IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, Plaintiff,	
vs.	Case Number: 12-CV-273-CVE-TLW
(1) BRANDON LECHNER; (2) NORTHSTAR MEMORIAL GROUP, LLC; (3) FLORAL HAVEN FUNERAL HOME, INC.; (4) NORTHSTAR CEMETERY SERVICES OF OKLAHOMA, LLC; (5) NORTHSTAR FUNERAL SERVICES OF OKLAHOMA, LLC; and (6) KEITH KENNEDY, Defendants.	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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COMES NOW the Plaintiff, Pennsylvania Manufacturer's Association Insurance Company ("PMA"), and pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully moves this Court to enter summary judgment in its favor and against all defendants as to Plaintiff's Claims for Declaratory Relief [Doc. 1]. Plaintiff offers the following in support:

Background

PMA provides Workers' Compensation and Employers' Liability insurance coverage to Defendant Northstar Memorial Group, LLC, under the terms of a written insurance policy. PMA seeks a declaratory judgment that there is no coverage under the policy requiring PMA to defend or indemnify any of the Defendants named herein, in connection with the case of *Lechner v. Northstar Memorial Group, LLC, et al.*, Case No. CJ-2011-07544, filed on December 19, 2011, in the District Court of Tulsa County, State of Oklahoma ("The Lechner Case").

The Lechner Case arose from an incident that occurred on or about January 4, 2010, when Defendant Brandon Lechner ("Lechner") was injured after a tire he was inflating exploded in his face. The incident occurred at Lechner's workplace, commonly known as "Floral Haven Cemetery," where Lechner alleges he worked as an employee of Northstar Memorial Group, LLC; Northstar Cemetery Services of Oklahoma, LLC; Northstar Funeral Services of Oklahoma, LLC; and Floral Haven Funeral Home, Inc.[1] (collectively, "Floral Haven"). Lechner alleges that Floral Haven and Keith Kennedy ("Kennedy"), his supervisor, acted with the intent to injure him and with knowledge to a substantial certainty that serious injury or death would result from their actions.

Lechner's allegations are clearly crafted to avoid the exclusive remedy provision of the Oklahoma Workers' Compensation Act. However, as a result, Lechner's allegations run afoul of certain provisions of the Policy issued by PMA to Floral Haven, his employer, to the extent that

[1] Floral Haven Funeral Home, Inc. has since been dismissed without prejudice from this action because they have been dismissed from The Lechner Case.

there can be no coverage under the Policy for any claims related to The Lechner Case. The Policy limits bodily injury coverage to **accidents**; Lechner's Petition alleges intentional torts. Those torts are also expressly excluded under the Policy. Additionally, coverage is precluded under the Policy's Workers Compensation provisions because Lechner is not suing for workers compensation benefits in The Lechner Case. Finally, there can be no coverage for Defendant Keith Kennedy because he is not insured under the Policy. Under either Oklahoma law, which clearly applies as demonstrated by the analysis below, or Texas law, which some Defendants assert governs this case [*see* Doc. 20 ¶ 41], these facts show there is no coverage under the Policy, and thus no duty to defend. The Court should therefore enter summary judgment in favor of PMA.

Undisputed Facts

1. On December 19, 2011, Lechner filed The Lechner Case against Northstar Memorial Group, LLC; Floral Haven Funeral Home, Inc.; Northstar Cemetery Services of Oklahoma, LLC; Northstar Funeral Services of Oklahoma, LLC (all, collectively, "Floral Haven"); and Keith Kennedy. Ex. "1," Petition.

2. In The Lechner Case, Lechner alleges he was an employee of Floral Haven when he was severely injured while inflating a tire at his workplace, commonly known as "Floral Haven Cemetery", in Broken Arrow, Tulsa County, Oklahoma, on or about January 4, 2010. Ex. "1," ¶ 2.

3. Lechner alleges that Keith Kennedy ("Kennedy"), his supervisor at Floral Haven, required him to inflate the tire to a dangerous and hazardous level, and that as a result, the tire exploded in his face and seriously injured him. Ex. "1," ¶¶ 3-4.

4. Lechner alleges that the actions of Floral Haven and Kennedy were taken with the intent to injure him and with knowledge to a substantial certainty that serious injury or death would

occur to Lechner. Ex. "1," ¶ 6.

5. Lechner alleges that Floral Haven and Kennedy intended for him to be injured and disregarded the knowledge that serious injury was certain or substantially certain to occur and intentionally exposed him to that risk. Ex. "1," ¶ 7.

6. Lechner seeks actual and punitive damages in The Lechner Case as a result of the injuries he alleges were intentionally caused by Floral Haven and Kennedy. Ex. "1," ¶¶ 5, 8.

7. PMA issued a Workers' Compensation and Employers' Liability Insurance Policy, No. 200900-62-86-64-5 ("the Policy") to Northstar Memorial Group for the coverage period of April 28, 2009, to April 28, 2010. The Policy's terms speak for itself and grant or exclude coverage under certain circumstances. A true and correct copy of the policy is attached hereto as Exhibit "2."

8. PMA has assigned defense counsel in the Lechner Case to defend Northstar Memorial Group at PMA's expense under a reservation of rights. Ex. "3," Reservation of Rights Letter.

Summary Judgment Standard

Summary judgment is appropriately granted when there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact is one that might affect the outcome of the suit under the governing law, and such facts are genuinely disputed "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Argument & Authority

I. The Underlying Litigation: Lechner Has Alleged an Intentional Tort to Avoid the Exclusive Remedy Provision of the Oklahoma Workers' Compensation Act

A. Lechner Has Alleged an Intentional Tort in The Lechner Case

Lechner has clearly crafted his allegations in The Lechner Case to avoid the exclusive remedy provision of the Oklahoma Workers' Compensation Act. On December 19, 2011, Lechner filed suit against Northstar Memorial Group, LLC; Floral Haven Funeral Home, Inc.; Northstar Cemetery Services of Oklahoma, LLC; Northstar Funeral Services of Oklahoma, LLC; and Keith Kennedy The Lechner Case. (Undisp. Fact ¶ 1.) Lechner alleges that he was an employee of the collective Floral Haven defendants when he was severely injured while inflating a tire at his workplace, commonly known as Floral Haven Cemetery, in Broken Arrow, Tulsa County, Oklahoma, on or about January 4, 2010. (Undisp. Fact ¶ 2.) Lechner further alleges that Keith Kennedy ("Kennedy"), his supervisor at Floral Haven, required him to inflate the tire to a dangerous and hazardous level, and as a result, the tire exploded in his face and caused him severe injuries. (Undisp. Fact ¶ 3.)

