

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2007-P-1510

STEVEN HEALY and CARLA HEALY,
Plaintiff/Appellants,

v.

ESSEX INSURANCE COMPANY,
Defendant/Appellee.

BRIEF OF PLAINTIFFS/APPELLANTS

ON APPEAL FROM A DECISION OF THE SUPERIOR COURT

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the allegations in the complaint of Mr. Daysh against the Appellants, Steven and Carla Healy (the "Healys"), and the facts known to Appellee, Essex Insurance Co. ("Essex"), permit the possibility that the Healys were acting on behalf of their company, Healy Transportation, when they allegedly defamed Mr. Daysh, so as to trigger Essex's duty to defend.

2. Whether, as a basis to deny a defense, Essex may rely on application of the narrow "knowing violation" exclusion in the Essex policy.

II. STATEMENT OF THE CASE

The Healys filed their Complaint against Essex in the Hampshire County Superior Court, seeking an order that Essex owed the Healys a defense to the complaint filed against them by Robert Daysh. (Appendix, hereafter referred to in the form "App. __," at 7).

After Essex answered, the Healys filed their Motion for Judgment on the Pleadings. (App. 97). Essex opposed the motion and responded with its Cross-Motion for Summary Judgment. (App. 109). Argument was heard on the motions by the court, Rup, J., on December 11, 2006. (App. 4). Judge Rup entered judgment in Essex's favor by her memorandum of decision of August 8, 2007. (Addendum p. 1).

The Healys filed their Notice of Appeal on August 27, 2007. (App. 159).

III. STATEMENT OF FACTS

The Healys are husband and wife, and residents of Worthington, Hampshire County, Massachusetts. They are principals of a local school bus company, Healy Transportation, Inc., which has its principal office in Worthington, Hampshire County, Massachusetts.

(App. 8, 71).

Defendant Essex is an insurance company with its main offices in Glen Allen, Virginia. Essex does business in Hampshire County, Massachusetts. (App. 8).

The Essex policy issued to Healy Transportation was a commercial general liability policy effective January 12, 2005 to January 12, 2006, no. 2CG1920 ("Policy"). (App. 8, 11).

Under the Policy's "Coverage B," for "Personal and Advertising Injury Liability," Essex agreed to pay "those sums the insured becomes legally obligated to pay as damages because of 'personal and advertising injury'" which is defined to include injuries arising out of "[o]ral or written publication, in any manner, of material that slanders or libels a person..." (App. 34, 42).

The named insured on the Policy's declarations page is Healy Transportation, Inc. (App. 11). As principals and employees of the company, the Healys are each insureds under the policy, provided that, in the event of a claim against them, their alleged conduct was within the scope of employment, or occurred while performing duties related to the conduct of the business:

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:

d. an organization other than a partnership, joint venture or limited liability company, you are an insured. Your 'executive officers' and directors are insureds, but only with respect to the duties as your officers and directors....

2. Each of the following is also an insured:

a. your...employees, other than either your executive officers (if you are an organization other than a partnership, joint venture or limited liability company)..., but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business....

(App. 37).

Suit was filed against the Healys by Robert Daysh.

(App. 69). Mr. Daysh's introduction to his allegations against the Healys and the Town of Westhampton is, in part, as follows:

This case is a wrongful termination of employment in violation of public policy claim alleging that the Defendant, Town of Westhampton wrongfully terminated the Plaintiff's employment as a Westhampton Police Officer in violation of the Open Meeting Law and in retaliation for the issuance of a speeding citation to Carla Healy on or about October 15, 2004. The Defendant [sic] also asserts common law tort claims and statutory claims related to this wrongful termination.

(App. 69).

As for the traffic stop, Mr. Daysh alleges, in relevant part:

11. On or about October 15, 2004, Officer Daysh was on duty in Westhampton, Massachusetts. In the course of his duties that date Officer Daysh issued a citation for speeding (52 in a 35 zone) to the operator of a motor vehicle who he identified as Carla Healy.

12. A passenger in the motor vehicle that day was Steven Healy. The ownership of the vehicle that the Defendant Carla Healy was driving was listed as Healy Transportation a local school bus provider.

13. Upon reason and belief Healy Transportation is owned, at least in part, by the Defendant, Steven Healy who is married to the Defendant, Carla Healy.

