IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TIG INSURANCE COMPANY, Plaintiff, and ROYAL INSURANCE COMPANY OF AMERICA, Intervenor Plaintiff, v. PREMIER PARKS, INC. (n/k/a Six Flags, Inc.), Defendant.	)	C.A. No. 02C-04-126 JRS

Date Submitted: December 1, 2003
Date Decided: March 10, 2004

MEMORANDUM OPINION

On Defendant, Premier Parks, Inc.'s Motion for Partial Summary Judgment. **GRANTED in part, DENIED in part.**
On Plaintiff, TIG Insurance Company's Cross Motion for Partial Summary Judgment. **GRANTED.**

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SLIGHTS, J.

I.

This declaratory judgment action is before the Court on cross motions for partial summary judgment. Plaintiff, TIG Insurance Company ("TIG"), seeks a declaration that it is not required to provide insurance coverage to its insured, Premier Parks, Inc., now known as Six Flags, Inc. ("Six Flags"), for a judgment entered against Six Flags upon a plaintiff's verdict in a personal injury lawsuit litigated in Maryland. The Maryland litigation followed an incident at a Six Flags amusement park during which it was alleged that Six Flags employees detained and assaulted a group of patrons at the park without justification. TIG alleges that most of the claims against Six Flags in the Maryland action were not covered under its policy. Because the jury did not allocate its compensatory damages award as between covered and non-covered claims, TIG argues that the Court must either conclude that no coverage is available for any of the claims or, alternatively, must allocate the damages in a manner consistent with the evidence presented during the Maryland trial.

Six Flags argues that TIG's coverage position comes too late -- if TIG wanted an allocation of damages as between covered and non-covered claims, it should have directed the attorneys it engaged on behalf of Six Flags to draft appropriate jury interrogatories to accomplish this goal. Having failed to do so, TIG cannot now ask the Court to attempt to discern the jury's intent from a trial record that provides no

guidance on this issue. Because the jury found Six Flags liable for covered claims, and because the damages awarded by the jury could relate entirely to those covered claims, Six Flags argues that TIG must provide coverage for the entire amount of compensatory damages awarded by the jury.

In addition to compensatory damages, the jury also awarded punitive damages against Six Flags. TIG contends that its policy does not cover punitive damages; Six Flags contends that there is coverage for punitive damages because the conduct giving rise to the liability is solely that of Six Flags' employees (as opposed to corporate behavior).

Finally, Six Flags points to the policy's "separation of insureds" provision in support of an argument that all of the claims against its employees, whether based on intentional conduct or conduct less culpable, still must be considered "accidental" with respect to the corporate insured since there was no evidence presented at trial that the corporate entity intended or could have anticipated harm to any of the plaintiffs in the Maryland litigation. Because the "separation of insureds" provision requires the carrier to consider a claimed loss from the perspective of each separate insured under the policy, Six Flags argues that it must be afforded coverage even though its employees (separate insureds under the policy) may not be entitled to coverage.

As explained in more detail below, the Court cannot reasonably be expected to perform a post-verdict allocation of damages as between covered and non-covered claims when the record provides little, if any, evidence of the jury's methodology in reaching its damages awards. Given that the jury found in favor of four of the five plaintiffs in the Maryland action on both covered and non-covered claims, and given that the jury's compensatory damages awards could have been prompted by covered claims alone, TIG cannot deny coverage for those damages. As to the fifth plaintiff, the Court concludes that the jury's verdict was for non-covered claims only for which TIG is not responsible. Six Flags' effort to find coverage in the policy's "separation of insureds" provision is not persuasive. Finally, the Court has concluded that the policy does not cover the jury's award of punitive damages.

Six Flags' motion for partial summary judgment is **GRANTED in part and DENIED in part.** TIG's cross motion for partial summary judgment with respect to punitive damages is **GRANTED.**

II.

In July of 1999, Eddie Williams, Linda Williams, Katrina Smith, Charles Smith, Shaniqua Smith and Frances Williams (collectively, "the Williams plaintiffs") were involved in an altercation with park attendants at a Six Flags amusement park in Prince George's County, Maryland. As the Williams plaintiffs attempted to board

a ride called the "Typhoon Sea Coaster," park attendants advised them that Shaniqua Smith did not meet the minimum height requirements for the ride. After the Williams plaintiffs allegedly refused to heed instructions that they were not to enter the ride, park attendants forcibly removed and then detained them.