Lechner alleges the actions of Floral Haven and Kennedy were taken with the intent to injure him, and with the knowledge that there was a substantial certainty that serious injury or death would occur to Lechner. (Undisp. Fact ¶ 4.) He further alleges that Floral Haven and Kennedy intended for him to be injured and disregarded the knowledge that serious injury was certain or substantially certain to occur and intentionally exposed him to that risk. (Undisp. Fact ¶ 5.) Lechner seeks actual and punitive damages in The Lechner Case as a result of the injuries he alleges were intentionally caused by Floral Haven and Kennedy. (Undisp. Fact ¶ 6.)

B. The "Intentional Acts Exception" to the Exclusive Remedy of the Oklahoma Workers' Compensation Act

When originally passed in 1915, the Oklahoma Workers' Compensation Act ("OWCA") abolished employees' common law negligence actions against their employers and supplanted them with the benefit of a compensation system that did not depend on employer fault. *See Parret v. UNICCO Service Co.*, 127 P.3d 572, 583 (Okla. 2005). In *Adams v. Iten Biscuit Co.*, 162 P. 938 (Okla. 1917), the court upheld the constitutionality of the OWCA against attacks alleging it denied injured workers equal protection of the laws because it left workers with no remedy if they were injured by an employer's intentional act. The court agreed the OWCA only covered accidental injuries, but concluded the common law remedy was still intact as to injuries intentionally inflicted. *Id.* at 945. The court reinforced this holding in *U.S. Zinc Co. v. Ross*, when it stated, under *Adams*, "that the ... courts are deprived of jurisdiction to hear and determine actions for damages for personal injuries ... unless the injury was willfully inflicted by the employer." 208 P. 805, 806 (Okla. 1922). The Oklahoma Supreme Court confirmed this "intentional acts exception" to the OWCA in *Parret v. UNICCO Service Co.* when it stated:

> Section 11 of the Workers' Compensation Act, OKLA. Stat. tit. 85, §§ 1-211 (2001), prescribes employer liability "for the disability or death of an employee resulting from an accidental injury sustained by the employee arising out of and in the course of employment, without regard to fault." Section 12 makes that liability "exclusive and in the place of all other liability of the employer." This Court has long recognized, however, that in some cases "an employee who has willfully been injured by his employer [may] ha[ve] a common law action for damages." *Roberts v. Barclay*, 369 P.2d 808, 809 (Okla. 1962).

127 P.3d at 574.

In *Parret*, the court addressed the following question certified by The United States District Court, Western District of Oklahoma:

> What is the standard of intent necessary for an employee's tort claim against an employer to fall outside the protection of the Oklahoma Workers' Compensation Act? Is the standard the 'true intentional tort' test, requiring deliberate specific intent to cause injury, or is the standard the 'substantial certainty' test?

127 P.3d at 573. In response, the court examined the "concept of 'intent' in tort law and its relationship to other standards of conduct." *Id.* at 575. The court recognized that a "continuum of tort liability" exists, and concluded that "an actor's conduct is intentional when the actor has the desire to cause the consequences of the act *or* when the actor knows the consequences are

substantially certain to result from the act." *Id.* at 576-77 (emphasis supplied).

Answering the federal court's question, the *Parret* court adopted the "substantial certainty" test for determining whether an employer's conduct falls within the "intentional acts" exception to the OWCA exclusive remedy:

> In adopting the "substantial certainty" standard, this Court is mindful that "[i]n applying the substantial certainty test, some courts have confused intentional, reckless, and even negligent misconduct, and therefore blurred the line between intentional and accidental injuries." In a determined effort to prevent such confusion, the standard must be clearly articulated and its parameters defined.
>
> In order for an employer's conduct to amount to an intentional tort, the employer must have (1) desired to bring about the worker's injury or (2) acted with the knowledge that such injury was substantially certain to result from the employer's conduct. Under the second part of this standard, the employer must have intended the act that caused the injury with knowledge that the injury was substantially certain to follow. The issue is not merely whether injury was substantially certain to occur, but whether the employer knew it was substantially certain to occur. The employer's subjective appreciation of the substantial certainty of injury must be demonstrated....
>
> To satisfy the "substantial certainty" standard, "more than knowledge and appreciation of the risk is necessary." As Professor Prosser explains:
>
> > [T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classified as an intentional wrong.
>
> Thus, the employer must have acted, or have failed to act, with the knowledge that injury was substantially certain, not merely likely, to occur. The employer must have knowledge of more than "foreseeable risk," more than "high probability," and more than "substantial likelihood." Nothing short of the employer's knowledge of the "substantial certainty" of injury will remove the injured worker's claim from the exclusive remedy provision of the [OWCA], thus allowing the worker to proceed in district court.

Parret, 127 P.3d at 578-79 (internal citations omitted). *Accord Price v. Howard*, 236 P.3d 82, 88 (Okla. 2010) (to remove OWCA exclusive remedy and allow claim in district court, "**nothing**

short of a demonstration of the employer's knowledge of the substantial certainty of the injury will suffice.").