14. Upon reason and belief the Defendant Carla Healy is related by blood or marriage to Karl Norris who is chairman of Board of Selectman [sic] for the Defendant, Town of Westhampton, Massachusetts.

15. The Defendant Carla Healy appealed the citation.

(App. 70-71).

Mr. Daysh alleges that, at the hearing on the citation, Steven Healy told Mr. Daysh "he would pay for this." (App. 71). Mr. Daysh alleges that he later learned that he might be terminated because of the "Healy thing." (App. 71). Mr. Daysh further alleges:

19. On March 11, 2005, an employee of Healy Transportation and a friend of Officer Daysh, Lori Lannon approached the Defendant Steven Healy at Healy Transportation's offices to speak on behalf of Officer Daysh. She was informed by the Defendant Steven Healy that, "not only will he [Officer Daysh] not get the Chief's position, but he isn't even going to be re-appointed as a police officer."...

20. During April, 2005, Officer Daysh's girlfriend, Kendra Johnson, who is employed as a bus driver for Healy Transportation was approached and informed by Steven Healy that "it was her job to see that the ticket got fixed." The Defendant Carla Healy was present.

(App. 71-72).

Mr. Daysh alleges he was not re-appointed as a police officer by the Town of Westhampton. (App. 72).

Among Mr. Daysh's claims against the Healys is a separate count for defamation. Mr. Daysh alleges:

42. The Defendants, joint [sic] and severally, have defamed the Plaintiff by its termination of the Plaintiff without providing a reason or hearing and/or by its lies whereby exposing the Plaintiff to public hatred, ridicule and/or contempt by its adverse employment action against the Plaintiff.

(App. 74).

The Healys promptly notified Essex of the Daysh Complaint, and requested coverage and a defense. (App. 9). Essex denied coverage for the reasons given in its counsel's correspondence to the Healys. (App. 9, 78).

The Healys, through counsel, responded to Essex's position, describing the basis for defense and coverage. (App. 9, 86). The Healys' counsel described efforts to obtain a more definite statement of the defamation claim in the underlying Daysh litigation:

In a motion for a more definite statement of this claim, the Healys pointed out that Daysh had not set forth any defamatory statements. Paragraph nos. 17, 19 and 20 refer to statements by Mr. Healy, but none are defamatory. Carla Healy, for her part, is not alleged to have made any statements. At argument on the motion, Judge Carhart accepted Daysh's position that, under the circumstances alleged generally in the Complaint, Daysh had reason to believe that one of the Healys said something that led the Town of Westhampton to not renew Daysh as a police officer. This is perhaps a fair reading of the Complaint. Our motion was denied and the defamation claim, vague as it is, remains pending.¹

¹The Healys take the position that this and the other information in its counsel's letter was information known to Essex, which it could consider and should have considered, in evaluating whether to tender a defense to the Healys. The scope of an insurer's duty to defend is based on "the facts alleged in the complaint and those facts which are known to the

(App. 86-87).

On the scope of employment issue, the Healys' counsel described to Essex an incident which was not alleged by Mr. Daysh, but which had caused tension between Healy Transportation and Mr. Daysh:

In fact, Healy Transportation had an issue with Daysh which had little to do with the traffic stop featured in the Complaint. One day, Daysh turned on his police cruiser's siren and pulled over a Healy Transportation Bus driven by his girlfriend to give her lunch. This was witnessed and reported back to Healy Transportation. It follows that any communication from the Healys to the Town of Westhampton, on the subject of Daysh, most likely would have been on Healy Transportation's behalf.

(App. 87).

Essex denied a defense by letter of its counsel dated August 9, 2006 and the Healys' suit followed.

(App. 78).

Essex has identified two grounds to deny coverage: (1) that Steven and Carla Healy's conduct was not within the scope of their employment by Healy Transportation; and (2) under an exclusion applicable where the injury was "caused by or at the direction of the insured with the knowledge that the act would

insurer." Herbert A. Sullivan Inc. v. Utica Mutual Insurance Company, 439 Mass. 387, 394 (2003), quoting Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., Inc., 406 Mass. 7, 11 (1989).

violate the rights of another and would inflict 'personal and advertising injury.'" (App. 84).

The trial court found in favor of Essex on the scope of employment issue. (Addendum at 7-8). The trial court concluded that Carla Healy had not met her burden of showing that "as an employee, her alleged conduct in defaming Daysh and affecting his termination as a police officer was motivated, at least in part, by a desire to serve Healy Transportation." (Addendum at 8).

IV. STANDARD OF REVIEW

The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to judgment as a matter of law.

McGregor v. All America Insurance Co., 449 Mass. 400, 402 (2007); see also, Herbert A. Sullivan Inc. v. Utica Mutual Insurance Company, 439 Mass. 387, 393 (2003).

"The critical issue is whether the summary judgment record alleges 'a liability arising on the face of the complaint and policy.'" Herbert A. Sullivan, 439 Mass. at 394, quoting Sterilite Corp. v. Continental Casualty Co., 17 Mass. App. Ct. 316, 324 (1983).

V. ARGUMENT

Neither ground asserted by Essex justifies a refusal to defend. The trial court seems to have unfairly taken the Healys to task for the vagueness of Mr. Daysh's allegations, concluding that the Carla Healy had not met her "burden" of demonstrating that the defamatory conduct was within the scope of employment. To the contrary, the burden on the Healys is fairly light: that the facts alleged or known to Essex permit a possibility that the Healys' alleged defamation is covered.

This boils down to whether there is a possibility that the Healys (allegedly) defamed Mr. Daysh on behalf of their school bus company, Healy Transportation. Based on the summary judgment record - which must, in any event, be read in the light most favorable to the Healys - this low threshold is easily met.

The "knowing violation" exclusion has been rejected as a basis to refuse a defense, except in three cases: unlawful sexual behavior toward a minor; setting fire to a building; and pushing a person down the stairs. The exception does not apply here.

A. The Duty to Defend

The mandated process for determining a duty to defend is "envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy." BSO v. Commercial Union Ins. Co., 406 Mass. 7, 13 (1989). Mr. Daysh's supposition - that something must have been said - is now the alleged basis for the defamation claim.

"[T]he underlying complaint need only show, through general allegations, a possibility that the liability claim falls within insurance coverage." Herbert A. Sullivan, supra, 439 Mass. at 394, quoting Sterilite Corp. v. Continental Casualty Co., 17 Mass. App. Ct. 316, 319 (1983).

If the complaint shows a claim within the policy's coverage, the insurer must defend. An insurer can

get clear of the duty from and after the time when it demonstrates with conclusive effect on the third party that as matter of fact - as distinguished from the appearances of the complaint and policy - the third party cannot establish a claim within the insurance.

Sterilite, 17 Mass. App. Ct. at 323. The options for such a conclusive determination are very limited: (1) in the third party action if the insurer has been impleaded, or (2) in a separate declaratory action, where there is a judicial decision that no possibility of coverage for the third-party claim exists. Id.

What is not permitted is that an insurer shall escape its duty to defend the insured against a liability arising on the face of the complaint and policy, by dint of its own assertion that there is no coverage in fact: the insurer then stands in breach of its duty even if the third party fails in the end to support any such claim of liability by adequate proof.

17 Mass. App. Ct. at 324. Here, since Mr. Daysh's allegations of defamation fall within coverage, Essex cannot deny coverage based on a disputed fact as to scope of employment. It must defend the Healys until it can obtain a "conclusive" determination on the fact issue - which, the Healys submit, Essex has not done.

The vagueness of the allegations and the indeterminacy of the facts are reasons to provide a defense, not deny a defense. A leading insurance treatise puts it this way:

[I]n a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. [footnote omitted]. Alternatively, where it is apparent from the pleading that

there is a reasonable possibility that plaintiff may be able, under the allegations of the complaint, to prove that his or her injuries were caused by some act or omission covered by the terms of the insurance policy, the insurer is required to defend.[footnote omitted].

14 Couch on Insurance Third, §200:25, "Ambiguous Pleadings," at 200-81-82 (3d Ed. 2000); see also, 1 Windt, Insurance Claims and Disputes, §4.02, at p. 162 (3d Ed. 1995)(if allegations are "unclear or ambiguous and may be reasonably interpreted to include coverage, there is a duty to defend"); Saragon v. Bousquet, 322 Mass. 14, 18 (1947)(insurer erred in denying defense based on assumption that the underlying allegations precluded plaintiff's status as an invitee, as opposed to a guest).

Under these standards, Essex must tender a defense if there is even a possibility that the Healys allegedly defamed Mr. Daysh on behalf of their company, Healy Transportation. Essex's obligation to defend continues unless and until it conclusively establishes that there is no such possibility.