In June of 2000, the Williams plaintiffs sued Six Flags alleging assault, battery, false imprisonment, negligent supervision and "injury with ill will, intent to injure or malice."[1] As Six Flags' insurer, TIG assumed the defense and reserved its rights to require an allocation of damages between those claims that were covered under its policy (the "Policy") and those that were not. At the conclusion of the evidence, TIG's trial counsel proposed special jury interrogatories that were ultimately submitted to the jury to guide it through its deliberations. The interrogatories separated the claims by plaintiff but did not require the jury to allocate damages as between covered and non-covered claims. Consequently, the jury awarded lump sum compensatory damages for each plaintiff. As to four of the five plaintiffs, the jury found the defendants liable on each count. With respect to the fifth plaintiff, Shaniqua Smith, the jury found Six Flags liable on all counts except false

[1]The original complaint alleged assault, assault with malice, battery, battery with malice, false arrest, false arrest with malice, false imprisonment, false imprisonment with malice, defamation/slander-libel, defamation/slander-libel with malice, negligent infliction of emotional distress, intentional infliction of emotional distress, breach of contract and negligent supervision. Many of these claims were dismissed by the trial court pursuant to a pre-trial defense motion for judgment.

imprisonment. The total award as among all plaintiffs was $1 million in compensatory damages and $1.5 million in punitive damages.[2]

After the verdict, TIG offered to cover a portion of the verdict in favor of those plaintiffs who prevailed on the only claim that TIG acknowledged was covered under its policy: false imprisonment. TIG declined to cover any of the verdict for Shaniqua Smith because she did not prevail on her claim of false imprisonment. When Six Flags refused to accept only partial coverage, TIG brought this complaint seeking a declaratory judgment that it had no duty to defend or indemnify Six Flags in the Maryland litigation. Six Flags counterclaimed alleging that TIG had a duty to defend and to indemnify Six Flags for all damages, including punitive damages. Both parties have now cross moved for partial summary judgment.

III.

In its motion, Six Flags asks the Court to determine that the Policy must cover all of the compensatory damages awarded at trial because TIG failed to request an allocation of damages as between arguably covered and non-covered claims. According to Six Flags, TIG controlled the defense and knew that coverage issues would surface after the verdict. Yet the jury interrogatories approved by TIG's trial

[2]As best as the Court can discern from the record, the jury's award of punitive damages is currently on appeal to the Maryland Court of Appeals.

counsel offer no guidance with respect to allocation; they simply reflect that the jury found TIG insureds liable for a covered claim or claims and awarded lump sum compensatory damages. Under these circumstances, TIG must provide coverage for the entire amount of compensatory damages because Six Flags has demonstrated that at least one of the claims for which the jury awarded damages (i.e. false imprisonment) is covered by the Policy.[3] Six Flags asserts that TIG has waived any right to contest coverage by failing to preserve evidence of the jury's intent with respect to the allocation of compensatory damages.

TIG responds that its defense was subject to a reservation of rights agreement whereby coverage issues were preserved. Accordingly, TIG argues that the Court must attempt to allocate damages in this situation, even in the absence of specific evidence regarding the jury's rationale and/or intent.[4] Moreover, TIG contends that even if the Court found that TIG had waived its right to seek an allocation of damages, the claims still do not fit within the unambiguous provisions for coverage in the Policy because the jury did not find that the Williams plaintiffs sustained

[3]Both parties agree that false imprisonment is a covered event under the Policy.

[4]At the Court's request, the parties submitted supplemental briefs on the allocation issue in which TIG offered several approaches by which the Court could attempt to allocate the verdicts.

"bodily injury" as a result of an "occurrence."[5] TIG reasons that no "bodily injury" was sustained because the plaintiffs did not submit medical bills or other evidence to support their claims of personal injury. Nor was there an "occurrence" because the actions taken against the Williams plaintiffs constituted intentional torts.

Six Flags reiterates its waiver argument in its reply papers and then raises a new argument based upon the "separation of insureds" provision in the Policy. According to Six Flags, this provision memorializes the parties' intent that Six Flags, as an entity, should be considered as a separate and distinct insured from its employees. The practical impact of this provision is that TIG must consider each claim for coverage from the separate perspective of each insured. In this case, the intentional torts committed by the Six Flags employees must be deemed "occurrences," or accidents, from the perspective of Six Flags because the Williams plaintiffs presented no evidence that Six Flags endorsed or acquiesced in the conduct of its employees.

Finally, in its cross motion for partial summary judgment, TIG asserts that the punitive damages awarded to the Williams plaintiffs are not covered by the Policy. TIG acknowledges that punitive damages would have been covered if the jury had

[5]The Policy provided coverage for "bodily injury" (defined as "bodily injury, sickness or disease sustained by a person, including mental anguish...") caused by an "occurrence" (defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions"). *See* D.I. 22, Ex. C .

concluded that Six Flags was vicariously liable for the intentional acts of its employees. But in this case the jury's verdict clearly reveals that Six Flags' exposure to punitive damages arose from its own improper supervision of its employees. Indeed, the jury interrogatories, *inter alia,* ask the jury to determine whether Six Flags itself caused the Williams plaintiffs' injuries.[6] Vicarious liability is not addressed in the jury interrogatories.

