who causes or attempts to cause the person to engage in a sexual act:

a. Without the consent of or by threatening the person. Placing the person in fear or asserting undue influence over the person;

b. If that person is incapable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; or

c. By engaging in or attempting to engage in lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of any person.

All interrelated or continuous "abusive acts" committed by one person or persons acting in concert, shall be deemed to be one "abusive act".

[* * *]

3. "Injury" means physical injury, sickness, disease, mental anguish, mental injury, shock or fright or death of the person(s) who is the subject of an "abusive act".

[* * *]

5. "Loss" means those sums that the insured is legally obligated to pay as damages, provided, however, that "loss" will not include:

a. Taxes, fines or penalties;

b. Any damages awarded for punitive or exemplary purpose or any damages for which the amount is determined by the application of a multiplier, where such amounts are not insurable under applicable law; or

c. Any other sums that are uninsurable under the applicable law.

All claims or "suits" based upon or arising out of or in any way involving the same or related "abusive act" or the same or related series of "abusive acts", shall be deemed to be a single "loss".

The AGLIC Policies also contain an endorsement entitled "Abusive Act Alleged Participant Coverage" (U-GL-1353-A CW (06/08)) ("Alleged Participant Coverage") that states:

Solely with respect to an "alleged participant", the Schedule above and the following changes apply to the Abusive Act Liability Coverage Form:

A. For the purposes of this endorsement, Paragraph 1., Insuring Agreement of Section I-Coverages is replaced by the following:

1. Abusive Act Alleged Participant Coverage

a. We will pay "(defense expenses" and "settlement" because of "injury" resulting from an "abusive act" caused by an '"alleged partici-

pant" to which this insurance apples. We will have the right and duty to defend the "alleged participant" against any "suit" for "injury" resulting from the "abusive act", and we will pay "defense expenses" with respect to any such "suit" we defend. However, we will have no duty to defend the "alleged participant" against any "suit" for "injury" to which this insurance does not apply. We may, at our discretion, investigate and settle any claim or "suit" that may result. . . .

b. This insurance applies only if:

(1) The "injury" caused by an "abusive act" begins during a "policy year" within the "policy period";

(2) The "abusive act" that causes the "injury" begins during the same "policy year"; and

(3) Coverage is not otherwise provided to an "alleged participant" under the Abusive Act Liability coverage Form.

B. For the purposes of this endorsement, Exclusion g. of Paragraph 2., Exclusions of Section I-Coverages does not apply.

F. For purposes of this endorsement, the following definitions are added to Section V-Definitions:

"Alleged participant" means any insured "employee" or "volunteer' · who allegedly participated in, directed or knowingly allowed any "abusive act".

The Schedule referred to in the Alleged Participant Coverage states the limits available under the coverage are provided by endorsement.

III. THE AGLIC UMBRELLA POLICIES

AGLIC issued three Commercial Umbrella Liability Policies under which Montville qualifies as all insured. The policies are:

- UMB 9063305 00; 7/1/11-7/1/12 ("'11-12 Umbrella Policy")
- UMB 9063305 01; 7/1)12-7/1/13 ("'12-13 Umbrella Policy")
- UMB 9063305 02; 7/1/13-7/1/14 ("'13-14 Umbrella Policy," and collectively, the "Umbrella Policies").

The Umbrella Policies each have a $9M per occurrence limit and a $10,000 retained limit The Umbrella Policies also include schedules of underlying insurance that list, among others, the AGLIC primary CGL Coverage, the Abusive Act Coverage in the AGLIC primary policies, and Educators Legal Liability Coverage ("Educators Coverage") issued by Darwin National Assurance Company ("Darwin") in the respective policy years.

The Umbrella Policies have the following relevant provisions in The coverage form (U-UMB-1 03-C CW (03/10)):

Section I. Coverage

A. Coverage A-Excess Follow Form Liability Insurance

Under Coverage A, we will pay on behalf of the insured those damages covered by this insurance in excess of the total applicable limits of underlying insurance. With respect to Coverage A, this policy includes:

1. The terms and conditions of underlying insurance to the extent such terms and conditions are not inconsistent or do not conflict with the terms and conditions referred to in Paragraph 2. below; and

2. The terms and conditions that apply to Coverage A of this policy.

   Notwithstanding anything to the contrary contained above, if underlying insurance does not apply to damages, for reasons other than exhaustion of applicable Limits of Insurance by payment of loss, then Coverage A does not apply to such damages. Also, Coverage A does not apply to any form of casualty business crisis expense insurance even if such insurance is afforded under underlying insurance or would have been afforded except for the exhaustion of the Limits of Insurance of underlying insurance.