In addition, the vagueness of Mr. Daysh's defamation allegations requires unavoidable speculation about what, exactly, the Healys (or one of them) are supposed to have said to the Town about Mr. Daysh, and

the circumstances of their saying it. Consequently, the facts which determine coverage may be reached only indirectly, through inference, using those facts which were known to Essex or which Mr. Daysh does allege. Against this background, Essex must conclusively exclude any reasonable inference of a possibility that the Healys were acting on behalf of their company.

As explained below, Essex fails to meet these requirements and must tender a defense to the Healys.

B. The Record Permits the Possibility That the Alleged Defamation was on Behalf of Healy Transportation

Since the alleged traffic stop involved two Healy Transportation employees, in a Healy Transportation vehicle, while on Healy Transportation business (App. 70-71), any contact with the Town by the Healys on the subject of the stop would presumably have been in the same capacity.

Analysis of the nature of conduct for purposes of insurance coverage depends on the language of the policy. See, Metropolitan Property & Casualty Ins. Co. v. Fitchburg Mutual Ins. Co., 58 Mass. App. Ct. 818, 820 (2003)(construing business activities exclusion in homeowners policy). Here, as Healy Transportation employees, the Healys are "insureds"

under the Essex policy if the alleged "acts are within the scope of their employment by [Healy Transportation] or while performing duties related to the conduct of [Healy Transportation] business." (App. 37).

By this language, the record need only show a possibility that the Healys' alleged complaints to the Town of Westhampton about Mr. Daysh were within their scope of employment with Healy Transportation, or occurred while the Healys were performing duties "related to" the conduct of their business.

Conduct of an agent is within the scope of employment if (1) it is of the kind he is employed to perform; (2) if it occurs substantially within authorized time and space limits; and (3) if it is motivated at least in part by a motive to serve the employer. Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854, 859 (1986).

As discussed in more detail below, these elements are met here for Steven and Carla Healy as principals of Healy Transportation. Both of the Healys would be obligated to notify Town authorities of perceived misconduct of an officer which they believed interfered with Healy Transportation business. The

time and place of the alleged defamation is unknown, but there is no reason, from Mr. Daysh's allegations, to assume it occurred outside of business hours. Since Steven Healy did not receive the citation, but is alleged to own Healy Transportation and to have defamed Mr. Daysh, his motivation would clearly not be personal, but rather to advance his company's interests, at least in part.

On the issue of scope of employment for purposes of whether the insurer owes a defense, Timpson v. Transamerica Ins. Co., 41 Mass. App. Ct. 344 (1996), presents a useful contrast to the Healys' case. The allegations in Timpson were quite specific. Sportswriter Lisa Olson, suing for sexual harassment, civil rights violations, and intentional infliction of emotional distress, among other claims, alleged

...she conducted an interview in the Patriots locker room with Patriots' player Maurice Hurst. During the interview, another player, Zeke Mowatt, while naked, stood close to Olson and proceeded to make crude remarks and gestures toward her. Timpson allegedly "laughed and shouted encouragement" to Mowatt.

41 Mass. App. Ct. at 345. Olson also alleged that Timpson had signed a contract with the Patriots requiring him to cooperate with the media as part of his employment. Id. at 349.

This Court had little trouble concluding that the allegations could not be read to show Timpson acting in the scope of his employment for the Patriots. Id. at 349-50. In particular, the Court rejected his argument that his shouted encouragement to teammates, who were allegedly harassing Olson, promoted team unity. Id. at 349. The allegation of his contractual obligations to the media undercut the first Wang element. Id. The conduct alleged served "purely personal motives" beyond the scope of employment. Id. at 349-50.

The Wang elements are all met here. As for the first element, the question is, whose interest was served by a complaint to the Town about Officer Daysh? A reasonable answer: Healy Transportation. As the principals of the company, the Healys were obligated to advance the interests of Healy Transportation.

Their alleged complaints to the Town would have been advocacy on behalf of Healy Transportation, because the company operated a fleet of school buses in the Town, and, consequently, would have a strong business interest in making the Town aware of what were felt to be any improprieties by its police officers, as related to Healy Transportation vehicles. Such

complaints would advance the interests of the Healy Transportation.

Moreover, Mr. Daysh alleges several details that strongly suggest a business motive. Mr. Daysh alleges that Carla Healy was driving, at the time of the stop, a vehicle owned by Healy Transportation Company, "a local school bus provider." (App. 71). Steven - Carla's husband - is alleged as owner of the company. (App. 71). Carla Healy is alleged to be related to an important Town official. (App. 71). If an alleged complaint to the Town were a purely personal matter, presumably, suit would have been brought against Carla Healy only. Instead, Mr. Daysh brought suit against Steven Healy, alleged owner of Healy Transportation. (App. 71).

The business connection is confirmed in later allegations. Mr. Daysh alleges he had a friend, who was also an employee of Healy Transportation, speak with Steven on Mr. Daysh's behalf at the Healy Transportation offices. (App. 71-72). Again, if this were a personal matter, presumably, it would not be discussed by Healy Transportation employees on what appears to be company time.

Mr. Daysh also alleges that Steven Healy spoke to Mr. Daysh's "girlfriend," who was a driver and employee of Healy Transportation, and said it was the girlfriend's job to get the ticket "fixed." (App. 72). The Healys deny this exchange, but, accepting it as true, Mr. Daysh is alleging that Steven (who had not gotten the citation, but who is alleged to own Healy Transportation) saw the citation as something to discuss with a Healy Transportation employee, on what appears to be company time, as a matter for a Healy Transportation employee to address, due to her relationship with Mr. Daysh.

Finally, facts known to Essex as it deliberated on whether to tender a defense tipped the scales even further toward the Healys acting on behalf of their business. It has long been recognized that the determination of whether there is a duty to defend by an insurer includes consideration not just of the underlying complaint, but of extrinsic facts bearing on coverage which are known or readily ascertainable by the insurer. Desrosiers v. Royal Ins. Co. of America, 393 Mass. 37, 40 (1984); Boston Symphony Orchestra, supra, 406 Mass. at 10-11 (information extrinsic to complaint, contained in letter from

insured's counsel, supported finding of duty to defend).

As described in the Healys' counsel's letter to Essex (App. 86), Mr. Daysh had used the siren of a Town cruiser, while on duty, to pull over a Healy Transportation bus driven by his girlfriend, to give her lunch.² (App. 87). This stop was reported back to Healy Transportation, and would have given the Healys ample motive to complain to the Town about Officer Daysh on behalf of Healy Transportation. Some of Mr. Daysh's allegations are consistent with these facts, such as his police chief's reference to the "Healy thing." (App. 71).

As for the second Wang element, the time and place of the supposed defamatory statements are not alleged. The Healys were owners and principals of their own small company. As a result, as applied to them, the "time and place" element must be somewhat flexible and read broadly, since the Healys could be expected to be on the job most of the time, beyond an eight-hour day, looking after the interests of their company.

²This incident and the traffic stop are among the subjects of the underlying litigation.

A reasonable inference from the allegations is that one of the Healys spoke about the traffic stop with a Town official during business hours. In the absence of any allegation to the contrary, this inference is the most reasonable. Certainly, by the lack of any allegations on this point, the Daysh Complaint does not exclude this as a possibility.

As to the third Wang element, the allegations raise a fair inference that the Healys were motivated to complain to the Town about one of its police officers to advance the interests of their company, Healy Transportation. If Town police were interfering with Healy Transportation vehicles, the business could suffer, and a complaint to Town authorities would be a logical response.

Mr. Daysh's allegations are inconsistent with purely personal motives. He does not allege which of the Healys made allegedly defamatory statements to the Town. If the motive had been purely personal, presumably Carla - the driver to whom Mr. Daysh issued the citation - would be alleged to have complained. Instead, the allegations against Steven suggest something other than personal motives, namely, business motives.

Essex was aware of additional information which tended to show that the Healys were motivated to act, at least in part, on behalf of Healy Transportation. As their counsel described to Essex in support of coverage, Mr. Daysh's pulling over a Healy Transportation bus to give lunch to his girlfriend (a Healy Transportation driver) would have supplied the Healys with motivation to complain to the Town, on Healy Transportation's behalf, about Mr. Daysh's conduct.

To return to the Policy, "scope of employment" was one of two definitions which would make the Healys "insureds" under the Essex policy and trigger a defense. The alternative basis is conduct which occurred while the Healys were performing duties "related to" the conduct of their business. (App. 37).

The word "related" carries a broad and widely encompassing connotation and is defined as "connected; associated" in the American Heritage Dictionary (Second College Edition, 1985). In addition, this standard eliminates time and place as a consideration. For these reasons, the "duties related to the conduct

of the business" definition of covered conduct is broader than the "scope of employment" standard.

For the reasons just discussed, especially as relates to the first and third Wang factor, the Healys meet this alternative definition of "insured." The Policy's terms are met, even assuming that the Healys failed to meet the "scope of employment" standard. Under either definition, the Healys are insureds under the Essex policy.

On summary judgment, all reasonable inferences must be drawn in the Healys' favor. At the very least, there is a factual dispute as to whether there is a possibility that the alleged defamation fell within the scope of the Healys' employment with Healy Transportation, or occurred while performing duties related to the conduct of their business. Under Sterilite, because the issue has not been conclusively determined, Essex owes the Healys a defense.

C. The "Knowing Violation" Exclusion Does Not Apply

The "knowing violation" exclusion does not apply to preclude a defense. There is no basis in the Daysh complaint or elsewhere to conclude that any communications between the Healys and Westhampton were caused by or at the direction of the insured (i.e.,

one of the Healys) "with knowledge that the act would violate the rights of another and would inflict personal or advertising injury." (See, Essex's position, App. 84).

A long line of Massachusetts cases rejects insurers' efforts to invoke, as a matter of law, exclusions to coverage which depend on the insured's state of mind. In Quincy Mutual v. Abernathy, 393 Mass. 81 (1984), the insured's son threw a piece of asphalt at a car, causing a fractured skull in one passenger and facial lacerations on the driver. At issue was whether the trial court correctly entered summary judgment for the insurer, ruling that conduct was barred by the exclusion for conduct "either expected or intended from the standpoint of the insured." Summary judgment was reversed. The appropriate focus was insured's intent to injure, not the intent to do the act resulting in injury. The state of mind of the insured could not be inferred from the conduct, and was not susceptible to determination on summary judgment. 393 Mass. at 86, 88.

In Preferred Mutual v. Gamache, 42 Mass. App. Ct. 194, aff'd, 426 Mass. 93 (1997), at issue was whether the insured's assault while resisting arrest while

intoxicated was an excluded "intentional act." The Gamache Court cited Abernathy for its analysis, in the case of exclusions based on intentional conduct, which properly focuses on the "intent to injure," not the "intent to act." 42 Mass. App. Ct. at 198-200. Summary judgment was reversed.

The Gamache Court noted that mental state could be inferred from conduct, for purposes of coverage, in only three cases: unlawful sexual behavior toward a minor; setting fire to a building; and pushing a person down the stairs. Id. at 200; see also, Metlife Auto and Home v. Cunningham, 59 Mass. App. Ct. 583, 591 (2003)(intent to injure could be inferred only in "very rare situations," not including the stabbing at issue).

Essex's "knowing violation" exclusion obviously depends on the Healys' state of mind - whether they knowingly violated Mr. Daysh's rights and knowingly inflicted injury. As the above-cited authorities make clear, proof of such a state of mind cannot be presumed from the Healys' conduct, and cannot be relied on by Essex to disclaim coverage as a matter of law. In light of the vagueness of the allegations and

the lack of developed facts, invocation of this exclusion has no basis.

Not only is intent to injure a forbidden inference, as discussed above, but this would also have the effect of reading defamation coverage right out of the policy. Defamation is the making of damaging statements. If Essex's interpretation of its exclusion were accepted, little or no defamation would ever be covered, since critical statements are usually intended to be critical. The "knowing violation" exclusion does not apply to justify denial of a defense.

VI. CONCLUSION

For all of the foregoing reasons, the trial court's judgment should be REVERSED, and Essex should be ordered to defend the action brought by Robert Daysh against the Healys.

In addition, the Healys request an award of their attorneys' fees and costs on appeal under the authority of Preferred Mutual v. Gamache, 426 Mass. 93 (1997)

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k), Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including without limitation Mass. R. App. Pro. 16(a) (6), 16(e), 16(f), 16(h), 18 and 20.

John E. Garber, Esq.

Dated: October 25, 2007

CERTIFICATE OF SERVICE

I, John E. Garber, Esq., hereby certify that on this 25th day of October, 2007, I served two copies of the foregoing brief and two copies of the one-volume Appendix upon counsel of record by FedEx Express to

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