To summarize, an employer's liability for accidental injury sustained by an employee in the course of his employment is exclusively governed by the Oklahoma Workers' Compensation Act. But, an exception to this exclusivity allows a worker to bring a claim against his employer in district court if the employer intended for the worker to be injured or acted with knowledge to a substantial certainty that such an injury would occur. The allegations made in The Lechner Case meet this exception and avoid the exclusivity of the OWCA. However, as a result, Lechner's allegations run afoul of certain provisions of the Policy issued by PMA. Indeed, as outlined below, Lechner's allegations are irreconcilably inconsistent with the provisions of the Policy that may have otherwise afforded coverage, such that there can be no coverage under the Policy for any claims related to The Lechner Case.

II. Under Oklahoma Law, There is No Coverage Under the Policy For the Underlying Claims

PMA issued a Workers' Compensation and Employers' Liability Insurance Policy, No. 200900-62-86-64-5 ("the Policy") to Northstar Memorial Group for the coverage period of April 28, 2009, to April 28, 2010. (Undisp. Fact ¶ 7.) The Policy's Information Page provides, in pertinent part:

ITEM 3. COVERAGE

> A. Workers Compensation Insurance: Part One of the policy applies to the Workers Compensation Law of the states listed here:
> CO FL IL OK TN TX
>
> B. Employers' Liability Insurance: Part Two of the policy applies to work in each state listed in Item 3.A...

(Ex. 2, WC 00 00 01 A.) The "GENERAL SECTION" of the Policy provides, in pertinent part, "[y]ou are insured if you are an employer named in Item 1 of the Information Page." (Ex. 2.) "Northstar Memorial Group" is the named insured under "Item 1" of the Policy's Information Page, which also states "SEE SCH OF NAMED INSUREDS." (Ex. 2, WC 00 00 01 A.) The Policy's "SCHEDULE OF NAMED INSURED(S)" names only "Northstar Memorial Group, LLC." (Ex. 2, WC 89 06 01.)

The Policy contains an endorsement that applies to the Employers' Liability Policy Part, and provides, in pertinent part:

> **B. We Will Pay**
>
> We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.
>
> The damages we will pay, where recovery is permitted by law, include damages:
>
> 1. for which you are liable to a third party by reason of a claim or suit against you by the third party to recover the damages claimed against such third party as a result of injury to your employee; and
>
> 2. for care and loss of services.

(Ex. 2, WC 35 03 02.)

The Employers' Liability Policy Part also provides, in pertinent part:

> **D. We Will Defend**
>
> We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.
>
> We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

(Ex. 2.)

In light of the foregoing Policy provisions, PMA assigned defense counsel to Northstar Memorial Group at PMA's expense under a reservation of rights. (Undisp. Fact ¶ 8.)

A. The Underlying Intentional Tort Claims are Not Within the Policy's Scope of Coverage

Both the Workers Compensation Policy Part ("Part One") and the Employers' Liability Policy Part ("Part Two") expressly limit their application to "bodily injury by accident or bodily injury by disease." (Ex. 2.) The underlying intentional tort allegations in The Lechner Case, which as crafted avoid the OWCA exclusivity provision, are outside of the Policy's scope of coverage for "bodily injury by **accident**." There have been no allegations regarding "bodily injury by disease." Though the Policy does not define the term "accident," a long line of Oklahoma case law demonstrates its plain meaning does not include intentional torts.

Under Oklahoma law, an insurance contract should be construed according to the terms set out within the four corners of the document. *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1173 (10th Cir. 2005); *Redcorn v. St. Farm Fire & Cas. Co.*, 55 P.3d 1017, 1020 (Okla. 2002). If the terms of the contract are "unambiguous, clear and consistent, they are to be accepted in their ordinary sense and enforced to carry out the expressed intention of the parties." *Roads West, Inc. v. Austin*, 91 P.3d 81, 88 (Okla. Civ. App. 2004). A court should not create an ambiguity in the policy by "using a forced or strained construction, by taking a provision out of context, or by narrowly focusing on a provision." *Wynn v. Avemco Ins. Co.*, 963 P.2d 572, 575 (Okla. 1998). A policy term will be considered ambiguous only if it susceptible to more than one reasonable interpretation. *Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 912 P.2d 861, 869 (Okla. 1996).

The term "accident" is not a technical term, and the Court must construe it in its "plain and ordinary sense." *Littlefield v. St. Farm Fire and Cas. Co.*, 857 P.2d 65, 69 (Okla. 1993); *see* *also Farmer's Alliance Mut. Ins. Co. v. Salazar*, 77 F.3d 1291, 1297 (10th Cir. 1996) ("According to the Oklahoma Supreme Court, '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.'"). The term "accident" implies an event was unintentional or an "unexpected happening." *U.S. Fid. & Guar. Co. v. Briscoe*, 239 P.2d 754, 756-57 (Okla. 1952). An accident generally occurs when "an unusual and unexpected result" follows the performance of a routine act or an unknown or unexpected cause results in an injury. *Id.* at 757.

This analysis is consistent with Oklahoma courts' interpretation of the phrase "caused by accident" in liability policies. The leading case is *Briscoe*, *supra*, in which a road contractor's policy insured against liability because of bodily injury or property damage "caused by accident." The court held the insurer did not have a duty to defend the contractor in a nuisance case by a family living near a road project from which cement dust blew. The court stated "an accident, within the insurance policy...is a distinctive event that takes place by some unexpected happening, the date of which can be fixed with certainty." 239 P.2d at 757. The court concluded "[i]f a contractor performs or does a voluntary act, the natural, usual and to-be-expected result of which is to bring injury or damage upon himself, then resulting damage, so occurring, is not an accident, in any sense of the word, legal or colloquial." *Id.*

The court in *Penley v. Gulf Insurance Co.*, 414 P.2d 305 (Okla. 1966), also construed a policy covering liability for property damage "caused by accident." The court entered judgment against the insured, Penley, as a result of its employee's negligence in putting gasoline into a motor grader which only used diesel fuel, causing property damage. The court held the damage was caused by accident because the employee did not realize the motor grader used diesel fuel.