B. Coverage B-Umbrella Liability Insurance

Under Coverage B, we will pay on behalf of the insured those damages the insured becomes legally obligated to pay by reason of liability:

1. Imposed by law because of bodily injury, property damage, or personal and advertising injury . . .

covered by this insurance but only if the injury; damage or offense arises out of your business. takes place during the policy period of this policy and is caused by an occurrence happening anywhere. We will pay such damages in excess of the Retained Limit specified in Item 5. of the Declarations or the amount payable by other insurance, whichever is greater.

Coverage B does not apply to any loss, claim or suit for which insurance is afforded under underlying insurance or would have been afforded except for the exhaustion of the Limits of Insurance of underlying insurance.

[* * *]

C. Coverage C-Casualty Business Crises Expense

Under Coverage C, we will pay for casualty business crisis expense regardless of fault arising from a casualty business crisis first commencing during the policy period. . . .

[* * *]

Section IV. Exclusions

C Under Coverage B this policy does not apply to:

[* * *]

Intentional Injury

4. Bodily Injury or property damage expected or intended from the standpoint of the insured. . . .

[* * *]

Section V. Definitions

A. The following definitions are applicable to Coverage A, Coverage B and Coverage C.

[* * *]

7. Underlying insurance means the policy or policies of insurance listed in the Schedule of Underlying Insurance forming a part of this policy. We will only be liable for amounts in excess of the Limits of Insurance shown in the Schedule of Underlying Insurance for any underlying insurance.

[* * *]

C. The following definitions are applicable to Coverage B only:

[* * *]

11. Occurrence means:

a. With respect to bodily injury or property damage liability. an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[* * *]

D. The following definitions are applicable to Coverage C only:

1. Casualty business crisis means an event that in the good faith opinion of your principal, in the absence of casualty business crises services, has been or may be associated with:

a. Damages covered by this policy under Coverage A that are in excess of the appli-

cable limits of underlying insurance or under Coverage B that are in excess of the Retained Limit; and

b. Significant adverse regional or national media coverage.

Casualty business Crisis shall include, without limitation, man-made disasters such as explosions, major crashes, multiple deaths or injuries, burns, dismemberment, traumatic brain injury, paraplegia, or contamination of food, drink or pharmaceuticals. . . .

The Umbrella Policies also contain a "Punitive Damages Exclusion Endorsement" (U-UMB-234-A CW (7/99)), which states:

> Under Coverage A and Coverage B this policy does not apply to punitive, treble or exemplary damages, whether or not such punitive, treble or exemplary damages arise out of any obligation to share damages with or repay someone else who must pay damages.

The Umbrella Policies also contain an endorsement entitled "School Board Errors and Omissions Follow Form" (U-UMB-242-A CW (7/99)) ("School Board Endorsement") that states:

> Under Coverage B only, this policy does not apply to any liability, damage, loss, cost or expense arising out of any breach of duty, negligent act, error or omission of any insured or of any person for whose acts any insured is legally liable while acting as an officer, director, trustee or member of any school board, school district or school organ-

ization.

IV. DISCLAIMER AND RESERVATION OF RIGHTS AS TO THE ZAIC AND AGLIC POLICIES

The ZAIC Policies have one potentially applicable coverage part: the CGL Coverage. The AGLIC Policies have three potentially applicable coverage parts: the CGL Coverage, the Abusive Acts Coverage. and the Alleged Participant Coverage. We address each coverage part in turn.

A. The CGL Coverage Part

1. Bodily Injury During the Policy Period

For coverage to attach under the CGL Coverage of the ZAIC and AGLIC Policies, there must be "bodily injury" during the policy period caused by an "occurrence." Although the Complaints allege there were multiple prior instances of sexual abuse against other children, both Complaints only seek recovery for injury to Child M that began when she was allegedly molested in or about February 2012. Further, although both Complaints include allegations related to Montville's Failure to report Fennes' misconduct and its settlement agreement with him, neither of those acts would qualify as "bodily injury" so as to trigger coverage under policies in effect when these acts took place. Zurich therefore disclaims any obligation to defend or indemnify Montville under the COL Coverage of the ZAIC Policies and the '09-10, '10-11, '12-13, '13-14, and, '14-15 AGLIC Policies.

2. Occurrence and the Expected or Intended Exclusion

For coverage to attach under the ZAIC and AGLIC Policies, the "bodily injury" must be caused by an "occurrence." As relevant here, "occurrence" is defined as an accident. The ZAIC and AGLIC Policies also include an exclusion for "bodily injury" expected or intended from the standpoint of the insured.