Not surprisingly, Six Flags takes issue with TIG's characterization of the jury's verdict. According to Six Flags, the jury's finding of liability against Six Flags was based solely on vicarious liability. Six Flags points to the fact that the trial court instructed the jury on *respondeat superior* in the general instructions and then advised the jury in the punitive damages instructions that such damages were appropriate if the jury found that the plaintiffs had endured an "assault and battery," presumably at the hands of the Six Flags employees. To the extent it is not clear from the jury interrogatories how the jury arrived at its punitive damages award, Six Flags urges the Court to presume that the punitive damages are covered because the burden of preserving a defense to coverage in the jury interrogatories fell on the trial counsel hired by TIG.

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[6]D.I. 38, Ex. A (Verdict Sheet) at questions 3, 12, 19, 27, 35 ("Did Six Flags' negligence cause or contribute to injuries sustained by [plaintiff]?").

The issues have been fully briefed and argued and the matters are now ripe for decision.[7]

IV.

At the outset, the Court must determine which state's substantive law will apply to this controversy. The Policy does not contain a choice of law provision, so the Court must look elsewhere for guidance.[8] The so-called "most significant relationship" test directs the analysis. Under this test, the Court must consider a number of relevant factors, including: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (c) the protection of justified expectations, (d) the basic policies underlying the particular field of law, (e) certainty, predictability and uniformity of result, and (f) ease in the determination and application of the law to be applied."[9] The Court also

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[7]The parties have not addressed, nor has the Court considered, the extent to which the coverage issues addressed in the briefing may affect TIG's ongoing duty to defend in the Maryland litigation.

[8]*See J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 (Del. 2000)(Delaware courts give great weight to contractual choice of law provisions)(citation omitted).

[9]RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6 (1971). *See also Liggett Group, Inc. v. Affiliated FM Insurance Co.*, 788 A.2d 134, 137 (Del. 2001)(citations omitted)(applying Section 6); *The Travelers Indemnity Co. v. Lake*, 594 A.2d 38, 45-46 (Del. 1991)(holding that Delaware has abandoned the *lex loci delicti* doctrine in favor of the Restatement's "most significant relationship" test).

must consider: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties." [10]

In insurance cases involving multiple insurers and multiple risks, the most significant factor is the principal place of business of the insurers because that location is the common link between the parties.[11] The place of performance is also important because it links that state closely with the conduct of the parties that gives rise to the litigation.[12]

Six Flags is incorporated in Delaware, with its principal place of business in Oklahoma. The premiums on the Policy were paid out of Six Flags' Oklahoma office. TIG is incorporated in Texas. Although the events giving rise to the underlying litigation took place in Maryland, the issues *sub judice* do not require a substantive interpretation of the law underlying the claims presented there. Rather, this case involves the interpretation of an insurance contract issued to Six Flags in Oklahoma. And while it is clear that none of the states with competing interests could stake an

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[10] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188 (1971).

[11] *Id.*; *Liggett*, 788 A.2d at 138 (applying Section 188)(citations omitted).

[12] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188 cmt. e (1971).

overwhelming claim to this controversy under the Restatement, Oklahoma, at the end of the day, takes the prize because it has the "*most* significant relationship" when the relevant factors are tallied on the scorecard. The parties' relationship is centered in Oklahoma and the contract was performed there, at least to the extent that premiums on the policy were paid from there. No other state has a more compelling interest in the outcome of the litigation. The Court will apply Oklahoma law.[13]

V.

The standard of review for motions for summary judgment is well-established.[14] Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[15] The moving party bears the initial burden of demonstrating the absence of material issues of fact.[16] When determining whether the moving party has carried this burden, the Court must view the evidence in the light most favorable to the non-moving party.[17]

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[13]The Court notes that the parties appear at least to have acquiesced in this conclusion, if not endorsed it in their briefing.

[14]Oklahoma law applies to the substantive issues in this case; however, Delaware law governs the procedural aspects of the case, including the standards for summary judgment. *International Business Machines Corp. v. Comdisco, Inc.*, 1991 WL 269965 (Del. Super.), at *29, n. 9 (citing *Connell v. Delaware Aircraft Industries*, 55 A.2d 637, 640 (Del. Super. Ct. 1947)).

[15]*Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[16]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[17]*Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to show the existence of material issues of fact.[18]

Cross motions for summary judgment do not change the standard of review.[19] As our Supreme Court has observed:

> [T]he existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues. Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for the purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party. Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion."[20]

VI.

First, the Court turns to TIG's cross motion for partial summary judgment in which it contends that the jury's award of $1.5 million in punitive damages is not covered under the Policy. Punitive damages are designed to punish the wrongdoer and to deter similar conduct in the future.[21] Oklahoma has adopted the rule set forth

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[18] *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. Ct. 1991).

[19] *Haas v. Indian River Vol. Fire* Co., 2000 WL 1336730 (Del. Ch.)(citation omitted), *aff'd*, 768 A.2d 469 (Del. 2001).

[20] *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)(citations omitted).

