HANDOUT #11

Brief in Insurance Coverage Case for Homeowner's Insurance Coverage for Sexual Assault (NJ) (2011)

BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF INSURER AND IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF VICTIM FOR HOMEOWNER'S INSURANCE COVERAGE FOR SEXUAL ASSAULT COMMITTED BY INSURED

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VICTIM, Plaintiff v. JOHN DOE , JOHN DOE2, JANE DOE1 and JANE DOE2, LIQUOR STORE, LLC, D/B/A "THE LIQUOR STORE", BOB JONES ABC, INC. 1-10 (Fictitious Entities) and JOHN DOES 1-20 (Fictitious Entities and/or Persons) Defendants	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION DOCKET NO: L-XXXX
INSURANCE COMPANY Plaintiff v. BOB JONES, JOHN DOE1 , JOHN DOE 2 JANE DOE1, and JANE DOE2, VICTIM and "THE LIQUOR STORE" Defendants	:	

PLAINTIFF VICTIM'S RESPONSE AND BRIEF IN OPPOSITION TO INSURANCE COMPANY'S, MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF VICTIM'S
<u>CROSS MOTION FOR SUMMARY JUDGMENT</u>

PRELIMINARY STATEMENT

INSURANCE COMPANY files a motion for summary judgment seeking that this Honorable Court adopt a new standard for interpretation and application of intentional act exclusions which is at variance with controlling New Jersey Supreme Court precedent, about which INSURANCE COMPANY has failed to advise this Court in the first place. Simply put, INSURANCE COMPANY seeks this Court's novel interpretation because there exists no record evidence that their insured, Bob Jones specifically and subjectively intended to cause injury to VICTIM in performing negligent and intentional *acts* on May 18, 2001, the relevant inquiry under controlling law. **There is only one person who has relevant evidence of Bob Jones's subjective intent to cause harm is Bob Jones, and he has not testified that he intended or expected any harm. Thus, the inquiry is over and judgment should be entered in his favor and against INSURANCE COMPANY as a matter of law.** Because, after extensive discovery (namely the exchange of extensive written discovery and nineteen depositions, including two depositions for Plaintiff VICTIM and two depositions of Defendant Bob Jones), there exists no required evidence of Bob Jones's subjective intent to injure necessary for application of INSURANCE COMPANY's "intentional act" exclusion, summary judgment must be granted in Bob Jones's favor and against INSURANCE COMPANY.

I. FACTS

There exists no dispute that on May 18, 2001, Plaintiff VICTIM, who had just turned 15, attended a party at the Doe's family's new home in ANYTOWN, NJ. See Plaintiff's complaint, Exhibit "A". At such party, she was given alcohol by INSURANCE COMPANY's insured, Defendant Bob Jones, who was 17. See VICTIM Dep., 11/6/07, p. 55, Exhibit "C"; Bob Jones Dep., pp. 49-50, Exhibit "D". Although the precise nature of sexual acts are in dispute, it is undisputed that after several hours, Bob Jones performed sexual acts upon VICTIM in an empty second floor bedroom after both minors had consumed alcohol. All evidence indicates that VICTIM was intoxicated. John Doe Dep., p. 77, Exhibit "E"; VICTIM Dep, 3/3/08, p. 98, Exhibit "F"; G.N. Dep., p. 85, Exhibit "G"; A.D., Dep., p. 19, Exhibit "H"; A.G., p. 31-32, Exh. "I"; E.G. Dep., p. 31, Exhibit "J"; J.V. Dep., p. 21, Exhibit "K". It is further undisputed that VICTIM became very sick and vomited. *Id.* Bob Jones claims that VICTIM consented to the sexual acts; VICTIM denies that they were consensual and further contends that she was incapable of consenting due to her intoxication. However, whether such acts were consensual or not is irrelevant to the determination of INSURANCE COMPANY's obligation to provide insurance coverage, which is the only issue in the present cross-motions for summary judgment.

After the incidents, Bob Jones was charged in New Jersey with juvenile delinquency and on October 4, 2001, he accepted a charge of such juvenile delinquency for endangering the welfare of a minor for providing alcohol to her while she was a minor. See Bob Jones Dep., p. 9, Exhibit "D".

Following these incidents, VICTIM became withdrawn, anxious and depressed and, according to her physicians, developed Post-traumatic Stress Disorder and Adjustment Disorder, chronic, which has required extensive psychological counseling and will continue to require such counseling. See Report of Dr. _____, Exhibit "M". Defendants' forensic psychiatry expert, Dr. _____, attributes a diagnosis of Adjustment Disorder with Anxiety and Depressive Features as a result of the events of 5/18/01. Exhibit "N", p. 17.

VICTIM filed suit against Bob Jones and others stating multiple alternative counts in her complaint, for both intentional torts and negligence torts, stemming from his service of alcohol to her, then age 15, and non-consensual sexual acts which caused her injuries. Exhibit "A". Specifically, VICTIM alleged in her amended complaint[1] claims against Bob Jones for:

-- common law negligence in the service of alcohol and social host liability (*Id.*, Count II, paras. 23-26);

-- assault and battery (*Id.*, Count III, paras. 27-31);

-- negligence and recklessness (*Id.*, Count IV, paras. 32-25);

-- intentional infliction of emotional distress (*Id.*, Count V, paras. 36-42); and

-- false imprisonment (*Id.*, Count VI, paras. 43-47).