Here, both Complaints are replete with allegations that Montville knew of Fennes' sexual misconduct for years, but failed to take any action against him, including reporting his sexual misconduct pursuant to New Jersey law. For example. the CHPS Complaint alleges that "Montville failed to take appropriate action upon receipt of notice and information concerning inappropriate sexual conduct on the part of Jason Fennes towards his students. . . . " Further, the Child M Complaint alleges that "Montville [was] on notice of [Fennes' inappropriate abusive and/or sexual conduct with his infant students.]" In addition, the Complaints allege that Montville entered into a settlement agreement with Fennes in which it agreed not to report his sexual misconduct to other potential employers. Zurich therefore reserves its rights to disclaim coverage under the CGL Coverage of the ZAIC and AGLIC Policies to the extent Montville's actions were intentional and/or not accidental, and to the extent Montville expected or intended any injury.

3. Abusive Act Exclusion

The Abusive Act Exclusion in the AGLIC Policies precludes coverage for bodily injury "arising out of or relating in any way to an 'abusive act.'" The definition of ' ·abusive act" in the exclusion encompasses actual

or threatened abuse or molestation done to any person, including actual or threatened sexual abuse or molestation done to any person by anyone who causes or attempts to cause the person to engage in a sexual act. Fennes' alleged sexual acts against Child M clearly constitute "abusive acts" as defined in this exclusion. Child M's injuries also 'arise out of' and "relate" to Fennes' alleged abusive acts towards her. Zurich disclaims any obligation to defend or indemnify Montville under the CGL Coverage of the AGLIC Policies pursuant to the Abusive Act Exclusion.

4. Title 18A Endorsement.

The Title 18A Endorsement states that Zurich will reimburse Montville for amounts that Montville must pay pursuant to Title 18A: 16-6; 18A:16-6.1; and 18A: 12-20. These statutes generally require a board of education to pay the defense costs of any person holding any office, position or employment under the jurisdiction of the board, and for any board member, for any civil action, administrative action, or other legal proceeding, or criminal or quasi-criminal proceeding in which there is a disposition in favor of the accused, for any act or omission arising out of and in the course of the performance of the duties of such position. Here, no individual employees or board members have been sued by CHPS or Child M. Therefore, these statutes are not triggered. Consequently, Zurich reserves its rights to address coverage under the Title 18A Endorsement if and when claims that trigger the statutes are alleged.

B. Abusive Act Coverage

1. Insuring Agreement

The insuring agreement in the Abusive Act Coverage states that Zurich "will pay loss" because of 'injury' resulting from an 'abusive act' to which this insurance applies." As relevant to Montville, the crux of both the Child M Complaint and the CHPS Complaint is that Montville is responsible for Child M's injuries because it failed to report Fennes to the proper authorities. The alleged acts of abuse against Child M, though, were committed by Fennes while he was an employee of CHPS and while she was a student at CHPS. Zurich reserves its rights to disclaim coverage under the Abusive Act. Coverage of the AGLIC Policies to the extent the coverage requirements of the insuring agreement have not been met.

Secondly, for the Abusive Act Coverage to apply, the "abusive act" and "injury" must both begin during the same policy year. Here, both the "abusive act" against Child M and the "injury" to Child M allegedly began in February 2012. As such, Zurich disclaims coverage under the Abusive Act Coverage of the '09-10, '10-11, '12-13, '13-14, and '14-15 AGLIC Policies.

2. Exclusion

c. Prior Claims or Litigation Involving Abusive Acts

The Abusive Act Coverage contains an exclusion for any claim or suit based upon, arising out of or attributable to "any 'abusive act'" that was alleged in or formed the basis of any litigation or claim that was pending prior to the inception of the Abusive Act

Coverage, which is the inception of each respective AGLIC Policy. If you are aware of any litigation or claims involving Fennes' alleged sexual abuse prior to Child M's allegations, please provide us with such information. Zurich reserves its rights to disclaim coverage under the Abusive Act Coverage pursuant to this exclusion for the '09-10, 'l0-11, and '11-12 AGLIC Policies. and disclaims coverage under the Abusive Act Coverage pursuant to this exclusion for the '12-13, '13-14, and '14-15 AGLIC Policies.