[21] *See Thiry v. Armstrong World Indus.*, 661 P.2d 515, 517 (Okla. 1983).

in *Northwestern National Cas. Co. v. McNulty*,[22] where the court determined that public policy generally will prohibit an insurer from covering punitive damages.[23] This rule is grounded in the nature of the damages themselves: a party found culpable for intentional wrongdoing to the point that a jury saw fit to punish that party should not be permitted to shift the punishment to an insurance company.[24] A contrary result would allow the wrongdoer to deflect its burden to the public at large through increased insurance premiums.[25]

Oklahoma has adopted a common-sense exception to this rule in vicarious liability situations.[26] The doctrine of *respondeat superior* imposes liability on an employer for the wrongful acts of its employees.[27] When the employer's liability for punitive damages is derivative only, punitive damages will be covered.[28] The policy behind this exception is rooted in the principle of burden-shifting: the concerns relating to the transfer of the punishment from insured to insurer are not present when

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[22]307 F.2d 432 (5th Cir. 1962).

[23]*See McNulty*, 307 F.2d at 433; *Dayton Hudson Corp. v. American Mutual Liability Insurance Co.*, 621 P.2d 1155, 1158 (Okla. 1980)(following *McNulty*).

[24]*Id.* at 1159.

[25]*Id.*

[26]*Id.* at 1160 (citations omitted).

[27]*See Sides v. Cordes*, 981 P.2d 301, 304 (Okla. 1999).

[28]*Dayton Hudson,* 621 P.2d at 1160.

the employer is liable solely because of its employees' wrongful conduct.[29] The actor in a vicarious liability situation is not the employer itself.[30] And the focus must be on the perpetrator of the wrong: thus, punitive damages are not covered when the employer perpetrates a wrong separate from its employees; they are covered, however, when agency alone imposes liability on the employer for the wrongs perpetrated by its employees.[31]

In light of the foregoing, the Court must determine whether the award of punitive damages was assessed against Six Flags as a consequence of wrongs perpetrated by the corporation or by its employees alone. The evidence of record clearly reveals that the jury sought to punish Six Flags for corporate conduct, not just employee conduct. Consequently, the punitive damages may not be covered under the Policy.

The leading Oklahoma case on this issue, *Magnum Foods v. Continental Casualty Co.*,[32] directs the Court to examine the "totality of the circumstances" to

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[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] 36 F.3d 1491 (10th Cir. 1994)(applying Oklahoma law).

determine the theory under which the jury found Six Flags liable.[33] To support their respective interpretations of the jury's punitive damages verdict, the parties supplied the Court with the jury's verdict sheet and portions of the trial transcript, specifically the closing arguments of counsel and the court's instructions to the jury. The trial transcripts present conflicting points of view on the punitive damages issue. In his closing argument on the merits, plaintiffs' counsel asked the jury to "decide whether or not this conduct by Six Flags' employees was such that they ought to be punished for their conduct...That is called punitive damages..."[34] But during separate arguments on the punitive damages issue, after mentioning the net worth of Six Flags' parent corporation, plaintiffs' counsel urged the jury to:

> [S]end a message to explain to the corporation that they cannot and should not treat people in the way that they have. We need to do something that will alert them, and the only way that we have at our disposal is financially...we can only ask you to consider what would be important to them because if it's a mere pittance or annoyance, this will not deter or stop the actions that have occurred...[w]e are going to ask you to consider what would go across the COO's desk? What would make them pay attention ... I'm just suggesting that you should come up with a figure that you feel is fair; look at the net worth ... [t]his is what we have to deal with, because I don't think five hundred thousand dollars is even going to go across the COO's desk.[35]

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[33] *Id.* at 1499 (citing *Commercial Union Ins. Co. v. Ramada Hotel Operating Co.*, 852 F.2d 298, 302 (7th Cir. 1988)).

[34] D.I. 36, Ex. A at 3-163 (Transcript of Merits Trial dated October 31, 2001).

[35] D.I. 38, Ex. C at 3-204-205 (Transcript of Merits Trial dated October 31, 2001).

It is not possible from the transcripts alone to determine which theory was applied because the jury heard several and, at times, contradictory theories of liability for punitive damages.

In the absence of clear direction in the trial transcript, the Court must focus its analysis on the verdict sheet. And it is here that the jury's intent to assess punitive damages against Six Flags for corporate conduct is most readily demonstrated. For each plaintiff, the first three jury interrogatories read: "[d]id Six Flags employees commit [(1) assault, (2) battery or (3) false imprisonment] against [the plaintiff]?"[36] If these three questions were answered in the affirmative, the next question asked: "[d]id Six Flags' negligence cause or contribute to injuries sustained by [the plaintiff]?"[37] The last question as to each plaintiff was: "[d]o you find by clear and convincing evidence that Six Flags acted with ill-will, intent to injure or malice when it caused injury to [the plaintiff]?"[38] This last question was the predicate to the jury's punitive damages award against Six Flags.[39]

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[36]D.I. 38, Ex. A (Verdict Sheet) at 1.

[37]*Id.* Both parties conceded at oral argument that this question referred to the negligent supervision claim. *See* D.I. 53 at 31-32.

[38]D.I. 38, Ex. A.

