

# **EXHIBIT A**

MONTVILLE TOWNSHIP BOARD OF  
EDUCATION,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE  
COMPANY,

Defendant.

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION:  
MORRIS COUNTY  
DOCKET NO. MOR-

CIVIL ACTION

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**BRIEF ON BEHALF OF PLAINTIFF, MONTVILLE TOWNSHIP BOARD OF  
EDUCATION, IN SUPPORT OF ORDER TO SHOW CAUSE SEEKING  
DECLARATORY RELIEF AGAINST DEFENDANT, ZURICH AMERICAN  
INSURANCE COMPANY**

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**PRELIMINARY STATEMENT**

The Montville Township Board of Education (“Board”) brings this Order to Show Cause seeking declaratory relief for defense and indemnification against Zurich American Insurance Company (“Zurich”). Zurich has failed and refused to provide defense and indemnification to the Board under the applicable insurance policies for claims against stemming directly from the bodily injuries of the minor Plaintiff, Child M, in a lawsuit entitled Child M, a minor by her g/a/l v. Jason Fennes, et al., Docket No. MID-L-6011-12 (“Child M. Lawsuit” or “Lawsuit”). As of this time, the Board has successfully obtained summary judgment on all counts of the underlying complaint by Child M and Cedar Hill Prep School, and Child M and Cedar Hill Prep School have appealed that determination. By failing to provide defense and indemnification to the Board, Zurich is violating the clear policy language and frustrating the reasonable expectations of the Board. As any insured, the Board reasonably expects Zurich to provide defense and indemnification for covered claims. Despite the Board’s requests, Zurich has refused to fulfill their obligations under the terms of the respective policies. The urgency of this application and the declaratory relief sought is necessitated by the appeal in the Child M. Lawsuit, the Board’s ongoing expense in having to defend these claims, and the failure of Zurich to honor the ruling of the Court in the Child M. Lawsuit.

At all times relevant, Zurich American Insurance Company (“Zurich”) insured the Board. In contravention of the clear policy terms, Zurich has independently denied both defense and indemnification to the Board for the claims and counterclaims against it set forth the Child M. Lawsuit. The predicate basis for the Child M. Lawsuit is the alleged bodily injuries of the Plaintiff, Child M. The exact nature of those bodily injuries is unknown at this time as no findings of fact have been made. The allegations against the Board, however, are the exact type

of claims contemplated by the terms of the Zurich Policy. The bodily injuries sustained by Child M. were allegedly committed by a former employee of the Board, Jason Fennes. For the reasons set forth at length below, the Court should issue an Order compelling Zurich to provide defense and indemnification to the Board which comply with both the plain language of the policy, interpretive case law, and the objectively reasonable expectations of the Board.

### **STATEMENT OF FACTS**

The Board relies on the facts set forth in the Certification of Stephen J. Edelstein (“Edelstein Cert.”), the documents annexed thereto, and the Verified Complaint seeking declaratory relief as if set forth at length herein.

Zurich insured the Board under a Commercial General Liability Policy (“CGL Policy”) that was at all times relevant in full force and effect. See Edelstein Cert. at Exhibit A. The Board seeks coverage under the CGL Policy for defense and indemnification for the claims in the Child M Lawsuit.

The Third Amended Complaint was filed on or about January 23, 2015 by Plaintiffs, Child M, a minor, and her parents, against Defendants, Jason Fennes (“Fennes”), Cedar Hill Prep School (“Cedar Hill”) and the Board (improperly pled as William Mason Elementary School, Montville Township Public Schools and Montville Board of Education). It contains all of the claims and counterclaims presently permitted by the Middlesex County Superior Court. See Edelstein Cert. at Exhibit B. Cedar Hill Prep School v. Montville Township Public Schools and Montville Board of Education, Docket No. MID-L-4842-14, was dismissed by the Middlesex County Superior Court and the claims contained therein are now incorporated within the Child M Lawsuit. The Child M Lawsuit arises out of alleged bodily injuries suffered by Child M. as a

result of sexual abuse and improper conduct by the Board's former employee, Jason Fennes. At the time of the alleged bodily injuries, Cedar Hill Prep employed Fennes.