Id. at 309. In evaluating whether harm is caused by accident, the court stated that "'[i]t is the state of the will of the person by whose agency it [the injury] was caused' rather than that of the injured person which determines whether an injury was accidental." *Id.* at 308 (*quoting Rothman v. Metropolitan Cas. Ins. Co.*, 16 N.E.2d 417 (Ohio 1938)). *Penley* distinguished *Briscoe*, where the insured's conduct was not committed by a mistake, stating: "'[a]lthough **an intentional or willful tort would negate the existence of an accident**, an act attributable solely to negligence may be an accident'". 414 P.2d at 308-09 (*quoting Minkov v Reliance Ins. Co. of Philadelphia*, 149 A.2d 260 (N.J. Super. 1959)) (emphasis added.).

Kerr-McGee Corp. v. Admiral Insurance Co., 905 P.2d 760 (Okla. 1995), considered the meaning of the word "accidental" in an exception to an exclusion in a liability policy issued to Kerr-McGee. The company was sued in numerous cases for damages caused by intentional dumping of industrial waste. An exclusion eliminated coverage for property damage caused by the discharge of pollutants but contained an exception if the discharge was "sudden and accidental." Adopting the definition of "accident" in *Briscoe*, the court held the intentional dumping was not accidental. "The focus of that language is not on whether the polluter knew its waste could hurt the environment, but rather whether the 'discharge, dispersal, release or escape' was **unexpected or unintended**." *Id.* at 764 (emphasis added).

In *Culp v. Northwestern Pacific Indemnity Co.*, 365 F.2d 475 (10th Cir. 1966), the court considered the meaning of "caused by accident" in the insuring clause of an auto liability insurance policy. The court held a physical altercation between an employee of the named insured and another "was not an accident...because it affirmatively appears that the assault and battery was intentionally committed by" the employee. 365 F.2d at 477.

Allstate Insurance Co. v. Fox, 139 F.3d 911, 1998 WL 77745 (10th Cir. 1998) (table), involved homeowners liability coverage for "'damages which an insured person becomes legally obligated to pay because of bodily injury...arising from an accident,'" and an auto policy covering bodily injury arising from the use of an insured auto if the injury resulted from an accident. Fox was driving an insured auto with a passenger, Byrum, on a highway beside a car driven by Phelps. The Fox car cut in front of the Phelps car and chased the Phelps car to a parking lot where Phelps stopped. Fox gave Byrum a baseball bat he kept in the car, and Byrum struck Phelps in the head, killing him. The court held the killing was not an accident, even though Byrum "was only convicted of manslaughter, a crime that does not require proof of intent to injure or kill," because "the fact that intent to injure may not be required for Mr. Byrum's manslaughter conviction is irrelevant to determining whether there was an accident for insurance purposes. The injury that occurred here was the foreseeable result of Mr. Byrum's decision to hit the decedent with the bat and...therefore was not accidental." *Id.* at *2.

Other Oklahoma cases have applied the definition of "accident" derived from *Briscoe* to liability coverage for injury caused by an "occurrence," where "occurrence" is defined in the policy as an "accident." In cases involving an intentional tort, courts have consistently held the injury was not caused by an accident and thus was not caused by an "occurrence." *See, e.g, Shelter Mut. Ins. Co. v. Wheat*, 313 F. App'x 76, 80-81 (10th Cir. 2008) (unpublished) (shooting of a weapon by the insured into a house which injured an occupant); *Allstate Ins. Co. v. Savage*, No. CIV 04535L, 2008 WL 1331087, at *6 (W.D. Okla. June 2, 2005) (insured got out of his car, went over to another vehicle and attacked its driver through the window); *Sphere Drake Ins., P.L.C. v. D'Errico*, 4 F. App'x 660 (10th Cir. 2001) (unpublished) (patron of a club struck by a bouncer); *Farmers Alliance Mut. Ins. Co. v. Salazar*, 77 F.3d 1291, 1297 (10th Cir. 1996) (driveby shooting); *Mass. Bay Ins. Co. v. Gordon*, 708 F. Supp. 1232, 1234 (W.D. Okla. 1989) (insured physically attacked ex-wife's boyfriend).

Recently, in *Evanston Insurance Co. v. Dean*, No. 09-CV-0049-CVE-TLW, 2009 WL 2972336 (N.D. Okla. Sept. 11, 2009), Chief Judge Eagan held a commercial general liability (CGL) insurer has no duty to defend or indemnify the named insured in a *Parret* case filed against it by its employee. The employee, Dean, alleged his employer, ICES, "'knowingly ordered [Dean] to operate a mill machine with the knowledge that there was a substantial certainty that an injury would occur.'" *Id.* at *1. The CGL coverage applied to an insured's liability for "damages because of 'bodily injury'...to which this insurance applies," and imposed the duty to defend only if the bodily injury was "caused by an occurrence." The policy expressly stated "[w]here there is no coverage under this policy, there is no duty to defend", and it defined "occurrence" as an "accident." *Id.* *1-2.

Applying the ordinary definition of "accident" to the policy definition of "occurrence," Chief Judge Eagan held a *Parret* claim is not a claim for bodily injury caused by an accident or "occurrence":

> [P]laintiff has no duty to defend or indemnify ICES against Dean's Parret claim. Dean is clearly attempting to avoid the exclusive liability provided by the [OWCA] and has alleged an intentional tort against his employer. There is no reasonable way to construe the term "occurrence" to provide coverage for an intentional tort, and ICES has failed to establish that coverage exists for Dean's Parret claim.

Id. at *8. A copy of the *Dean* opinion is attached for the Court's convenience as Ex. "4." [2]

[2] See also, *American Interstate Insurance Company v. Wilson Paving & Excavating, Inc., and Steven L. Broom*, No. 09-CV-342-JHP-TLW, 2009 WL 2972336 (N.D. Okla. June 25, 2010), holding an insurer had no duty to defend under facts and policy language substantially similar to the present case, and in reliance on the *Evanston* opinion. A copy of the *Wilson* opinion is included within Ex. "4" for the Court's convenience. See also, *CompSource Oklahoma v. L & L Const., Inc.*, 2009 OK CIV APP, 207 P.3d 415 (Also substantially similar to the present case with respect to relevant facts and policy language, and relied on by the *Wilson* Court).