[39]The jury instructions indicate unequivocally that the jury was charged: "in order for punitive damages to be recoverable, the wrongful conduct must be accompanied by evil motive, intent to injury, ill will or fraud... [a]n award of punitive damages must be proven by clear and convincing evidence." D.I. 36, Ex. A at 3-207 - 3-208.

The only reasonable conclusion, based on the verdict sheet, is that the jury not only concluded that Six Flags was liable for negligent supervision of its employees, it also concluded that Six Flags acted with the requisite malice to justify an award of $1.5 million in punitive damages. This was not a vicarious liability determination. The jury clearly determined that Six Flags engaged in intentional corporate wrongdoing. And because Six Flags was found liable for its own conduct and not for that of its employees, the vicarious liability exception does not apply and the punitive damages are not covered under the Policy.

VII.

Next, the Court turns to Six Flags' motion for partial summary judgment, which at first requires a determination of the insurer's duty to preserve a clear record with respect to the jury's verdict when controlling the defense of litigation in cases where coverage issues are likely to surface post-verdict. The relevant case law establishes that when a dispute over covered versus non-covered claims arises between an insurer and an insured, and the insurer assumes the insured's defense, the insurer must request an allocation of damages that will allow the parties to more

readily address the coverage issues after trial.[40] When the insurer fails to do so, it bears the initial burden of showing that a lump sum verdict represents damages for non-covered claims.[41] When the insurer meets this burden, the burden shifts to the insured to prove what portion of the verdict represents damages for covered claims.[42]

TIG's inexplicable failure to request an allocation of damages at the conclusion of the trial places the Court in the tenuous position of guessing what was in the mind of the jury when it deliberated the damages. The best evidence of the jury's intent should be the responses to the jury interrogatories. Unfortunately, the jury interrogatories were not propounded in a manner that would allow the jury to allocate damages between covered and non-covered claims. Instead, the verdict sheet indicates: (1) as to four of the five Williams plaintiffs, the jury found Six Flags liable for all three claims for relief submitted for consideration (assault, battery, and false imprisonment); (2) as to one of the five Williams plaintiffs (Shaniqua Smith), the jury found Six Flags liable for two of the three claims submitted (assault and battery); and

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[40] *See Duke v. Hoch*, 468 F.2d 973, 976 (5th Cir. 1973)(where an insurer controlled the defense in a garnishment proceeding and failed to request allocation of damages, the burden was on the insurer to show that a portion of the unallocated verdict represented liability for noncovered acts, then the burden shifted back to the insured to show the portion of damages awarded for covered acts)(applying Florida law); *Gay & Taylor v. St. Paul Fire & Marine Insurance Co.*, 550 F. Supp. 710 (W.D. Okla. 1981)(same holding in the context of a settlement as opposed to jury verdict).

[41] *Id.*

[42] *Id.*

(3) the jury awarded lump sum compensatory damages to each of the five Williams plaintiffs in varying amounts. The portion of the trial transcript provided to the Court which includes the parties' closing arguments and excerpts from the court's instructions to the jury provides no guidance at all with respect to allocation.

TIG contends that the Court has a duty to allocate in this situation. The Court disagrees. Indeed, the case most heavily relied upon by TIG in support of its position, *Duke v. Hoch*, actually exposes the flaw in TIG's reasoning.[43] *Duke* clearly holds that a post-verdict allocation of damages in the coverage context should not even be considered unless and until the insurer meets its burden of showing that the general verdict included damages for non-covered acts.[44] TIG cannot meet that burden in this case. It has admitted that as to four of the five plaintiffs, the jury found the Six Flags employees - - all insureds under the Policy -- liable for a covered claim (false imprisonment). The jury awarded damages in a lump sum, some or all of which may have been attributed to the false imprisonment claim. Under these circumstances, the

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[43] In *Duke*, the insurer met its burden of establishing damages for non-covered claims and the court remanded the case so the trial court could perform a damages allocation. 468 F.2d at 984.

[44] *Id.* at 976 ("Obviously, the troublesome problem of separating out of the unallocated verdict the precise damages for which [the insurer] was responsible would be reached only if it was first established that a portion of the verdict represented liability for noncovered acts. In its defense of the garnishment suit the burden was upon [the insurer] to establish that the judgment entered against its insureds and sought to be collected included damages for noncovered acts.")(citing *Jewelers Mut. Ins. Co. v. Balogh*, 272 F.2d 889 (5th Cir. 1959); *Weinstock v. Prudential Ins. Co.*, 247 So. 2d 503 (Fla. Ct. App. 1971); *Phoenix Ins. Co. v. Branch*, 234 So. 2d 396 (Fla. Ct. App. 1970)).

so-called "duty to allocate" recognized in *Duke* is not even implicated.