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[1] Plaintiff originally filed a complaint 5/8/06 and thereafter amended it on 12/7/07 to correct and add the name of another party learned in discovery, JANE DOE2. Exhibit "A". No allegations asserted against Bob Jones were changed or added in the amended complaint. *Id.*

Bob Jones was insured under a policy of liability insurance (policy number INSURANCE COMPANY XXXXXXXXXXXX) issued by INSURANCE COMPANY to his parents, Robert Jones and Mary Jones, which is attached as Exhibit "B". The INSURANCE COMPANY policy language defines those insured under the policy to include Bob Jones, the named insureds' minor child who was 17 years old. *Id.* Specifically, the policy states that "'insured' means you and residents of your household who are: a. your relatives; or b. other persons under the age of 21 and in the care of any person named above." *Id.* at p. 1.

The Smith's INSURANCE COMPANY policy provides liability coverage as follows:

> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> pay up to our liability for the damages for which the insured is legally liable; and
>
> provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay or tender for damages resulting from the occurrence equals our limit of liability.

Id. at p. 3. The words "bodily injury" are defined in the policy as meaning: "bodily harm, sickness or disease including required care, loss of services and death that results." See Exhibit "B", para. 1, p. 1. The liability coverage contains, in Section II, an exclusion relied upon by INSURANCE COMPANY to deny coverage to Bob Jones for VICTIM's injuries from the claims asserted against him. The amended exclusion states that personal

liability coverage (and medical payment coverage) does not apply to bodily injury which is:

> a. caused by the intentional or purposeful acts of an insured, that would reasonably be expected to result in bodily injury to any person or property damage to any property; but, this exclusion shall not apply to an Insured that did not participate in the intentional act.[2]

Id. at p. 3. Notably, the INSURANCE COMPANY policy does not contain exclusions found in many modern personal and commercial liability insurance policies, such as, *inter alia*: willful harm exclusion[3], violation of penal law exclusion[4]; malicious act exclusion; knowing endangerment exclusion[5]; criminal act exclusion[6], felony exclusion[7]; juvenile delinquency exclusion, sexual act exclusion, sexual abuse exclusion, sexual

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[3] *See, e.g.*, *Cumberland Mutual Fire Ins. Co. v. Murphy*, 183 N.J. 344, 349, 873, A. 2d 534, 537, 2005 N.J. LEXIS 582 (2005) (policy contained a "willful harm" exclusion).

[4] *Id.* at 351-52 (policy contained an exclusion for the insured's violation of "penal law").

[5] *Id.* (policy contained a "knowing endangerment" exclusion).

[6] *Philadelphia Indemnity Ins. Co. v. Healy*, 156 Fed Appx. 472, 2005 U.S. App. LEXIS 28319 (3d Cir. 2005) (New Jersey policy contained a "felony exclusion"); *Cumberland Mutual Fire Ins. Co,* 183 N.J. at 349, 873 A.2d at 537 (policy contained a "penal law" exclusion); *See also*, *Villa v. Short*, 2008 N.J. LEXIS 604, *10 (N.J. June 5, 2008) (policy contained an intentional act exclusion and a "criminal act" exclusion).

[7] *Philadelphia Indemnity Ins. Co. v. Healy*, 156 Fed Appx. 472, 2005 U.S. App. LEXIS 28319 (3d Cir. 2005) (New Jersey policy contained a "felony exclusion").

molestation exclusion; alcohol service exclusion and/or assault and battery exclusion[8], to name but a few.

INSURANCE COMPANY seeks to deny coverage to Bob Jones and VICTIM for liability coverage on the basis of its "intentional injury" exclusion and has filed the within motion for summary judgment. Bob Jones opposes INSURANCE COMPANY's motion on the basis that no injury was subjectively expected or intended. VICTIM also opposes INSURANCE COMPANY's motion on this basis and in turn brings this cross motion for summary judgment in favor of coverage. As discussed below, there is no evidence of record that Bob Jones subjectively intended or expected to cause injury or harm to VICTIM such that VICTIM's motion must be granted and INSURANCE COMPANY's motion be denied.

II. LEGAL ARGUMENT

A. INSURANCE COMPANY'S MOTION MUST BE DENIED AND VICTIM'S CROSS MOTION MUST BE GRANTED AS THERE EXISTS NO EVIDENCE OF RECORD THAT BOB JONES SUBJECTIVELY INTENDED OR EXPECTED TO CAUSE INJURY

Subjective Intent to Cause Injury is Required
Under NJ Law For INSURANCE COMPANY To Deny Coverage

Under well established law in New Jersey, in interpreting intentional act exclusions contained in liability insurance policies, the focus of the inquiry must be on the "insured's intent to cause the injury rather than on [his] intent to commit the act that resulted in the injury." *S.L. Industries, Inc. v. American Motorists Ins. Co.*, 128 N.J. 188,

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[8] *See, e.g.*, *L.C.S. Inc. v. Lexington Ins. Co.*, 2004 N.J.Super. LEXIS 334 (App. Div. August 2, 2004) (policy contained an "assault and battery" exclusion.)

207, 607 A.2d 1266, 1276, 1992 N.J. LEXIS 382 (1992); *See also*, *Id., citing, Voorhees v. Preferred Mutual Ins. Co.,* 128 N.J. 165, 183, 607 A.2d 1255, 1992 N.J. LEXIS 384 (1992) ("In V*oorhees* we held that 'the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury[,]' notwithstanding the intentional nature of the precipitating action.")[9]; *Cumberland Mutual Fire Ins. Co. v. Murphy*, 183 N.J. 344, 349, 873, A.2d 534, 537, 2005 N.J. LEXIS 582 (2005). "A covered accident includes the unintended consequences of an intentional act, but not injury that is itself, intended." *Cumberland Mutual Fire Ins. Co.*, 183 N.J. at 349, 873 A.2d at 537.