d. Prior Knowledge of Abusive Acts

The Abusive Act Coverage also contains an exclusion for any claim or suit based upon, arising out of or attributable to "any 'abusive act'" of which any insured, other than any insured actually committing the "abusive act," bas knowledge prior to the effective date of the Abusive Act Coverage, The claims against Montville in the Child M and CHPS Complaints are both founded on Fennes' alleged abusive acts while committed at Montville. Further, both Complaints include allegations, and indeed Montville's liability is premised on, Montville's knowledge of Fennes' abusive acts while he worked for Montville. Because of the application of this exclusion, Zurich disclaims any obligation to defend or indemnify Montville in relation to the Complaints under the Abusive Act Coverage of all of the AGL IC Policies.

g. Participation, Direction, or Knowingly Allow Abusive Acts

The Abusive Act Coverage also contains an exclusion that precludes coverage for any person who actually or allegedly participated ln, directed or

knowingly allowed any "abusive act," To the extent Montville knew about and allowed Fennes to commit abusive acts, Zurich reserves its rights to disclaim coverage under the Abusive Act Coverage of all of the AGLIC Policies.

C. Alleged Participant Coverage

The Alleged Participant Coverage provides certain coverage to an "alleged participant" for injury resulting from an "abusive act" until one of several events, such as a criminal conviction or guilty plea, causes the termination of coverage. The definition of "alleged participant" includes any insured "employee" or "volunteer" who allegedly participated in. directed or knowingly allowed any "abusive act" There are no claims against any of Montville's "employees" or "volunteers." Instead, all of the claims against Montville are against entities, such as the MBOE and MTPS. These entities would not qualify as "employees" or "volunteers." Because coverage under the Alleged Participant Coverage is limited to "employees" or "volunteers" of Montville, Zurich disclaims any obligation to defend or indemnify Montville under the Alleged Participant Coverage.

In addition, the Alleged Participant Coverage includes the same definition of "abusive act," and includes the same limitation that the "injury" and "abusive act" both must begin in the same policy year. Zurich incorporates its discussion related to the definition of "abusive act" and the timing of the "injury" and "abusive act" as set forth above. Because the "abusive act" and "injury" began in February 2012, Zurich further disclaims coverage under the Alleged

Participation Coverage for the '09-10, '10-11, '12-13, '13-14, and '14-15 AGLIC Policies.

The Alleged Participant Coverage also incorporates the same exclusions as the Abusive Act Coverage discussed above. Zurich disclaims coverage and reserves its rights wider the Alleged Participant Coverage for the reasons as set forth above related to Abusive Act Coverage for each respective policy year.

V. DISCLAIMER AND RESERVATION OF RIGHTS AS TO THE UMBRELLA POLICIES

A. Coverage A

Coverage A in the Umbrella Policies provides excess follow form coverage to the policies set forth in their respective schedules of underlying policies. As discussed above, no coverage is available under the AGLIC CGL Coverage, Abusive Acts Coverage, or Alleged Participants Coverage. Further. we have been informed that Montville's primary errors and omissions insurer, Darwin, has also disclaimed coverage. In light of these disclaimers, no coverage is available under Coverage A of the Umbrella Policies.

B. Coverage B

1. The Coverage Grant

Coverage B provides umbrella coverage for certain damages that are not covered by underlying insurance. For Coverage B to apply, the injury, damage or offense must: 1) arise out of Montville's business; 2) take place during the policy period of this policy; and 3) be caused by an occurrence happening anywhere. We address each in turn.

First, for Coverage B to apply, the injury, damage or offense must arise out of Montville's business. Here, the allegations in the Complaints are that Montville is liable for Child M's injuries because it "'covered-up" Fennes' prior sexual misconduct when it failed to report him to the proper authorities and entered into a settlement agreement with him. "Covering-up" a teacher's sexual misconduct likely falls outside of a school's business of educating students. Zurich reserves its rights to disclaim coverage under Coverage B of the Umbrella Policies to the extent Child M's injuries do not arise out of Montville's business.

With regard to the second requirement of Coverage B, the Umbrella Policies require that the injury take place during the policy period. As discussed above, Child M's injury began in February 2012. Zurich therefore disclaims coverage under Coverage B for the '12-13 and '13-14 Umbrella Policies.

Third, the Umbrella Policies, like the ZAIC and AGLIC Policies, require the operative Injury to be caused by an "occurrence." Further, the Umbrella Policies contain the same definition of "occurrence," and include .the same exclusion for expected or intended injuries as the ZAIC and AGLIC Policies. Zurich reserves its rights Under the Umbrella Policies with regard to these provisions for the reasons discussed above in relation to the ZAIC and AGLIC Policies.