Lechner's *Parret* claims require allegations and proof that his injury was caused by his employers' intentional acts with subjective knowledge on their part of the substantial certainty Lechner would be injured as a result of their intentional acts. But an intentional act which an insured subjectively knows will, with substantial certainty, cause an injury to an employee is clearly not an accident, thus no coverage can be owed for The Lechner Case. Any other tort action such as negligence or gross negligence would be barred by the exclusive remedy provision, Section 11 of the Workers' Compensation Act, Okla. Stat. tit. 85, § 1-211 (2001).

B. The Workers' Compensation Policy Part Does Not Apply to a Civil Action for Damages by an Employee Against His Employer

Part One of the Policy provides "[w]e will pay promptly when due the benefits required of you by the workers compensation law." (Ex. 2.) It further provides "[w]e have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance…we have no duty to defend a claim, proceeding or suit that is not covered by this insurance." (Ex. 2.) In other words, the Policy requires PMA to pay any benefits that Northstar Memorial Group, the employer/insured, is required to pay to an employee who suffers a bodily injury caused by accident or disease that is covered by the OWCA and to defend Northstar Memorial Group in any proceeding brought to recover those benefits.

As outlined in section I.B. above, the OWCA requires employers to pay benefits for disability or death resulting from an accidental injury to an employee. However, Lechner is not suing for statutory benefits under the OWCA. The Lechner Case is a suit at common law for actual and punitive damages not within the scope of coverage of Part One of the Policy.

All courts recognize Workers Compensation Coverage does not apply to a civil action by an injured employee against an employer, regardless of the nature of the civil claim. The workers compensation insurer thus does not have a duty to defend the employer under the workers compensation coverage or to indemnify the employer in the event the employer is held liable in the civil suit. *See, e.g., Carolina Cas. Ins. Co. v. Pinnacol Assur.*, 425 F.3d 921, 929-930 (10th Cir. 2005) (Colorado law); *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 884 P.2d 1048, 1056-57 (Cal. 1994); *Springdale Donuts, Inc. v. Aetna Cas. & Sur. Co. of Ill.*, 724 A.2d 1117, 1121 (Conn. 1999); *Hames Contracting, Inc. v. Georgia Ins. Co.*, 440 S.E.2d 738, 740 (Ga. App. 1994); *Bond Builders, Inc. v. Commercial Union Ins. Co.*, 670 A.2d 1388, 1390 (Me. 1996). Lechner is not seeking compensation benefits in the Workers Compensation Court, thus Part One of the Policy does not apply to the district court claims.

C. The Underlying Intentional Tort Claims are Excluded by the Policy's Intentional Acts Exclusion

Part Two of the Policy contains an exclusion that provides, in pertinent part, "[t]his insurance does not cover...bodily injury **intentionally** caused or aggravated by you." (Ex. 2.) Such "intentional injury" exclusions require proof that the insured subjectively intended to cause harm. *Lumbermen's Mut. Cas. Co. v. Blackburn*, 447 P.2d 62, 65 (Okla. 1970). In *Allstate Insurance Co. v. Hisely*, 465 F.2d 1243 (10th Cir. 1972), the court held an intentional injury exclusion in an auto liability policy applied to the injuries to the occupants of a car which the insured was bumping and ramming during a high speed chase. The Court of Appeals for the 10th Circuit concluded an intent to injure was circumstantially proven "from the driving of a motor vehicle at speeds up to 120 miles per hour and then the ramming, bumping and pushing of another vehicle off the road and into the ditch." *Id.* at 1248.

In *Allstate Insurance Co. v. Thomas*, 684 F. Supp. 1056 (W.D. Okla. 1998), the court held an insured's intent to harm was inferred from the nature of his acts of sexually molesting a minor, despite his protests that he did not intend to cause any harm. The court held that intent was conclusively demonstrated by the very nature of the act committed by the insured. *Id.* at

1060. Similarly, the court in *Sullivan v. Equity Fire & Casualty Co.*, 889 P.2d 1285 (Okla. Civ. App. 1995), held an intentional injury exclusion in an auto liability policy applied to a judgment for injury to the occupant of a vehicle who was hit by a BB gun which the insured, a passenger in another vehicle, intentionally threw out of the vehicle he was occupying. The court concluded the exclusion applied because the act of throwing the gun was "obviously intentional." *Id.* at 1287.

CompSource Oklahoma v. L&L Construction, 207 P.3d 415 (Okla. Civ. App. 2009), involved an intentional injury exclusion in an employers' liability policy part identical to the intentional injury exclusion under Part Two of the Policy issued by PMA in the present case. The court applied the exclusion to an underlying *Parret* case, holding the insurer did not have a duty to defend or indemnify the employer in that case. The employer, L&L, was sued for the death of its employee, DeBuhr, allegedly caused by toxic fumes while performing his job. CompSource, L&L's workers compensation/employers liability insurer, paid workers compensation death benefits. In the underlying *Parret* case, DeBuhr's estate alleged L&L was liable "for failing to use proper training, equipment, procedure, and safety,...failing to procure and maintain preventive measures," and was strictly liable because the work of the decedent "was ultra hazardous." 207 P.3d at 416. The DeBuhr Estate's petition further alleged "the death of decedent was a substantially certain result of the failure of L&L to properly educate, train and protect decedent in conjunction with its knowledge of the lethal properties of hydrogen sulfide gas and decedent's exposure to them...." *Id.* at 421 n. 4.