In each of these three cases, the New Jersey Supreme Court relies upon a two-step analysis to be applied: "(1) if the wrongdoer **subjectively intends or expects** to cause some sort of injury, that intent will generally preclude coverage; and (2) if there is evidence that the extent of injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause **that injury**. Lacking that intent, the injury was 'accidental' and coverage will be provided." *Cumberland Mutual Fire Ins. Co.*, 183 N.J. at 349; *Voorhees*, 128 N.J. at 212 (case remanded for determination of whether insured intended to cause emotional distress).

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[9] Incredibly, INSURANCE COMPANY, in its brief, does not cite to, reference, attempt to distinguish or in any way even mention these three cases of the New Jersey Supreme Court: *S.L. Industries*, *Voorhees* and *Cumberland Mutual*, although they represent controlling authority regarding insurance coverage for intentional acts. VICTIM submits that INSURANCE COMPANY failed to cite these cases because they produce a finding of coverage in the insured's favor, as a matter of law given the lack of any evidence of record whatsoever that Bob Jones subjectively intended or expected to cause injury.

The *Voorhees* court expressly held that in a case of negligence and intentional infliction of emotional distress, as is state in counts II, IV, & V in the present case, "the event causing the distress will be deemed an accidental occurrence entitling the insured to coverage when the insured's actions, although intentional, were not intentionally injurious." *Voorhees*, 128 N.J. at 169. The *Voorhees* court explained the basis for its holding:

> The accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is "accidental", **even if the act that caused the injury was intentional**. That interpretation prevents those who intentionally cause harm from unjustly benefitting from insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for unintentionally-caused harm.

Id., 128 N.J. at 183. (emphasis added). The Voorhees court thus concluded: ". . . we will look to the insured's subjective intent to determine intent to injure." *Id.*

In *Cumberland Mutual Fire Ins. Co.*, the New Jersey Supreme Court, citing the lack of subjective intent to cause injury, found there should be coverage as a matter of law where the insured-tortfeasors intentionally shot a BB gun at passing cars causing the victim's blindness. Notably, the Court found coverage although the policy contained "intentional act", "penal law", "willful harm" and "knowing endangerment" exclusions to liability coverage, the last three of which are not even found in the INSURANCE COMPANY policy issued to the Smiths. *Id.* 183 N.J. at 350.

Intentional Torts Causing Unintended Results are Covered Under NJ law

Further, under New Jersey law, coverage must be afforded to an insured tortfeasor even where he committed an intentional tort where unintended results occur. *Prudential Property & Casualty Ins. Co. v. Karlinski*, 251 N.J.Super. 457, 598 A.2d 918, 1991 N.J.Super. LEXIS 357 (App.Div. 1991). In *Karlinski*, the court relied upon Appleman's treatise on insurance law, *Insurance Law & Practice*, in defining "intent" as follows:

> The word "intent" for purposes of tort law and for purposes of exclusionary clauses in insurance policies denotes that the actor desires to cause the consequences of his act or believes that consequences are substantially certain to result from it. In order for an act to be intentional, its consequences must be substantially certain to result as opposed to the feature of wanton acts that the consequences be only probably certain to result; thus, a normal actor's conduct loses the character of intent and becomes mere recklessness.

Id. at 461*, citing,* 7A J. Appleman, *Insurance Law and Practice*, § 4492.02, at 29 (Berdal. ed. 1979); *Hanover Ins. Co. v. Cameron*, 122 *N.J.Super.* 51, 298 *A.*2d 715 (Ch.Div.1973).

When the issue involved an exclusion clause, it is to be strictly construed against the insurer. *Aetna Ins. Co. v. Weiss*, 174 N.J. Super. 292, 296, 416 A.2d 426 (App. Div.), *certif. denied*, 85 N.J. 127, 425 A.2d 284 (1980).

Similarly, courts have held that insurers are obligated to defend their insureds on social host claims. *See, e.g., The Salem Group v. Oliver*, 128 N.J. 1, 3, 607 A.2d 138, 139, 1992 N.J. LEXIS 371 (1992).

With this controlling law and subjective standard in mind, there is no genuine issue to refute that Bob Jones did not *subjectively intend* VICTIM any bodily injury as would be required for application of the intentional injury exclusion. The Court need

look no further than the testimony of Bob Jones who is the only person in the world who has knowledge of his subjective intent. He was deposed twice and both times testified he had no subjective intent or expectation to injure or cause harm to VICTIM. See Exhibits "D" & "L".