The allegations against the Board consist of four (4) separate counts contained in the Third-Amended Complaint. Cedar Hill cross-claims against the Board under the same causes of action. In the Ninth Count, the Plaintiffs allege that the Board negligently, carelessly, recklessly and/or intentionally failed to report inappropriate conduct by Fennes in violation of N.J.S.A. 9:6-8.14. As a result, Child M sustained bodily injuries. See, Third Amended Complaint, Ninth Count at ¶¶2-5. The Tenth Count alleges that during Fennes' employment with the Board, Fennes engaged in various acts of sexual molestation and/or child abuse against other infant students and the Board failed to report same and purposefully concealed same from future employers. As a result, Child M sustained bodily injuries. See Third Amended Complaint, Tenth Count at ¶¶3-6. The Eleventh Count alleges the Board's negligence, carelessness, recklessness and/or intentional conduct including the failure to provide "pertinent and highly relevant information to potential future employers [of Fennes]", caused Child M to suffer bodily injury. See Third Amended Complaint, Eleventh Count at ¶¶3-6. The Twelfth Count alleges Plaintiff parents R.M. and Z.P. have lost the services and society of their daughter, Child M as a result of the Board's alleged negligence. See Third Amended Complaint, Twelfth Count at ¶¶2-3.

The Third-Amended Complaint makes clear that Child M.'s alleged claims resulted in bodily injury. Additionally, the specific claims against the Board do not sound in abuse, sexual assault or improper conduct. Rather, the claims against the Board sound in negligence, carelessness, intentional and/or negligent infliction of emotional distress and failure to report suspected abuse which in turn caused the alleged bodily injuries suffered by Child M. The

allegations against the Board center around Fennes' former employment with the Board and not the discrete acts of abuse while Fennes was a teacher at Cedar Hill. There is no allegation that Plaintiffs were injured during a time when the Board could have exercised control over any of the parties. Nevertheless, the bodily injury component of Child M.'s claims remain.

### **The Zurich Policy**

Of relevance is Zurich Policy No. CPO 3701598-07, which provides broad Commercial General Liability Coverage. (See Edelstein Cert. at Exhibit A for the full policy):

#### **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.

The Zurich Policy, defines "bodily injury" to include "mental anguish, mental injury, shock, fright or death resulting from bodily injury, sickness or disease."

Despite the coverage afforded to the Board under the Zurich Policy, Zurich refuses to provide either defense or indemnification to the Board. By letters dated May 31, 2016 to James Tevis, Business Administrator/Board Secretary of the Board, Zurich denied any obligation to defend or indemnify Montville in relation to the Child M. Lawsuit. See Edelstein Cert. at Exhibit C, May 31, 2016 letter.

Zurich correctly points out that its policy requires “bodily injury” caused by an “occurrence.” The Board does not dispute this. The allegations in the Third-Amended Complaint distinguish, however, between the acts of the Board that led to the bodily injury and those of Fennes’. The alleged acts of the Board do not relate to sexual abuse. Rather, it was the separate, intervening alleged sexually abusive acts of Fennes, that are sexual in nature. Despite the above, Child M.’s alleged bodily injuries occurred in or around February 2012 and the CGL policy encompassed coverage for the period running from July 1, 2011 to July 1, 2012. Nevertheless, Zurich disclaims and/or reserved its right to disclaim coverage on the basis of its policy exclusion for “bodily injury” expected or intended from the standpoint of the Board. See Edelstein Cert. at Exhibit C, pp. 10-12 (IV. Disclaimer and Reservation of Rights as to the ZAIC and AGLIC Policies).

Zurich maintains that the “Abusive Act Exclusion” contained in the Policy bars coverage to the Board for the acts of Jason Fennes.

In its letter, Zurich provides:

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.’ . . . Fennes’ alleged sexual acts against Child M clearly constitute ‘abusive acts’ as defined in this exclusion . . . Zurich disclaims any obligation to defend or indemnify Montville under the CGL Coverage of the AGLIC Policies pursuant to the Abusive Act Exclusion.

See Edelstein Cert. at Exhibit C, p. 11.

Zurich also disclaims coverage under the Abusive Act Coverage and Alleged Participant Coverage provisions of the Policy, arguing that the injury and abusive act did not occur in the same policy year, the Board had prior knowledge of abusive acts, there were prior claims or litigations involving abusive acts, and the Board is not an employee or volunteer. See Edelstein Cert. at Exhibit C, pp. 12-14 (IV. Disclaimer and Reservation of Rights).