CompSource declined to defend and filed a declaratory judgment action to determine if it was obligated to defend or indemnify L&L. The trial court ruled the *Parret* claim was an excluded intentional tort, but held CompSource had a duty to defend under the employers' liability policy part because the petition "contained allegations of strict liability and negligence, both covered by the policy." *CompSource,* 207 P.3d at 417. The appellate court agreed the *Parret* claim was an excluded intentional tort but also held the allegations of strict liability and negligence were immaterial to the coverage issue because the only claim the employee's estate could make in state court was an intentional tort claim under *Parret*:

> The policy does not cover intentional harm because Section C Exclusions so states. The trial court's order with respect to CompSource's Motion for Summary Judgment, in which it stated that "CompSource has no obligation under the Policy to indemnify L&L Construction for any loss that L&L Construction may suffer arising out of a determination that L&L Construction has committed an intentional tort under *Parret,*" is affirmed.
>
> ***
>
> We have held above that CompSource is not liable under the Policy because the Petition alleges an intentional tort so as to avoid the exclusivity of the [OWCA]. It follows that any other claims in district court, including negligence and products liability, fall within the exclusivity of the Act, are not the obligation of the employer, i.e., they are not sums the employer legally must pay as a result of an action in district court.
>
> As a result, CompSource has no duty to defend the negligence and products liability claims because those claims are not covered by the policy. Summary judgment was erroneously entered in favor of L&L, and is hereby entered in favor of CompSource.

Id. at 421-22.

Dean and *CompSource* are persuasive.[3] Both decisions recognize a *Parret* claim is an intentional tort claim and that an employer acting intentionally with subjective knowledge to a substantial certainty that injury to an employee will result from the act can be sued for the injury

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[3] *CompSource* is in accord with numerous decisions in other jurisdictions holding employer's liability insurance does not apply to intentional tort claims by employees against employers. *See, e.g., Travelers Ins. Co. v. Noble Oil Svcs.*, 42 F.3d 1386, 1994 WL 684031 (4th Cir. Dec. 7, 2001) (table); *Moore v. Cardinal Packaging*, 735 N.E.2d 990 (Ohio App. 2000), *app. den'd* 728 N.E.2d 403 (Ohio 2000); *Lakota v. Westfield Ins. Co.*, 724 N.E.2d 815 (Ohio App. 1998); *Wake County Hosp. System, Inc. v. Safety Nat'l Cas. Corp.*, 487 S.E.2d 789 (N.C. App. 1997) *review den'd* 497 S.E.2d 789 (N.C. 1997); *Lyles v. City of Charlotte*, 477 S.E.2d 150 (N.C. 1996); *Reagen's Vacuum Truck Serv. v. Beaver Ins. Co.*, 37 Cal.Rptr.2d 89 (App. 1994).

in district court. This is the same analysis applied by Oklahoma courts in construing "caused by accident" and "caused by occurrence" liability policies in other contexts and in applying an exclusion for injury intended by an insured. In every case, if the consequences of intentional acts were expected, there was no accident. Likewise, if the insured subjectively appreciated the consequences of the intentional act, the exclusion applied. In other words, because the requirements of a *Parret* claim require **subjective** knowledge of the substantial certainty that the intentional act will harm the employee, the injury to the employee is "intentionally caused or aggravated by you," within the exclusion. Thus, the underlying claims in The Lechner Case are excluded under Part Two of the Policy.

III. There is No Coverage Under the Policy as to Defendant Keith Kennedy Because he is Not Insured Under the Policy

Defendant Keith Kennedy is not named as an insured under the Policy and is not listed in the Policy's Name and Location Schedule. (Ex. 2.) There are no provisions in the Policy that provide coverage to individual employees of the insured. Because Defendant Keith Kennedy is not insured under the policy, there can be no coverage that requires PMA to defend or indemnify him in connection with The Lechner Case. Even if Kennedy was insured under the Policy, coverage for him under the Policy would be precluded for the same reasons that it is precluded for the other Defendants herein.

IV. The Substantive Laws of Oklahoma Govern the Interpretation and Application of the Policy

Defendants Northstar Memorial Group, LLC, Northstar Cemetery Services of Oklahoma, LLC, Northstar Funeral Services of Oklahoma, LLC and Keith Kennedy (hereinafter the "Northstar Defendants") filed an Answer in this case, which also asserted in an affirmative defense that "[t]he substantive laws of the State of Texas apply to the interpretation and application of the insurance policy at issue." [Doc. 20 ¶ 41.] However, it is clear from the plain language of the Policy, as well as Oklahoma case law, that the issues in this case are governed by Oklahoma law.

Federal courts sitting in diversity apply the laws of the state in which they sit, including the forum state's choice of law rules. *Van Dusen v. Barrack*, 376 U.S. 612, 637 (1964); *see Mills v. St. Farm Mut. Auto. Ins. Co.*, 827 F.2d 1418, 1420 (10th Cir. 1987). Oklahoma's choice of law rules therefore determine which state's law governs the interpretation and application of the Policy at issue. In Oklahoma, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Okla. Stat. tit. 15, § 162.

The threshold inquiry under Okla. Stat. tit. 15, § 162 is whether the contract *indicates* a place of performance. In order to "indicate" the place of performance, a contract need not *expressly* provide the place of performance. *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 727-28 (10th Cir. 1991) (*citing Panama Processes v. Cities Serv. Co.*, 796 P.2d 276, 287-88 (Okla.1990)). Rather, **the parties' intent must be gleaned from the contract as a whole.** *Id.* at 728. The *Devery* court reviewed a case involving a contract that necessarily performed in both the plaintiff's and defendants' principal places of business but that did not expressly specify a state of performance. *Id.* at 275-26. The plaintiff argued this resulted in an ambiguity as to the contract's place of performance, and that, absent an express term specifying a place, the law of the state where the contract was made should apply. *Id.* at 727. Relying on *Panama Processes*, *supra*, the Court of Appeals for the 10th Circuit explained:

> Although the contract in *Panama Processes* did not contain an express designation of the location of performance ... the location as intended by the parties was apparent because of the contract terms-terms which called for the majority of the contractual duties to be carried out in Brazil even though some of the duties were to be carried out in New York.... The *Panama Processes* interpretation tracks the statutory choice of law provision and clearly places

> primary emphasis on the place of performance in interpreting the parties' intent regarding choice of law. On the other hand, [the plaintiff's] suggested rule would require the application of the law of the place of making in every bilateral contract which lacks an express designation of the place of performance regardless of the commercial realities of the transaction; we do not think that Oklahoma precedent supports such a mechanical interpretation.