There is No Record Evidence Bob Jones Intended or Expected Injury

Faced with this record, INSURANCE COMPANY incorrectly focuses on Bob Jones's intention to commit an *act* (not the *injury*) which is the wrong legal standard. As its primary basis for excluding coverage, INSURANCE COMPANY mistakenly attempts to argue that if Bob Jones intended *any act*, the intentional injury exclusion would bar coverage to him. INSURANCE COMPANY misstates and misunderstands the law. First, the INSURANCE COMPANY policy excludes and New Jersey case law bars coverage for intended *injuries* – not intended *acts*. Moreover, there exists no testimony or other evidence of record that Bob Jones *subjectively* expected or intended injury as would be required under INSURANCE COMPANY's exclusion and controlling New Jersey law. In fact, all evidence indicates that no injury or harm was subjectively expected or intended by Bob Jones – the controlling legal test. The mere fact that injury resulted from Bob Jones's acts will not suffice to fulfill INSURANCE COMPANY's strict proof requirements that injury was subjectively expected or intended by him, which is the relevant legal inquiry under New Jersey law. On the contrary, all record evidence indicates that no injury or harm was subjectively expected or intended by Bob Jones such that summary judgment should be entered in his favor and against INSURANCE COMPANY.

Bob Jones testified twice about his lack of subjective intention and expectation to cause harm or injury[10], namely Smith's unequivocal and uncontradicted testimony provided on November 28, 2007 and July 23, 2008. He first testified as follows:

Q. Did you intend to endanger her [VICTIM's] welfare?

A. No.

. . .

Q. Did you intend to cause any harm to [VICTIM]?

A. No.

Q. Did you expect to cause any harm to her?

A. No.

Bob Jones Dep, 11/28/07, pp. 91-92, Exhibit "D". Bob Jones was deposed for a second time on July 23, 2008 and once again testified that he had no intention or expectation to injure or harm VICTIM:

Q. Did you reasonably expect that it might have resulted in some kind of injury to her?

Mr. Fritz: Objection to form.

A. No, I did not.

Q. You didn't expect that that would result in an injury?

A. An injury, no.

Q. Why not?

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[10] Not surprisingly, Mr. Smith's unequivocal and unrebutted testimony about his lack of subjective intent and subjective expectation to cause injury is conspicuously absent from INSURANCE COMPANY's brief.

A. Because I've never injured anyone before doing that.[11]

Bob Jones further testified on July 23, 2008:

Q. And just to be clear here, you had given a deposition back on November 28, 2007. Are you changing anything you said from that deposition?

A. No.

Mr. Pollinger: Objection to the form of the question.

. . .

Q. On page 92 I asked you did you intend to cause any harm to [VICTIM] and you said no.

. . . .

Any of the testimony that you provided today, are you changing your answer to that question at all?

A. No, sir.

Q. And then I asked you whether you expected to cause any harm to her and you said no. Same question, are you changing any answer with regard to that response here today?

A. No, sir.

B. Smith Dep., 7/23/08, p. 15, Exhibit "L". **This testimony, which is the only evidence of Bob Jones's subjective intent and expectations, remains uncontroverted by anyone.**

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[11] Bob Jones further explained that he had engaged in similar sexual activity approximately five times before with his then girlfriend and she had never made any complaints of being hurt or injured. B. Smith Dep., 7/23/08, pp. 19-20, Exhibit "L".

Rather, in making its motion, INSURANCE COMPANY further attempts to misrepresent the record evidence in this case, and relies exclusively upon the misleading recitation of Bob Jones's testimony which indicates only that he intentionally placed his fingers into VICTIM's vagina. See Bob Jones Dep., 7/23/08, p. 23, Exhibit "L"; INSURANCE COMPANY Brief, p. 5. This sole act does not equate with a subjective intention or expectation to cause *injury* necessary to exclude coverage. In doing so, INSURANCE COMPANY ignores the **only** evidence of Bob Jones's subjective intent outlined above.

INSURANCE COMPANY's unfair and misleading recitation of Bob Jones's testimony that he intended to insert his fingers into VICTIM's vagina or that he intended to perform an act of oral sex upon her is not a substitute for the requisite finding of a subjectively intentional or expected *injury* necessary for the exclusion to apply under the policy's express terms and controlling New Jersey law. Simply stated, the insertion of a finger into a vagina or the performance of oral sex is not an "intentional or purposeful act of an insured, that would reasonably be expected to result in bodily injury **to any person**" (emphasis added), as is the specific language of the exclusion under the policy.

Further, INSURANCE COMPANY's coverage exclusion requires more than an intention to commit a sexual act of digital penetration – it requires that the act would be expected to result in bodily injury to "*any* person" (emphasis added). If INSURANCE COMPANY's view is accepted, then this position would equate with a finding that digital penetration would always be expected to result in bodily injury to "any person." Moreover, as discussed in detail below, INSURANCE COMPANY's position in this

regard is contradicted by Supreme Court precedent which requires evidence of the insured's *subjective* intent to injure or harm.

Without any record evidence that Bob Jones intended or expected any injury or harm, INSURANCE COMPANY, in its motion, next embarks on a desperate journey to infer intent and/or to write new exclusions into the policy that simply aren't there.

Juvenile Delinquency Finding is Not Criminal and Does Not Infer Intent

For example, INSURANCE COMPANY improperly seeks to use Bob Jones's acceptance of a juvenile delinquency finding of child endangerment in the juvenile proceeding to infer intent. However, even in a criminal case (which Bob Jones's *juvenile* proceeding is not), the tortfeasor's/insured's guilty plea is not binding in a subsequent civil case filed to determine the insurer's obligation to defend/indemnify. *See, e.g., Prudential Property & Casualty Ins. Co. v. Kollar*, 243 N.J.Super. 150, 578 A.2d 1238, 1240, 1990 N.J.Super. LEXIS 337 (App.Div. 1990), *citing*, *Burd v. Sussex Mutual Ins. Co.*, 56 N.J. 383, 397, 267 A.2d 7 (1970). Courts have long held that collateral estoppel may apply under such circumstances "only where the conviction definitively and unambiguously established the nature of the insured's intent **and where such conviction was the result of a trial, not a plea.**" *Kollar*, 243 N.J.Super. at 154, *citing, New Jersey Manufacturers Ins. Co. v. Brower*, 161 N.J.Super. 293, 300, 391 A.2d 923 (App. Div. 1978) (emphasis added). The *Kollar* court further held that "an innocent third-party victim . . . should not be estopped from effectively recovering against a defendant and his insurer when the defendant, for whatever reason, elects to enter a plea of guilty." *Kollar*, 243 N.J.Super. at 155.