By letter dated March 6, 2015, Zurich reiterated its previously stated position that “it has no duty to defend [the Board] in connection with [the Lawsuit] as New Jersey law establishes that while a liability insurer has a contractual obligation to provide a defense against all actions covered by the insurance policy, that obligation does not extend to claims which would be beyond the covenant to pay if the claimant prevailed.” Zurich argues that if it is proven that the Board had knowledge of Fennes’ prior abusive acts, then the exclusion in the abusive acts liability applies. See Edelstein Cert. at Exhibit D, Zurich letter dated March 6, 2015. However, the coverage sought for the claims by Child M. against the Board do not arise out of Fennes’ abusive act. Instead, coverage should lie for the separate and distinct acts of the Board as they relate to the Zurich Policy and as alleged in the Third-Amended Complaint.

## LEGAL ARGUMENT

### POINT I

#### **THE COURT SHOULD GRANT THE BOARD’S APPLICATION FOR AN ORDER TO SHOW CAUSE FOR IMMEDIATE DECLARATORY RELIEF AGAINST ZURICH.**

In the instant case, the Board seeks declaratory relief based upon the status of the Child M. Lawsuit. In the Child M. Lawsuit, on September 18, 2015, the Board successfully obtained summary judgment on all counts of the underlying complaint by Child M and Cedar Hill Prep School. The Honorable Joseph L. Rea, J.S.C. determined that the allegations against the Board were based on the Board’s alleged failure to provide notice to DYFS and/or the Board’s acts or omissions as they related to Cedar Hill Prep School’s employment of Fennes. Not only does The Honorable Joseph L. Rea’s decision establish the basis for coverage in this case, it is the same analysis presented by the Board to Zurich while seeking coverage throughout the Child M.



Lawsuit. The Board continues to incur additional and substantial legal fees for claims that should be covered by Zurich. The Board has been forced to proceed with the defense of the underlying claims in spite of having the benefit of coverage through the Zurich insurance policy. At the time it procured the Policy of insurance from Zurich, the Board was under the objectively reasonable expectation that defense and indemnification would be available in the event of a claim. Consequently, the order seeking declaratory relief is necessary at this time to prevent further degradation of the Board's coffers and prejudice to its contractual rights under the terms of the Zurich Policy.

## POINT II

### **THE COURT SHOULD GRANT DECLARATORY RELIEF TO THE BOARD AS ZURICH 'S OBLIGATION UNDER THE TERMS OF ITS POLICY IS WELL DEFINED.**

The Declaratory Judgment Act authorizes courts to declare the rights, obligations, and other legal relations of parties to litigation so as to afford relief from uncertainty and insecurity.

See Chamber of Commerce v. State, 89 N.J. 131, 140 (1982). The Act specifically provides:

A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

N.J.S.A. 2A:16-53. All divisions of the Superior Court have jurisdiction to grant declaratory relief. Nat'l-Ben Franklin Fire Ins. Co. v. Camden Trust Co., 21 N.J. 16, 22 (1956). Moreover, the "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Condenser Serv. & Eng'g Co. v. Am. Mut. Liab. Ins. Co., 45 N.J.

Super. 31, 38 (App. Div. 1957). Courts assess the appropriateness of declaratory relief by employing the following criterion: “Do the facts alleged, under all the circumstances, show that there is a substantial controversy between parties who have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment?” Id. at 39 (citations omitted).

It is well settled as a matter of law that “[n]o more fertile ground exists for the use of the declaratory judgment procedure than in the field of insurance.” Id. at 38. On countless occasions, New Jersey courts have utilized declaratory judgment to settle questions of coverage and “quiet uncertain jural relations” between insureds and insurers. Id. at 40. Here, there is a substantial controversy between the parties as the Board has been denied coverage for defense costs. In the present case, the Court will be called upon solely to read and interpret provisions of the Zurich insurance contract and declare the parties’ rights and obligations with respect thereto. Given the fact that the Board continues to incur costs and expenses,, the issuance of a declaratory judgment is warranted.