Devery, 944 F.2d at 727-28 (citations omitted).

Here, the Policy, as a whole, clearly indicates that the place of performance with respect to the parties in this case is Oklahoma. For example, the Policy's Information Page states, in pertinent part, that the Workers Compensation Policy Part applies to the Workers Compensation Laws of, *inter alia*, Oklahoma. (Ex. 2.) It also provides that the Employers' Liability Insurance Policy Part applies to work in each of those states. (Ex. 2.) In other words, for this case, the Policy expressly acknowledges the application of Oklahoma law to the interpretation and application of the Policy with respect to the insured interests in this state.

The Policy also includes an Extension of the Information Page that provides a "Workers Compensation Schedule" specifically for the State of Oklahoma. It names Northstar Cemetery Services of Oklahoma, Inc., and Northstar Funeral Services of Oklahoma, Inc.; provides a street address in Broken Arrow, Oklahoma; and references specific types of employees at that location. Similarly, the Policy includes a Name and Location Schedule specific to the State of Oklahoma that names the same Oklahoma Northstar entities as in the "Workers Compensation Schedule." Because the Northstar Defendants conduct business at their Oklahoma facilities, through their employees that are Oklahoma residents, they necessarily extended coverage to include their Oklahoma facilities and employees.

Likewise, the Policy includes endorsements specifically reconciling the Policy with Oklahoma law. The "Oklahoma Employers Liability Amended Coverage Endorsement" plainly states that it applies to the Employers Liability Policy Part "because Oklahoma is shown in item

3.A of the information page." (Ex. 2.) In other words, the core policy was amended by this endorsement specifically for the purpose of performing the policy (i.e. providing coverage) in Oklahoma.

The Policy includes an "Oklahoma Fraud Warning Endorsement," which provides: "Warning: [a]ny person who knowingly, and with intent to injure, defraud or deceive any insurer, makes any claim for the proceeds of an insurance policy containing any false, incomplete or misleading information is guilty of a felony." Okla. Stat. tit. 36, § 3613.1 requires that "[e]very insurance policy or application and every insurance claim form shall contain a statement that clearly indicates in substance" the *exact language* quoted by the Policy's Fraud Warning Endorsement. Similarly, the Policy's "Oklahoma Election of Coverage Notification Endorsement" provides the following notice, as required by Okla. Stat. tit. 85, § 356:

> You have the option to elect to include, as applicable, your sole proprietor, any or all of your partnership members, any or all of your limited liability company members, or any or all of your stockholder-employees as employees for the purpose of workers compensation insurance coverage by endorsing the policy in accordance with Section 3 of Title 85 of the Oklahoma Statutes.

(Ex. 2, at WC 35 06 04). Both of these endorsements were included in the Policy to meet the requirements of Oklahoma law because the parties anticipated contract performance in Oklahoma.

Another endorsement to the Policy is the "Oklahoma Cancellation, Nonrenewal, and Change Endorsement," which provides information regarding cancellation, nonrenewal and changes in premiums or coverage upon renewal. (Ex. 2, at WC 35 06 01 E). Like the Election of Coverage Notification, the information provided in this endorsement is drawn from an Oklahoma insurance statute, Okla. Stat. tit. 36, §§ 3639(C)-(E).

The "General Section" of the Policy provides that it "covers all of your workplaces listed in items 1 or 4 of the information page; and it covers all other workplaces in item 3.A…." (Ex. 2.) The Policy obviously needed to address Oklahoma-specific issues because it provides coverage for Oklahoma workplaces and employees. These endorsements were designed to ensure the Policy's compliance with Oklahoma law. Given these provisions, there can be no argument that the parties did not expect or intend for Oklahoma law to govern the Policy's interpretation and application with respect to this case.

Additionally, the Policy's specification regarding payment of benefits provides further evidence that the place of performance with respect to the parties to this lawsuit is Oklahoma. Specification of a place for payment of premiums and/or benefits under an insurance policy signifies the parties' designation of that location as the place of performance of the contract. *Rhody v. St. Farm Mut. Ins. Co.*, 771 F.2d 1416, 1420 (10th Cir. 1985) (citations omitted). The Workers Compensation Policy Part provides:

> **B. We Will Pay**
> We will pay promptly when due the benefits required of you by the Workers compensation law.

(Ex. 2.). Similarly, the Employers Liability Policy Part provides:

> **B. We Will Pay**
> We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

(Ex. 2.). In other words, payment of benefits under these Policy Parts is to be made to the *employees* of the insured. Thus, the place of performance with regard to payment of such benefits is the place where the employees are to be paid. Here, that place is Oklahoma. Lechner is a resident of Oklahoma, an employee of the named insured, and employed at the insured's

Oklahoma facility. If there was coverage under the Policy, and he obtained a money judgment in The Lechner Case, the Policy would pay such damages to Lechner as benefits under the Policy.

Notably, Mr. Lechner *has already been paid* workers compensation benefits under the Policy *in Oklahoma* as a result of the subject incident. Indeed, he filed a workers compensation claim in Oklahoma and was paid over $300,000. (See Ex. 5, Workers Compensation Documents.) The claim was subject to Oklahoma law and adjudicated in the Oklahoma Workers Compensation Court, pursuant to the Policy provisions requiring that Oklahoma law applies.

Furthermore, both the Workers Compensation and Employers Liability Policy Parts provide under the heading "We Will Defend," that "[w]e have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. (See Ex. 2, Parts One (C) and Two (D), respectively.) PMA has agreed to defend the Northstar Defendants in the Lechner Case at its expense under a reservation of rights. (Undisp. Fact ¶ 8.) That expense is the cost of defense paid to the Oklahoma counsel defending the Northstar Defendants. Thus, the place of performance with regard to payment of this benefit under the Policy is, again, Oklahoma.