Gay & Taylor v. St. Paul Fire & Marine Insurance Co.,[45] also showcased by TIG, is likewise inapposite. The parties in *Gay & Taylor* disputed the extent to which a post-verdict negotiated settlement encompassed non-covered punitive damages. In apportioning the settlement between covered and non-covered damages, the court reasoned that because the settlement amount exceeded the actual damages awarded in the verdict, the parties must have intended the excess to reflect punitive damages.[46] Here, the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded lump sum damages. And the Court will not engage in unguided speculation with respect to this issue, particularly when the dilemma now confronting TIG is of its own making.[47]

The Court is not satisfied that further proceedings in this case will illuminate a record darkened by ambiguity. The Court already has allowed the parties to supplement the record with any portions of the trial record that might help to explain

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[45] 550 F.Supp. 710 (W.D. Okla. 1981).

[46] *Id.* at 717 ("The total settlement paid ... was in excess of the actual damages...and therefore some of the settlement money paid had to be for punitive damages.").

[47] *See Liquor Liability Joint Underwriting Association of Massachusetts v. Hermitage Insurance Co.*, 644 N.E. 2d 964, 969 (Mass. 1995)(holding that the insurer was liable for the entire judgment because, in failing to defend the lawsuit, any attempt to apportion the damages would be "speculative and arbitrary."); *Universal Underwriters Insurance Corp. v. Reynolds*, 129 So. 2d 689, 691 (Fla. Dist. Ct. App. 1961)("From the record it is impossible to determine the particular amount that happened to be in the jury's mind as it returned the verdict with one figure...").

the jury's verdict. The Court can envision no further *competent* evidence of the jury's intentions beyond the verdict form and the trial transcript.[48] Nor has TIG specifically identified what further evidence it would present in support of its position.[49] While TIG properly preserved its position with respect to coverage throughout the trial process, it can no longer postpone the inevitable conclusion that the jury's verdict cannot be dissected beyond what appears on the face of the verdict sheet because TIG did not, when it had the chance, provide the jury with the opportunity to explain itself further.[50]

As to four of the five plaintiffs, the Court must conclude that the entire compensatory damages award relates to a covered claim and, absent applicable policy exclusions not apparent to or otherwise before the Court, coverage should be afforded without further delay.

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[48]Neither party has suggested that it would be appropriate to seek an explanation directly from the jurors who deliberated in the Maryland litigation and the Court would not look favorably upon an application to expand the record in this manner if such an application was made. *See* D.U.R.E. 606(b)("... a juror may not testify as to any matter or statement occurring during the course of the juror's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict....").

[49]*See* Del. Super. Ct. Civ. R. 56(f)(requiring party to state by affidavit the additional information it would seek to develop in discovery to oppose a properly supported motion for summary judgment).

[50]The reservation of rights agreement does not protect TIG. In *Duke*, the insurer defended pursuant to a reservation of rights agreement that included the right to deny coverage. The court made it clear that the insurer's notification of defense under a reservation of rights was not sufficient notification to the insureds that "they should protect their interest by requesting an appropriate verdict." *See Duke*, 468 F.2d at 979.

VIII.

The jury concluded that the conduct of the Six Flags employees as to Shaniqua Smith involved only intentional acts (assault and battery). Six Flags acknowledges that the Policy provides no coverage for the responsible employees with respect to these claims. At first glance, this conclusion would appear to end the inquiry regarding available coverage for Six Flags as well. But Six Flags urges the Court to look beyond the "expected/intended" exclusion in the Policy, arguing that it is not applicable to the corporate insured in this instance. Citing the so-called "separation of insureds" provision of the Policy,[51] Six Flags has argued that it is a separate insured under the Policy and, as such, it is entitled to a separate coverage determination in its own right. The Court agrees, but still finds no further coverage for Six Flags.

Six Flags argues that it did not endorse or acquiesce in the intentional tortious behavior of its employees against the Williams plaintiffs.[52] Accordingly, as to Six

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[51]The Policy provides, in relevant part:

> "[t]his insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each insured against whom claim is made or "suit" is brought."

[52]The Court will assume, for purposes of this argument, that Six Flags is correct with respect to its assertion that the jury did not find that Six Flags acted intentionally, notwithstanding the jury's affirmative responses to interrogatories # 8, 16, 23, 31 and 39 on the verdict sheet. (D.I. 38, at Ex. A)

Flags, the "bodily injury" sustained by each of the Williams plaintiffs, including Shaniqua Smith, resulted from an "occurrence." And the Policy specifically provides coverage for "bodily injury" caused by an "occurrence."[53] On the other hand, "[b]odily injur[ies] ... expected or intended from the standpoint of the insured" are excluded from coverage.

Oklahoma courts have not construed a "separation of insureds" clause in the context of an employer's claim for coverage for liabilities incurred as a result of the intentional, non-covered acts of employees. Consequently, the Court must "turn to other state court decisions, federal decisions and the general trend and weight of authority in an effort to predict how the Oklahoma Supreme Court would decide the issue."[54] Not surprisingly, the authorities are split on the issue.[55]

One view is espoused in *American Guarantee and Liability Insurance Co. v. The 1906 Company.*[56] An employee of the 1906 Company opened a photography studio with company funds. One of the studio's clients discovered that she had been videotaped while changing in the studio's dressing room. Consequently, the

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[53]The Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

[54]*Farmers Alliance Mutual Insurance Co. v. Salazar*, 77 F.3d 1291, 1295 (10th Cir. 1996)(applying Oklahoma law)(citation omitted).