### POINT III

#### ZURICH IS REQUIRED TO PROVIDE DEFENSE AND INDEMNIFICATION COVERAGE TO THE BOARD.

The interpretation of an insurance contract presents a question of law. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div.), cert. denied, 196 N.J. 601 (2008). Under well-settled principles of insurance contract interpretation, the words of a policy are given “their plain, ordinary meaning.” Passaic Valley Sewerage Comm’rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 607-08 (2011). If the policy terms are clear, the court will enforce the terms of the policy “as written and avoid writing a better policy than the one purchased.” Id. at 608.

Insurance policies are interpreted according to their plain and ordinary meaning. Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990). In most instances, "policies should be construed liberally in . . . favor [of the insured] to the end that coverage is afforded `to the full extent that any fair interpretation will allow.'" Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961). In construing an insurance policy it must be kept in mind that presumably it is the intention of the insurer to have the insured understand that, in the event of loss, he will be protected to the full extent that any fair interpretation will allow. Danek v. Hommer, 28 N.J. Super. 68, 76 (App. Div. 1953).

**A. The Court Should Construe the Zurich Policy in Accordance with the Board's Objectively Reasonable Expectations.**

The New Jersey Supreme Court has stated that "[w]hen members of the public purchase policies of insurance, they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They 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.'" Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961); see also President v. Jenkins, 180 N.J. 550, 563 (2004). The doctrine has been applied to all forms of insurance contracts. See, e.g., Zacarias, 168 N.J. at 601-03 (discussing reasonable expectations under boat owner's insurance policy); Doto, 140 N.J. at 556-59 (addressing insured's reasonable expectations under 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).

If 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**. Flomerfelt v.

Cardiello, 202 N.J. 432, 441 (2010) (emphasis added) (citing Doto v. Russo, 140 N.J. 544 (1995); Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992)). For that reason, if the policy language, “fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage.” President v. Jenkins, 180 N.J. 550, 563 (2004). A genuine ambiguity arises only where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage. Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001).

[U]nder the typical liability policy, the duty of an insurer to defend is broader than its obligation to indemnify. The insurer's obligation to defend is triggered by a complaint against the insured alleging a cause of action which may potentially come within the coverage of the policy, irrespective of whether it ultimately does come within the coverage and hence irrespective of whether the insurer is ultimately obliged to pay.

Hartford Insurance Group v. Marson Construction Corp., 186 N.J. Super. 253, 257 (App. Div. 1982), certif. denied, 93 N.J. 247 (1983).

**B. Zurich Has a Duty to Defend in Accordance With the Board's Reasonable Expectations.**

There is a duty to defend a claim unless excluded under the policy. Horesh v. State Farm Fire & Casualty Co., 265 N.J. Super. 32, 39 (App. Div. 1993); see also Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992). However, the insurer bears the burden “to bring the case within the exclusion.” Performance Ins. Co. v. Jones, 185 N.J. 415 (2005). Exclusionary clauses are presumptively valid and are enforced if they are “specific, plain, clear, prominent and not contrary to public policy.” Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (quoting Princeton Inc. Co. v. Chunmaung, 151 N.J. 80, 95 (1997)). The question of whether an insurance policy is ambiguous is not resolved by focusing on the language contained in one section of the contract. See Werner Industries, Inc. v. First State Ins. Co., 112 N.J. 30, 37 (1988). Rather, the section in

contention must be read in the context of the entire policy in order to determine whether “harmony can be found between the alleged ambiguous language and the remainder of the policy.” Zacarias v. Allstate Ins. Co., 168 N.J. 590, 603 (2001). Proper interpretation and construction is not restricted to one sentence in a single section “to the exclusion of the balance of the contract.” Id. “Such an interpretation is distorted and legally inappropriate.” Id.

In Abouzaid v. Mansard Gardens Assocs., LLC, 207 N.J. 67, 70 (2011), the New Jersey Supreme Court held that an insurance company’s duty to defend under a “bodily injury” provision of a commercial general liability insurance policy existed on a negligent infliction of emotional distress claim. The Court summarizes the broad duty of an insurer to defend an action.

**An insurer is contractually obliged to provide the insured with a defense against all actions covered by the insurance policy....**The duty to defend is triggered by the filing of a complaint alleging a covered claim. Consequently, when the complaint raises allegations that fall within a risk covered by the insurance contract, the insurer has a duty to defend.

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...** Thus, if "the complaint comprehends an injury which *may* be within the policy," a duty to defend will be found....In other words, "potentially coverable" claims require a defense.

Abouzaid v. Mansard Gardens Assocs., LLC, 207 N.J. 67, 79-80 (2011) (emphasis added) (internal citations omitted).

The Court also highlighted that the potential merit of the claim is immaterial to the duty to defend. Id. at 70. The Abouzaid relevant policy language was identical to that of Zurich’s bodily injury coverage language here. See id. at 71. Since the claim “could” involve “physical sequelae,” it was potentially covered under the bodily injury provision. The Court held that the

insurer was required to defend the claim “which did not allege physical injury, at least until physical manifestation was disproved or otherwise dropped out of the case.” *Id.* at 70. Here, a bodily injury (an alleged molestation by Fennes) is claimed by Child M. However, even without the allegation of molestation, an additional bodily injury could be claimed as part of the negligent infliction of emotional distress allegations against the Board. Therefore, Zurich has a duty to defend, regardless of whether Zurich is held ultimately liable for a potential resulting judgment.

The Abouzaid court explained while courts generally look to the complaint, the analysis is not necessarily limited to the facts asserted in the complaint. *Id.* at 81 citing *Voorhees supra* at 174-75, *SL Indus. v. Am. Motorists Ins. Co.*, 128 N.J. 188, 198-99 (1992); *Jolley v. Marquess*, 393 N.J. Super. 255, 271-72 (App.Div.2007). The insurers’ duty could be triggered by “facts indicating potential coverage that arise during the resolution of the underlying dispute.” *SL Indus. supra*, at 198. 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.* at 198-99, 607 A.2d 1266; *Abouzaid supra* at 81 (2011).

In the Third Amended Complaint, Plaintiff, Child M, alleges conduct actionable against the Board under tort law. Child M. alleges that the Board’s failure to report abusive and/or sexual conduct by Jason Fennes and alleged misrepresentations to Cedar Hill Prep led to the bodily injuries suffered by Child M. The Third Amended Complaint does not allege that Child M. suffered sexual abuse at the hands of the Board or its employees however. The distinct and separate conduct of Fennes is alleged to have been sexual in nature. Zurich attempts to foist Fennes’ upon the Board so that they may disclaim coverage. This is incorrect. In fact, the Board

successfully obtained summary judgment on all counts of the underlying complaint by Child M and Cedar Hill Prep School on September 18, 2015. So while the Child M. and the Board have appealed the Court's September 18, 2015 decision, even if the Board were found to be liable for the allegations in the Third Amended Complaint, its conduct would never center around sexual abuse. Child M.'s alleges bodily injury as a result of Board conduct separate and distinct of that of Fennes. As such, the Board is justified in reasonably expecting that its alleged non-abusive acts that led to bodily injury should be covered under the terms of both policies.

In sum, the Board reasonably expects Zurich to provide defense and indemnification for Child M.'s alleged bodily injuries. As defined in the Policy, "bodily injury" means bodily injury and includes mental anguish and mental injury. Child M and her parents claims are for such bodily injury.

**C. Zurich Must Provide Coverage and Defend the Board as the Expected or Intended Exclusion Does Not Apply**

Zurich is wrong to disclaim on the basis that the Board's actions were intentional and/or not accidental, and to the extent that the Board expected or intended any injury. The Expected or Intended Exclusion applied to intentional or intended acts relates to "bodily injury" that were expected or intended from the standpoint of the insured. The allegations against the Board are that it failed to execute a certain duty of care. While it may be argued that the Board was careless or negligent, or even that it acted intentional with respect to how it handled Fennes as its employee, there can be no presumption that the Board expected or intended Child M to be injured at the hands of Fennes while they were at Cedar Hill Prep School. It is absurd to presume that when the Board was employing Fennes it had knowledge that he would become an employee of Cedar Hill Prep, become a teacher of Child M, and sexually abuse her. Although

Fennes may have expected or intended the injury, such expectation or intention cannot be projected upon Montville.

It is not the intent to commit the act that caused the injury, rather the emphasis is on the insured's intent to commit the injury. Coverage will not be provided for intended results but will be provided for the unintended and unforeseen results of an intentional act. SL Industries, Inc. v. American Motorists Ins. Co., 128 N.J. 188, 207 (1992) (citations omitted). Applied to this case, although allegations of failure to report and failure to notify prospective employers of Fennes may be deemed intentional, the resultant injuries were neither intended nor expected.

**D. Zurich Must Provide Coverage and Defend the Board As the Abusive Act Exclusion Does Not Apply**

Coverage attaches under the CGL Coverage of the Zurich Policies, particularly the ZAIC policy covering July 1, 2011 to July 1, 2012, as the injury is alleged to have occurred in or about February 2012, when Child M was allegedly molested by Fennes. The Third Amended Complaint alleges that the Board either intentionally, negligently or recklessly misrepresented facts to Cedar Hill. The "Abusive Act Exclusion" should not bar coverage to the Board. The Abusive Act Exclusion precludes coverage for "bodily injury arising out of or relating in any way to an 'abusive act' . . .". Zurich concedes that the abusive act was perpetrated by Fennes and disclaimed based on that. However, neither the Board or any agents, employees or other representatives are alleged to have committed an abusive act. Therefore the Abusive Act exclusion does not apply. These alleged misrepresentations do not constitute abusive sexual acts to which the exclusion would apply. The alleged abusive sexual acts by Fennes against Child M stand separate and apart from any conduct, or lack of conduct, by the Board. Therefore, on its face the abusive act liability exclusion does not apply.



In fact, Zurich confirms that the Board did not commit an abusive act by its denial of coverage under the Abusive Act Coverage. That coverage provides that Zurich will pay loss because of injury resulting from an abusive act to which this insurance applies. Zurich's denial of coverage under this provision supports the Board's argument that no abusive act was alleged to have been committed by the Board.

**E. The Fact That The Additional Zurich Abusive Act Coverage May Not Apply is Irrelevant**

Zurich also disclaimed coverage 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. 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.

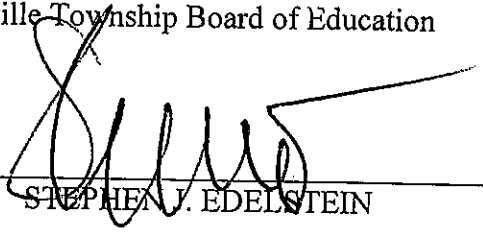
For these reasons the blanket exclusion for sexual abuse does not apply. While not every claim may be covered, there are claims such as emotional distress, which if proven, would be a covered claim under the Zurich policy.

**CONCLUSION**

For the reasons set forth above, the Court should grant the Montville Township Board of Education's application for an order to show cause seeking declaratory relief against Defendant Zurich. The Court should order Zurich to provide defense and indemnity to the Board for the claims alleged by Child M and Cedar Hill Prep, including reimbursement of past defense costs and attorneys' fees. This is the only result that will fulfill the objectively reasonable expectations of the Board.

Respectfully submitted,  
SCHWARTZ SIMON  
EDELSTEIN & CELSO LLC  
Attorneys for Plaintiff,  
Montville Township Board of Education

By: \_\_\_\_\_

  
STEPHEN J. EDELSTEIN

Dated: 6/21/16





2. Defendant Zurich American Insurance Company, is an insurance company located at One Liberty Plaza, 165 Broadway, 32<sup>nd</sup> 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.<sup>1</sup>

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.

#### **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,

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<sup>1</sup> All references are to documents attached to the Certification of Stephen J. Edelstein, Esquire submitted herewith.

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, R.M. 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 1 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 Plaintiffs 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: 

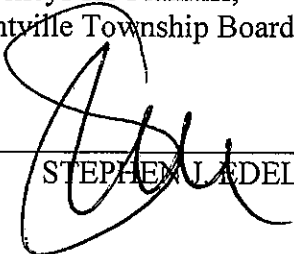
STEPHEN J. EDELSTEIN

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:  \_\_\_\_\_  
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, MorrisCounty, 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:   
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 1:38-7(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:   
STEPHEN A. EDELSTEIN

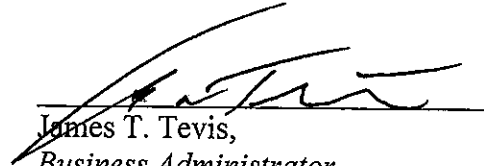
Dated: June 21, 2016

**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.

  
James T. Tevis,  
*Business Administrator*  
*Montville Township Board of Education*

Dated: 6/21/16