Oklahoma's choice of law rules mandate that a contract generally be interpreted according to the law of the place where it indicates it is to be performed. Okla. Stat. tit. 15, § 162; *Devery*, *supra*, 944 F.2d at 727-28. Payments of the various benefits available under the Policy are clearly meant to be paid in Oklahoma. Policy provisions and endorsements indicate an intent for the contract to comply with Oklahoma substantive law. Lechner himself has *already received* Policy benefits under Oklahoma law, and PMA is already funding a defense of The Lechner Case in Oklahoma. These facts demonstrate an indication that the place of performance of the contract is Oklahoma. The contract as a whole clearly expresses that the contract's place of performance is Oklahoma, and this Court should interpret and apply the subject Policy in accordance with Oklahoma law.

V. **Even if Texas Law Applies, There is Still No Coverage Under the Policy For the Underlying Claims**

Even if this Court finds Texas law applies, Texas courts interpret insurance policies in substantially the same way as Oklahoma courts. "Insurance policies are contracts and therefore are controlled by rules of construction applicable to contracts generally." *Barnett v. Aetna Life Ins. Co.,* 723 S.W.2d 663, 665 (Tex. 1987). "When construing a contract, including an insurance policy, [the court's] primary focus is to ascertain the true intent of the parties as expressed in the written document." *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex. 1995). "Whether a policy or contract is ambiguous is a question of law for the court to determine." *Id.* "A written contract that can be given a definite or certain legal meaning is not ambiguous." *Id.* "If the policy or contract contains no ambiguity, the words used are to be given their ordinary meaning." *Puckett v. U.S. Fire Ins. Co.,* 678 S.W.2d 936, 938 (Tex. 1984). "A court should consider a contract, such as an insurance policy, as a whole, giving effect to each part; no single phrase, sentence, or section of the contract or policy should be isolated and considered apart from the other provisions." *Forbau v. Aetna Life Ins. Co.,* 876 S.W.2d 132, 133 (Tex. 1994).

In Texas, "an insurer's duty to defend is determined by the 'eight corners rule,' which requires the court to look solely at the allegations in the pleadings of the underlying lawsuit in light of the policy provisions, regardless of the truth of the allegations." *Trinity Universal Ins. Co. v. Cowan,* 945 S.W.2d 819, 821 (Tex. 1997). An insurer is only required to defend those cases within policy coverage. *Fid. & Guar. Ins. Underwriters, Inc. v. McManus,* 633 S.W.2d

787, 788 (Tex. 1982). As outlined above, the intentional tort allegations in The Lechner Case are irreconcilably outside of the scope of coverage under the Policy.

Under the "eight corners rule" followed by Texas courts, an insurer has no duty to look beyond the policy and the pleadings in determining whether to defend a suit. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Merchs. Fast Motor Lines, Inc.*, 939 S.W. 2d 139, 141 (Tex. 1997) (per curiam). The pleadings are liberally construed in the insured's favor, treating the plaintiff's factual allegations as true for coverage purposes, but the court's interpretation must still be fair and reasonable. *Id.* "In determining the duty to defend, courts may not read facts into the pleadings, look outside the pleadings, or imagine factual scenarios that might trigger coverage." *Id.* at 142. If the underlying petition alleges only facts warranting exclusion by the policy, "then the insurer has no obligation to defend the lawsuit." *McManus,* 633 S.W.2d at 788.

Under Texas law, "[t]here is not an accident when the action is intentionally taken and performed in such a manner that it is an intentional tort, regardless of whether the effect was unintended or unexpected." *Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466, 472 (5th Cir. 2001) (*citing Argonaut Sw. Ins. Co. v. Maupin,* 500 S.W.2d 633, 635 (Tex. 1973)). Additionally, the Texas Supreme Court has specifically held that "a claim does not involve an accident or occurrence when...direct allegations purport that the insured intended the injury (which is presumed in cases of intentional tort)." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007).

Though there appears to be no comparable law in Texas to the *Parret* line of cases in Oklahoma, such cases are not necessary to reach the conclusion under Texas law that there is no duty to defend here. Under Texas law, construing the pleadings in The Lechner Case liberally, reasonably and fairly, and accepting the facts alleged therein as true, there can be no duty to defend under the Policy. The underlying intentional tort allegations run afoul of the Policy for essentially the same reasons as they do under Oklahoma law. Because Lechner's intentional tort allegations do not involve an "accident," there can be no coverage under the Policy. Thus, there can be no duty to defend.

Conclusion

There is no coverage for any of the Defendants named herein in connection with the Lechner Case. The underlying intentional tort allegations were clearly designed to avoid the exclusive remedy provision of the OWCA and allow Lechner to sue for actual and punitive damages in the district court. It is unavoidable that such allegations and proof preclude coverage under the Policy, as evidenced by a long line of Oklahoma and Texas law. The subject of Lechner's intentional tort claims cannot reasonably be construed as an "accident" within the Policy's coverage provisions. It is likewise clearly excluded under the Policy's intentional acts exclusion. Finally, there can be no coverage for Defendant Keith Kennedy because he is clearly not insured under the Policy.

WHEREFORE, Plaintiff Pennsylvania Manufacturer's Association Insurance Company, respectfully requests the Court grant summary judgment in its favor and against all Defendants and declare that there is no coverage under the Policy of insurance it issued to Defendant Northstar Memorial Group, LLC, requiring PMA to defend or indemnify any of the Defendants named herein, in connection with the case of *Lechner v. Northstar Memorial Group, LLC, et al.*, Case No. CJ-2011-07544, filed on December 19, 2011, in the District Court of Tulsa County, State of Oklahoma.

PENNSYLVANIA MANUFACTURERS'
ASSOCIATION INSURANCE COMPANY,

— Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic filing to the following ECF registrants:

Stephen R. Hickman, frasier@tulsa.com, attorney for Defendant Floral Haven Funeral Home, Inc.

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