Bob Jones accepted a finding of juvenile delinquency for child endangerment in a *juvenile* proceeding – which is not a *criminal* proceeding at all. N.J.S.A. § 2A:4A-48 ("No disposition under [the Juvenile Justice Act] shall operate to impose any of the civil disabilities ordinarily imposed by virtue of a criminal conviction**, nor shall a juvenile be deemed a criminal by reason of such [Juvenile Act] disposition**.") (emphasis added). Thus, in summary, INSURANCE COMPANY incredibly is seeking to infer intent and deny coverage by relying, as a matter of law, upon Bob Jones's admission of child endangerment (for serving alcohol to a minor) in a non-criminal (juvenile) proceeding in which no trial was held, but where merely acceptance of juvenile delinquency finding was entered by him. Further, INSURANCE COMPANY is attempting to take this position to deny coverage to its insured and to VICTIM, an innocent victim, where its own policy does not even contain a "criminal act" exclusion or "juvenile act" exclusion, such as is contained in the *Schmitt* case (cited by INSURANCE COMPANY) and other policies issued by other insurance carriers in New Jersey. Even if the policy contained a criminal or juvenile act exclusion, which it doesn't, because Smith's adjudication was not on the merits, it would not serve to infer intent in this declaratory judgment action. Moreover, Bob Jones explained why he agreed to a juvenile adjudication for endangering the welfare of a minor, specifically because: "[t]here was a minor at the party and there was alcohol being served." See Bob Jones Dep., p. 9, Exhibit "L".

INSURANCE COMPANY attempts to rely upon *Allstate Ins. Co. v. Schmitt*, 238 N.J. Super. 619 (App. Div. 1990) as "an appropriate starting point for the analysis of the issue of whether Smith's conduct is excluded from coverage under the INSURANCE

COMPANY policy." However, *Schmitt* is readily distinguished from the case at bar on numerous grounds. First, like many other insurance policies in New Jersey, the homeowner's insurance policy at issue in *Schmitt* contained a "criminal act" exclusion which, unfortunately for INSURANCE COMPANY, is not contained in the INSURANCE COMPANY policy. Specifically, the Allstate policy in *Schmitt* read: "We do not cover bodily injury or property damage which may reasonably be expected to result from the intentional or **criminal acts** of an insured person or which is in fact intended by an insured person." *Id.* at 623 (emphasis added). The "criminal act" exclusion and the insured's criminal conviction was specifically relied upon by the *Schmitt* court in denying coverage to its insured. *Id.* at 626; *Prudential Property & Casualty Ins. Co. v. Karlinski*, 251 N.J.Super. 457, 463, 598 A.2d 918, 921, 1991 N.J.Super. LEXIS 357 (App.Div. 1991) ("In *Allstate Ins. Co. v. Schmitt* [citations omitted], we reviewed the scope of *Ambassador, Lyons, Oakes* and *Allstate v. Malec, supra,* as applied to an express policy exclusion for *criminally* reckless conduct, and concluded that, in face of a criminal conviction, such an exclusion was valid.") (emphasis in original).

In the present case, unlike in *Schmitt*, there is no criminal act exclusion and no criminal conviction. The INSURANCE COMPANY exclusion provides that personal liability coverage will not apply to bodily injury "caused by the intentional or purposeful acts of an insured, that would reasonably be expected to result in bodily injury to any person" See Exhibit "B", Section II-Exclusions, New Jersey Special Provisions, page 3 of 6. In a *post hoc* attempt to deny coverage, years after it issued its insurance policy to the

Smiths, INSURANCE COMPANY is now seeking to write a criminal and/or juvenile act exclusion into the policy although Mr. Smith was convicted of no crime. INSURANCE COMPANY is also unfairly attempting to equate Bob Jones's acceptance of a juvenile delinquency adjudication with a criminal conviction after a trial. Thus, even if INSURANCE COMPANY's policy had a "criminal act" exclusion in it, it would be inapplicable in this case.

Secondly, in its further attempt to rely upon *Schmitt* to deny coverage, INSURANCE COMPANY misrepresents: (1) the policy language; (2) the plaintiff's complaint; (3) the controlling case law; and (4) the deposition testimony of its own insured. First, despite the INSURANCE COMPANY policy's lack of a "criminal act" exclusion (or even a "juvenile act" exclusion), it attempts to argue "the language in the Allstate policy [contained in *Schmitt*] is substantially similar to the language in the INSURANCE COMPANY policy. . . " See INSURANCE COMPANY Memorandum of Law, p. 7. Nothing could be further from the truth. For the reasons outlined above, the two policies are <u>not</u> "substantially similar". Next, INSURANCE COMPANY completely ignores that controlling case law from the New Jersey Supreme Court, requires that the subjective intent of its insured controls this coverage determination. In seeking to rely upon *Schmitt* as somehow controlling, INSURANCE COMPANY completely ignores the controlling Supreme Court precedent, namely *Voorhees*, *SL Industries* and *Cumberland Mutual Fire Ins. Co. v. Murphy, supra,* in which the New Jersey Supreme Court unequivocally held three times that it is the subject intent of the insured which controls the outcome.

Finding no evidence of subjective intent to injure to support its motion, and after attempting to rely upon the wrong case law, INSURANCE COMPANY has also resorted to misrepresenting the record in this case.

First, INSURANCE COMPANY, in its motion, attempts to state that Plaintiff's amended complaint, at count IV, asserts a claim for "intentional" conduct, see p. 3 of INSURANCE COMPANY's brief: "Count IV – **Intentional**, negligent and reckless conduct". In fact, a simple review of Plaintiff's complaint reveals that Count IV is for negligence and recklessness only:

Count IV - Negligence & Recklessness
Plaintiff VICTIM v. Defendant Bob Jones

See Plaintiff VICTIM's complaint, paras. 32-35, Exhibit "A".

Further, as discussed above, INSURANCE COMPANY also wrongfully attempts to misstate Bob Jones's testimony on the relevant issue of whether or not he subjectively intended or expected to cause any injury. In particular, INSURANCE COMPANY ignores the only evidence of Bob Jones's subjective intent, namely Smith's testimony provided on November 28, 2007 and July 23, 2008 that he did not intend or expect to cause any injury. See Bob Jones Dep., 11/28/07, pp. 91-92, Exhibit "D"; Bob Jones Dep., 7/23/08, p. 15, Exhibit "L".

Sexual Acts By a Teenager Upon a Teenager Does Not Infer Intent to Injure

Recognizing that there is no evidence of Bob Jones's subjective intent to injure, INSURANCE COMPANY then attempts to infer intent by applying even more inapplicable, non-controlling case law. Under controlling New Jersey law, application of

this standard must be rejected because the present case involves sexual acts between two teenagers, not sexual abuse of young children by adults. The New Jersey Supreme Court and the Appellate Division courts have inferred intent only where "the actions are particularly reprehensible [such that] the intent to injury can be presumed from the act." *Voorhees*, 128 N.J. at 184; *see also*, *Cumberland Mutual Fire Ins. Co. v. Murphy*, 183 N.J. 344, 349, 873 A.2d 534, 537, 2005 N.J. LEXIS 582 (2005). Further, Courts have inferred intent only where there is child sexual abuse, incest or multiple stabbings leading to death[12]– all scenarios which are not presented in the case at bar.

Sexual Acts By a Teenager Upon a Teenager Is Not Sexual Abuse, Incest or Intentional Stabbing

Specifically, INSURANCE COMPANY attempts to rely upon five cases of sexual abuse and/or incest committed upon young children where courts found that sexual abuse of young children was inherently injurious: *Villa v. Short*, 195 N.J. 15 (2008); *J.S. v. R.T.H.*, 155 N.J. 330 (1998); *Highpoint Ins. Co. v. J.M.*, 398 N.J. Super. 562 (App.Div. 2008); *J.C. v. N.B.*, 335 N.J.Super. 503 (App.Div. 2000); and *Prudential Property & Cas. Ins. Co. v. Boylan*, 307 N.J.Super. 162, 169 (App. Div. 1998), all of which are inapposite to the present case. Specifically, each of these cases deals with the longstanding law of "inferred intent" in the context of cases involving sexual abuse of a minor by an adult, which is not presented in the case at bar. In each of these cases, the Courts held that intent may be inferred from an adult's illegal and criminal actions of sexually abusing

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[12] *Harleysville Ins Co. v. Garitta*, 170 N.J. 223, 785 A.2d 913, 2001 N.J. LEXIS 1494 (2001) (repeated stabbing by insured into victim's torso was inherently reprehensible).

much younger children. In *Villa v. Short*, 195 N.J. 15 (2008), the victim was a 5 year old and the insured-perpetrator was her 21-year-old uncle. In *J.S. v. R.T.H.*, 155 N.J. 330 (1998), which was not even a declaratory judgment action and dealt only with the issue of a sexual abuser's spouse's duty to victims of sexual abuse, the victims were 12 and 15 year old girls and the insured perpetrator was a 64 year old man and his wife. In *Highpoint Ins. Co. v. J.M.*, 398 N.J. Super. 562 (App.Div. 2008), the victim was a young child and the insured-perpetrators were a sex offender and her spouse. In *J.C. v. N.B.*, 335 N.J.Super. 503 (App.Div. 2000)[13], a case of incest, the victim-plaintiff was an infant and the insured-perpetrators were the child's father and mother. In *Prudential Property & Cas. Ins. Co. v. Boylan*, 307 N.J.Super. 162, 169 (App. Div. 1998), the victim was a 5 year old and the perpetrator was 15 years old.

By contrast, the present case involves non-consensual sexual acts by a minor, Bob Jones, then 17, Smith Dep. of 7/23/08, p. 14, Exhibit "L", upon VICTIM, then 15, less than two years apart in age, where there is no record evidence of the insured, Bob Jones's, intention or expectation of injury to VICTIM— not inherently injurious child sexual abuse by an adult or much older person upon a minor as was at issue in the cases where the courts inferred intent to harm. Sexual acts performed by a 17 year old upon a 15 year-old, is not inherently illegal or criminal whereas each of the cases cited by INSURANCE COMPANY where intent was inferred was illegal and criminal. As one court has held: "Improper sexual behavior by a minor is not necessarily accompanied by an understanding of the effect on the victim." *Shelby Casualty Ins. Co. v. H.T.,* 391

N.J.Super. 406, 416, 918 A.2d 659, 664, 2007 N.J.Super. LEXIS 86 (2007) (holding that there would be no universal application of an inferred intent rule).