2. The School Board Endorsement

The School Board .Endorsement states:

> Under Coverage B only, this policy does not apply to any liability, damage, loss, cost or expense arising out of any breach of duty,

> negligent act, error or omission of any insured or of any person for whose acts any insured is legally liable while acting as an officer, director, trustee or member of any school board, school district or school organization.

Here, the Complaints seek to hold Montville liable for Montville's failure to report and disclose Fennes' alleged sexual abuse while he was employed at Montville. Montville had a statutory duty to disclose the alleged abuse, and allegedly breached that duty. Montville also had a duty not to cause injury to any person, including Child M. Further, the Complaints specifically seek damages because of Montville's alleged breach of its duty to report, and its other negligent acts. errors, and omissions. Coverage for these allegations is precluded by the School Board Endorsement. Because all of the allegations in the Complaints against Montville seek to hold Montville responsible for its alleged breaches of duty, negligent acts, errors, and omissions, coverage is precluded under Coverage B of all Umbrella Policies.

C. Coverage C

Coverage C provides coverage for "casualty business crisis," which means an "event [that] has been or may be associated with . . . damages covered by this policy Under Coverage A . . . or under Coverage B . . . " As discussed above, there is no coverage available under Coverage A or Coverage B. Consequently, there is no coverage available under Coverage C of the Umbrella Policies. Further, the definition of "casualty business crises" states that it includes, without limitation, certain enumerated events or injuries

that do not encompass sexual molestation. Because the acts and injuries here relate to sexual molestation, Zurich has no obligations under Coverage C of the Umbrella Policies.

D. No Coverage Is Available for Punitive Damages

The Child M complaint seeks punitive damages from Montville. Each of the Umbrella Policies includes an exclusion for punitive damages that applies to all coverage parts. Further, punitive damage awards are uninsurable under New Jersey Jaw. For these reasons, Zurich disclaims any obligation to indemnify Montville for punitive damages under the Umbrella Policies.

VI. CONCLUSION

In conclusion, Zurich disclaims coverage as follows:

- Under the CGL Coverage of the ZAIC Policies (the only coverage at issue in these policies) because there was no bodily injury during the ZAIC Policies' policy periods;
- Under the CGL Coverage of the AGLIC Policies, with the exception of the '11-12 AGLIC Policy, because there was no bodily injury during the policy periods;
- Under the CGL Coverage of the AGLIC Policies due to the application of the Abusive Act Exclusion;
- Under the Abusive Act Coverage and Alleged Participant Coverage of the AGLIC Policies, with the exception of the '11-12 AGLIC Policy, because the injury and abusive act did not occur in the same policy year;

- Under the Abusive Act Coverage and Alleged Participant Coverage of the AGLIC Policies due to the application of the exclusion for prior knowledge of abusive acts.
- Under the Abusive Act Coverage and Alleged Participant Coverage of the '12-13, '13-14, and '14-15 AGLIC Policies due to the application of the exclusion for prior claims or litigation involving abusive acts;
- Under the Alleged Participant Coverage of all of the AGLIC Policies because Montville is not an "employee" or "volunteer";
- Under Coverage A of the Umbrella Policies because there is no coverage available wider the scheduled underlying insurance;
- Under Coverage B of the '12-11 and '13-14 Umbrella Policies because there was no bodily injury during those policy periods;
- Under. Coverage B of the Umbrella Policies because of the operation of the School Board Endorsement;
- Under Coverage C of the Umbrella Policies because no coverage is available under Coverage A or B of the Umbrella Policies; and
- Under Coverage C of all of the Umbrella Policies because sexual molestation does not fail within the definition of a "casualty business crises."

In addition to these grounds for disclaimer, Zurich reserves its rights as discussed above. Further, Zurich requests that Montville provide the information requested above, and also provide copies of all other

policies under which it has sought coverage and any coverage position letters issued other insurers from which Montville has sought coverage, including Darwin.

This disclaimer and reservation of rights are based on facts and circumstances known at this time. Zurich does not waive the right to raise other facts, terms, conditions, and/or exclusions that may become applicable to the claims presented as they become known to Zurich. In the event Zurich does not specify herein a basis upon which coverage may be further disclaimed or limited, it is not done with the intention of waiving such basis and Zurich specifically reserves its rights to rely on such other basis, whether that basis relates to facts or policy language, at some future date if and when appropriate. Should Montville come into the possession of any new or additional information at any time that it believes would affect Zurich's coverage position, please submit said information for our review and consideration.

Please contact the undersigned should you have any questions or wish to further discuss this matter.

Regards,

Zurich American Insurance Company
American Guarantee & Liability Insurance Company
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Mass Litigation Claim Specialist
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