[55]*See King v. Dallas Fire Insurance Co.*, 85 S.W. 3d 185, 190 (Tex. 2002)(citations omitted).

[56]129 F.3d 802 (5th Cir. App. 1997)(applying Mississippi law).

employer (1906 Company) was sued on several counts, including negligent entrustment, negligent supervision and negligent hiring. The insurance carrier filed a declaratory judgment action to determine its obligations. 1906 Company's liability insurance policy provided coverage for "bodily injury" caused by an "occurrence," excluded coverage for intentional acts, and contained a "separation of insureds" clause nearly identical to those found in the TIG Policy. After examining the case law of neighboring jurisdictions, the Fifth Circuit determined:

> where negligence claims against an employer such as negligent hiring, negligent training, and negligent entrustment, are related to and interdependent on the intentional misconduct of an employee, the "ultimate question" for coverage purposes is whether the employee's intentional misconduct itself falls within the definition of an occurrence.[57]

The court went on to deny coverage under the intentional acts exclusion because the negligent supervision claims against the employer were "related to and interdependent" upon the employee's acts which, from the employee's perspective, were "expected and intended."[58]

Other jurisdictions have taken a different approach. For instance, in *King v. Dallas Fire Insurance Company*,[59] a victim who was attacked by one of King's

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[57] *Id.*

[58] *Id.*

[59] 85 S.W. 3d 185 (Tex. 2002).

employees sued King on various theories, including vicarious liability and negligent hiring, training and supervision. Again, the policy contained a coverage provision for "bodily injury" caused by an "occurrence," an intentional acts exclusion and a "separation of insureds" clause nearly identical to those found in the TIG Policy. *King* rejected the "related to and interdependent" analysis endorsed by the Fifth Circuit, and observed: "whether one who contributes to an injury is negligent is an inquiry independent from whether another who directly causes the injury acted intentionally. Essentially, the actor's intent is not imputed to the insured in determining whether there was an occurrence."[60]

Although Oklahoma has not confronted this issue directly, the parties have cited to two federal decisions arising from the "Sooner State" that do provide some guidance.[61] Six Flags cites to *Lutheran Benevolent Insurance Co. v. the National Catholic Risk Retention Group, Inc.,*[62] which involved allegations of sexual abuse by a member of the clergy, as well as a negligent retention claim against the diocese. The policy issued by the insurer to the church provided coverage for "bodily injury"

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[60] *Id.* at 191-192 (citing *Silverball Amusement v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151, 1163 (W.D. Ark. 1994)(holding that the employer's negligent acts, rather than the employee's intentional acts, determined the duty to provide coverage)).

[61] Neither the Court nor the parties have found any "on point" authority from an Oklahoma State court.

[62] 939 F. Supp. 1506 (N.D. Okla. 1995).

caused by an "occurrence."[63] "Occurrence" was defined as "an accident ... which results in bodily injury ... neither expected nor intended from the standpoint of the insured..."[64] There was no "separation of insureds" clause. Focusing on the "standpoint of the insured" language, the court held that "occurrence" was meant to encompass ordinary negligence.[65] The court then considered whether the acts of the church constituted "ordinary negligence," as opposed to gross or willful negligence, the latter conduct falling outside of the policy's protection.[66] The court concluded that the negligent retention claim was an "occurrence" because the church did not intend or expect to cause injury to the victim.[67]

TIG claims that *Lutheran Benevolent* was implicitly overruled by *Farmers Alliance Mutual Insurance Co. v. Salazar,*[68] a case in which the insurer sought a declaratory judgment that it had no duty to defend the insured under a homeowner's policy. After Mrs. Salazar's son was convicted of intentional murder, the victim's

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[63] *Id.* at 1510.

[64] *Id.*

[65] *Id.* at 1512.

[66] *Id.*

[67] *Id.* at 1513. ("It follows logically that 'an act of negligence completely void of any intent to inflict injury or damage' may be construed as an 'accident.'")(quoting *Penley v. Gulf Ins. Co.*, 414 P.2d 305, 308-09)(Okla. 1966)).

[68] 77 F.3d 1291.

family sued Mrs. Salazar for negligent supervision. Her homeowner's policy provided coverage for "bodily injury" caused by an "occurrence," which was defined as "an accident...which results in bodily injury...neither expected nor intended from the standpoint of the insured."[69] Again, the policy did not contain a "separation of insureds" provision. The events giving rise to the alleged "occurrence" were the focus of the analysis: should they be viewed from the perspective of the son or from the perspective of Mrs. Salazar?[70] In other words, was the actual firing of the bullet the "occurrence," or was it the mother's alleged negligent supervision of her son? How far up the "causal chain" would the court look to isolate the "occurrence?"[71] The court concluded that the relevant inquiry must focus on the "immediately attendant causative circumstances."[72] And, since "intentional murder is not 'an accident,'" the act giving rise to liability was not an "occurrence" under the policy.[73]

Salazar is persuasive. Although the court there did not address a "separation of insureds" provision directly, it did undertake an analysis of coverage from the

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[69] *Id.*

[70] *Id.* at 1295-1296.