INSURANCE COMPANY has not provided and cannot provide record evidence or proof that VICTIM's injuries were subjectively intended or expected by Bob Jones or that this case involves acts so reprehensible that intent to injury must be inferred, such as has been the case with sexual abuse of children, incest or multiple stabbings leading to death. Because INSURANCE COMPANY can provide proof of neither, and because "the burden is on the insurer to bring the case within the exclusion", *Villa v. Short*, 2008 N.J. LEXIS 604, *16 (N.J. June 5, 2008), there exists no factual dispute regarding Bob Jones's subjective intent to injury – the controlling legal standard – and summary judgment must be granted in his favor affording coverage for VICTIM's claims.

B. BOB JONES WAS INTOXICATED SUCH THAT HE COULD NOT HAVE INTENDED OR EXPECTED INJURY

The New Jersey Supreme Court has held that voluntary intoxication may completely negate application of the intentional act exclusion contained in an insurance policy. *Burd v. Sussex Mutual Ins. Co.*, 56 N.J. 383, 398-99, 267 A.2d 7 (1970). Bob Jones testified that he drank alcohol at the party. See B. Smith Dep., p. 39, Exhibit "D". Further, he testified that his judgment can be affected by drinking alcohol. *Id.* at pp. 39-40. He testified as follows:

Q. Do you agree that your judgment can become affected when drinking alcohol?

A. Yes.

Q. Has that always been the case in your life?

A. As far as – yeah.

Id. Thus, because there is record evidence of intoxication, this only provides further proof and additional grounds of a lack of subjective intent, as a matter of law.

C. ALTERNATIVELY, VICTIM'S CLAIMS OF *NEGLIGENCE* CONTAINED IN COUNTS II & IV OF HER COMPLAINT ARE COVERED UNDER INSURANCE COMPANY'S POLICY

Mistaken Consent Is A Covered Negligence Claim

INSURANCE COMPANY's intentional act exclusion cannot, by definition, exclude claims of negligence VICTIM asserted in her complaint in Counts II and IV. Bob Jones believed that VICTIM consented to sexual activity on the sole basis that they held hands, kissed and were in "close proximity" to each other earlier in the night. Bob Jones was mistaken. Mistakes are precisely what one purchases insurance liability coverage for and this would comport with the reasonable expectation of coverage of an insured. Plaintiff VICTIM asserted in her complaint that: "Defendant Bob Jones negligently and/or recklessly believed that Plaintiff VICTIM consented to the sexual acts. . . ." See paras. 33 & 34 of Plaintiff VICTIM's complaint, Exhibit "A". Smith testified:

Q. Did you believe that she [VICTIM] consented to that sexual activity?

A. Yes.

Q. What made you believe that she consented?

A. We were holding hands that night, kissing outside.

Q. Anything else?

A. Not that I can recall.

. . .

Q. I asked you whether you believe that VICTIM consented to the sexual activity that occurred between the two of you and you said yes. And then I asked you why it is you believe that she consented and you stated holding hands and kissing. Was there any other basis for you to conclude that she consented to sexual activity?

A. We were just flirting the entire night, talking to each other, in close proximity of each other.

Smith Dep., 11/28/07, pp. 44-46, Exhibit "D". Bob Jones and others also unequivocally testified that he served alcohol, specifically beer, to VICTIM, then a 15 year old:

Q. Had you consumed any alcoholic beverages when – by the time [VICTIM] first arrived?

A. Within 45 minutes, I probably would have started drinking a beer, yes.

Q. Did you offer her a beer?

A. Yes.

Q. And did she accept?

A. Yes.

Q. Did you get it for her?

A. I may have asked somebody to grab one out of the cooler, **but I handed it to her, yes.**

Id. at pp. 49-50 (emphasis added).

For the reasons outlined above, because there is no record evidence of subjective intent to injure, there should be coverage[14] for both intentional and negligent acts. However, given that VICTIM has asserted claims of negligence and recklessness, torts which are not even grounded on intentional conduct, there is even further reason to afford coverage as a matter of law to Bob Jones.

Further, VICTIM brought claims against Bob Jones for negligence and recklessness for wrongfully relying exclusively upon the fact that he and she were kissing and were in "close proximity" to each other as somehow constituting consent to perform sexual acts. The claims of negligence and recklessness are not excluded from coverage under the policy.

The Third Circuit Court of Appeals, interpreting a Pennsylvania insurance policy under Pennsylvania law has held under similar circumstances that the mistaken belief that one had consent to perform sexual acts, while under the influence of alcohol, is a covered occurrence under a policy of homeowner's liability insurance. *Aetna Life & Cas Co. v.* B*arthelemy*, 33 F.3d 189, 1993 U.S.App. LEXIS 16583 (3d Cir. 1994). In *Barthelemy,* the insured was an 18 year old college student and the victim was a 19 year old college student. Barthelemy provided rum to the victim, an inexperienced drinker. Barthelemy also drank rum and while the victim was in an inebriated state, Barthelemy had sexual relations with her. *Id.* at 190. As is the case here, the victim sued Barthelemy for battery, negligent or reckless conduct and emotional distress. The policy contained an exclusion

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[14] INSURANCE COMPANY goes to great length in their brief to argue against insurance coverage for punitive damages. VICTIM concedes that punitive damages are not covered under INSURANCE COMPANY's policy and controlling New Jersey law.

for bodily injury which is expected or intended by the insured. The *Barthelemy* court held that it would look to the insured's actual subjective intent to harm in determining whether coverage would apply and held that "for the exclusionary clause to apply, the insurer had to prove that Barthelemy has the specific subjective intent to harm [the victim]." *Id.* at 193. Further, the Third Circuit Court of Appeals declined to apply cases in which intent was inferred based upon an adult's sexual abuse of a minor child – just as New Jersey courts have done. Finally, the *Barthelemy* Court not only reversed a finding of no coverage in favor the insurer, but also directed judgment in favor of coverage for the insured. Thus, mistake as to consent where there is no specific subjective intent to injure, as is precisely the case here on all evidence of record, constitutes a covered occurrence, not barred by an intentional or expected act exclusion. Recently, a New Jersey Court, in *Shelby Casualty Ins. Co. v. H.T.,* 391 N.J.Super. 406, 416, 918 A.2d 659, 664, 2007 N.J.Super. LEXIS 86 (2007), cited *Barthelemy* with favor.

Service of Alcohol to a Minor Is Actionable Negligence

INSURANCE COMPANY asserts that there can be no claim of negligence asserted against Bob Jones for service of alcohol to a minor. However, contrary to INSURANCE COMPANY's position, N.J.S.A. § 2C:33-17, Availability of alcoholic beverages to underaged, provides that: "a. **Anyone** who purposely or knowingly offers or serves or makes available an alcoholic beverage to a person under the legal age for consuming alcoholic beverages or entices or encourages that person to drink an alcoholic beverage is a disorderly person." (emphasis added). Thus, the New Jersey legislature has set forth a duty barring "anyone" from offering, serving, enticing, encouraging or making

available alcohol to a person under the legal age. There is no exception that minors, such as Bob Jones, should be exempted from the legal duty set forth in N.J.S.A. § 2C:33-17. *accord State ex rel. D.J.F.*, 336 N.J. Super. 214 (App. Div. 2001). For this reason, VICTIM brought a claim of negligence against Bob Jones and others for negligent service of alcohol to her. Such negligence is not excluded in the INSURANCE COMPANY policy.

D. INSURANCE COMPANY SHOULD BE ESTOPPED FROM DENYING COVERAGE TO BOB JONES

Additionally, for the reasons outlined in the Defendant, LIQUOR STORE's Opposition to INSURANCE COMPANY's Motion for Summary, which Plaintiff VICTIM incorporates herein by reference, INSURANCE COMPANY should be estopped from denying coverage for defense and indemnification because it did not obtain a valid non-waiver agreement under New Jersey law.

E. ALTERNATIVELY, INSURANCE COMPANY'S POLICY EXCLUSION IS AMBIGUOUS AND MUST BE CONSTRUED IN FAVOR OF INSURANCE COVERAGE AND/OR INSURANCE COMPANY'S POLICY EXCLUSION IS INCONSISTENT WITH NEW JERSEY PRECEDENT AND MUST BE DECLARED VOID

If policy language is ambiguous**,** courts should construe the language to "comport with the reasonable expectation of the insured." *Villa v. Short*, 2008 N.J. LEXIS 604, *16 (N.J. June 5, 2008). If a policy language fairly supports two meanings, the policy should be construed to sustain coverage. *Id.* "Insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." *Villa v. Short*, 2008 N.J. LEXIS 604, *16 (N.J. June 5, 2008). As outlined in Exhibit "B", the

INSURANCE COMPANY policy does not define the terms/phrases “intentional or purposeful acts of an insured”; “that would reasonably be expected to result in bodily injury to any person”; or “intentional act.” *Id.* Thus, in the alternative, VICTIM submits that these policy terms are ambiguous such that they should be construed against the insurer and in favor of coverage to the insured. *See, e.g., Voorhees*, 128 N.J. at 173-74. Additionally, given that INSURANCE COMPANY has attempted to use its ambiguous policy language which is inconsistent with well established New Jersey Supreme Court precedent governing the application of intentional act exclusions, *see, e.g., SL Industries, Inc., Voorhees, & Cumberland Mutual Fire Ins. Co., supra,* such policy language should be stricken as illegal and declared void.

E. PLAINTIFF VICTIM SHOULD BE AWARDED COUNSEL FEES IN HER FAVOR PURSUANT TO R. 4:42-9(6)

Rule 4:42-9(a)(6) provides that fees for legal services are allowed "in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." See also Rule 2:11-4.

Should the Court find in favor of VICTIM, Plaintiff requests fees for legal services as she will have been a “successful claimant” in this action, an “action upon a liability . . . policy of insurance.” Plaintiff requests the opportunity to submit an appropriate accounting within 5 days of the Court’s decision in this matter.

WHEREFORE, VICTIM seeks that INSURANCE COMPANY's motion for summary judgment be denied and her affirmative motion for summary judgment in favor of coverage be granted and that attorney's fees be awarded pursuant to Rule 4:42-9(a)(6).

Respectfully submitted,

SOLOFF & ZERVANOS

Dated: _____

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Jeffrey P. Fritz, Esquire