[71] *Id.*

[72] *Id.* at 1296. ("We find that when determining whether a bodily injury was 'caused by an occurrence' the question of whether there was an 'occurrence' should be resolved by focusing on the injury and its immediately attendant causative circumstances.").

[73] *Id.* at 1296-1297.

different perspectives of the two insureds under the policy (mother and son). The Court correctly focused on the definitions in the coverage section of the Policy to determine whether the conduct at issue gave rise to or, stated differently, "caused" the "bodily injury" for which coverage was sought. *Salazar* considered the causation question from the perspectives of both mother and son (supervisor and actor).

Complex causation analyses are inherent in the negligence cause of action. For instance, when there is more than one possible proximate cause of a car accident, the fact finder can consider the conduct of different actors along the causal chain to determine whether there is concurrent liability.[74] *Salazar* differed from an ordinary negligence case, however. The sequence of events from which the *Salazar* court had to determine causation was negligent supervision followed by intentional murder. When considering causation starting with the event causing the injury and then working backwards, as *Salazar* directs, the element of intent existing in the "immediately attendant causative circumstances" of the murder stops the causation analysis in its tracks. The intentional act interrupts the causal chain between negligent supervision and injury. Under these circumstances, there can be no "occurrence" because the injury was not caused by an "accident."

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[74] *See Forgues v. Heart of Texas Dodge, Inc.*, 2003 WL 21801424, at *27-29 (Wis. App. 2003)(refusing to apply *Salazar's* "immediately attendant causative circumstance" standard to the "occurrence" analysis in a car accident scenario).

In the context of this claim for coverage, the "separation of insureds" provision, standing alone, is inert. It must interact with either a coverage provision or exclusion in the Policy to animate the coverage analysis.[75] Six Flags urges the Court to link the "separation of insureds" provision to Section 1(b) of the Policy, which provides: "this insurance applies to... 'bodily injury' ... caused by an 'occurrence.'" But Section 1(b) applies only in those instances where the events giving rise to a claim for coverage fit within the definition of "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[76]

"[W]hen determining whether a bodily injury was 'caused by an occurrence' the question of whether there was an 'occurrence' should be resolved by focusing on the injury and its immediately attendant causative circumstances."[77] The injury occurred at the Six Flags theme park when the Williams plaintiffs were intentionally assaulted and battered and then falsely imprisoned by Six Flags employees. The incident involving the Williams plaintiffs cannot be described as resulting from "repeated exposure to substantially the same general harmful conditions" because it

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[75] *See* D.I. 22, Ex. C (Policy at Section IV(7)): "*this insurance applies*: a. [a]s if each Named Insured were the only Named Insured; and b. [s]eparately to each insured against whom claim is made or 'suit' is brought." (emphasis added).

[76] *See Id.* (Policy at Section V(12)).

[77] *Salazar*, 77 F.3d at 1296 (citations omitted).

was an isolated event. Thus, the incident can only be covered if it was an "accident," a term which is not defined in the Policy. In this absence of a definition, "accident" must be given its usual and customary meaning.[78] The Oklahoma Supreme Court has interpreted "accident" to mean: "an event from an unknown cause, or an unexpected event from a known cause[;] [a]n unusual event and unexpected result, attending the performance of a usual or necessary act."[79] By their very nature, intentional torts are not "accidents." And since the assault and battery of the Williams plaintiffs -- even when considered in the light most favorable to Six Flags -- cannot fit into the definition of "accident," there was no "occurrence" under Section 1(b) of the Policy and coverage is not triggered.[80]

IX.

Based on the foregoing, the Court concludes the following: (1) Six Flags is not entitled to indemnification for the $1.5 million punitive damages award; (2) Six Flags is entitled to indemnification for the $750,000 in compensatory damages awarded to Charles Smith, Katrina Smith, Frances Smith and Linda Williams; (3) Six Flags is not

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[78] *Id.* at 1297 ("'the words 'accident' and 'accidental' have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally.'")(quoting *United States Fidelity & Guar. Co. v. Briscoe*, 239 P.2d 754, 756 (Okla. 1951)).

[79] *Id.* (citing *Briscoe*, 239 P.2d at 757).

[80] Having concluded that there was no "occurrence," it is not necessary to address TIG's argument that there was no "bodily injury" under the Policy.

entitled to indemnification for the $250,000 in compensatory damages awarded to Shaniqua Smith.

Six Flags' motion for summary judgment is **GRANTED in part and DENIED in part.** TIG's cross motion for partial summary judgment is **GRANTED.**

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary.