COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1623 **Cir. Ct. No. 2012CV135**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MONICA HEISZ AND KENADIE R.,

PLAINTIFFS,

GRANT R.,

INTERVENING-PLAINTIFF-APPELLANT,

V.

WILLIAM C. HEISZ AND MARY HEISZ,

DEFENDANTS,

FARMERS AUTOMOBILE INSURANCE ASSOCIATION AND PEKIN INSURANCE COMPANY,

INTERVENORS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Grant R. appeals a judgment that dismissed his claims against Farmers Automobile Insurance Association and Pekin Insurance Company. The circuit court concluded Farmers and Pekin had no duty to defend or indemnify their insured, Mary Heisz, because the sexual molestation exclusions in their policies precluded coverage for Grant R.'s claims.[1] We agree and affirm.

BACKGROUND

¶2 Monica Heisz and her daughter, Kenadie R., sued William and Mary Heisz, alleging William sexually abused Kenadie R. and Mary failed to prevent the abuse.[2] Grant R. is Kenadie's father. The first amended complaint alleged the following facts.

¶3 William and Mary are married and reside together in La Crosse. William sexually abused Kenadie R. "regularly and routinely" over a period of two-and-one-half years. Kenadie R. was five years old when the abuse was discovered. The abuse sometimes occurred while Mary was home. Mary "knew about, or was in a position to observe and discover," the abuse, but she "did nothing to stop, prevent or report" it.

¶4 The first amended complaint set forth multiple claims against William and Mary. Count 1, assault and battery, alleged William "intentionally

[1] The court also concluded Farmers and Pekin had no duty to defend or indemnify William Heisz, Mary's husband. Grant R. does not appeal that determination.

[2] Because they share the same last name, we refer to William, Mary, and Monica Heisz by their first names throughout the remainder of this opinion.

caused offensive contact to [Kenadie R.]" and intentionally caused her bodily harm. Count 1 further alleged Mary "knowingly rendered assistance to William by hiding his wrongful conduct … thereby aiding and abetting his continued abuse and battery." Count 2, negligence, alleged William and Mary breached a duty to provide appropriate and safe care for Kenadie R. Count 3 alleged intentional infliction of emotional distress. Count 5 alleged negligent infliction of emotional distress.[3] Count 6 alleged Monica had suffered a loss of Kenadie R.'s society and companionship.

¶5 Farmers and Pekin subsequently moved to intervene. They asserted Farmers had issued William and Mary homeowners polices during the relevant time period, and Pekin had issued them umbrella policies, but none of the policies provided coverage for Monica's and Kenadie R.'s claims. The motion asked the circuit court to bifurcate and stay proceedings on liability and damages pending resolution of the coverage issue. The court granted Farmers' and Pekin's motion.

¶6 Grant R. later moved to intervene, and the circuit court granted his motion. He subsequently filed a complaint incorporating the allegations set forth in the first amended complaint. He also asserted a separate claim for loss of society and companionship and sought an award of punitive damages.

¶7 Farmers and Pekin then moved for declaratory judgment, asserting they had no duty to defend or indemnify William and Mary. The insurers asserted their policies did not provide initial grants of coverage for the claims against William and Mary because any bodily injury Kenadie R. suffered was not caused

[3] Count 4, which alleged false imprisonment and arrest, was dismissed for failure to state a claim. No party has appealed that decision.

by an "occurrence." The insurers also argued coverage was barred by the policies' intentional acts and sexual molestation exclusions. The circuit court agreed that the policies' sexual molestation exclusions precluded coverage. The court therefore entered a judgment dismissing Farmers and Pekin from the case and declaring they had no duty to defend or indemnify William and Mary. Grant R. now appeals, challenging only the court's ruling that Farmers and Pekin have no duty to defend or indemnify Mary.

DISCUSSION

¶8 Whether to grant or deny a motion for declaratory judgment is addressed to the circuit court's discretion. ***Bellile v. American Family Mut. Ins. Co.***, 2004 WI App 72, ¶6, 272 Wis. 2d 324, 679 N.W.2d 827. However, when the court's exercise of discretion turns on a question of law, we review the legal question independently. ***Id.*** Interpretation of an insurance policy is a question of law.[4] ***Id.***

[4] Here, the circuit court concluded neither Farmers nor Pekin had a duty to defend or indemnify Mary. The duty to defend is "broader than the duty [to] indemnify because it is triggered by arguable, as opposed to actual, coverage." ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666. However, where there is no duty to indemnify, "coverage is no longer open to debate[,]" and an insurer's duty to defend is extinguished. *See* ***Baumann v. Elliott***, 2005 WI App 186, ¶¶9-10, 286 Wis. 2d 667, 704 N.W.2d 361. Thus, if we conclude Farmers and Pekin had no duty to indemnify Mary, it follows they have no further duty to defend her.

Although we normally consider evidence outside the complaint when analyzing the duty to indemnify, in this case, the only pertinent materials before the circuit court on the insurers' motion for declaratory judgment were the first amended complaint, Grant R.'s complaint, and copies of the relevant insurance policies. Thus, both the court and the parties addressed the coverage issue by comparing the allegations in the complaints to the policy terms. Because there is no other evidence to consider, we do the same.

¶9 Our goal in interpreting an insurance policy is to give effect to the parties' intent. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. We construe a policy as it would be understood by a reasonable person in the position of the insured. ***Id.*** If policy language is unambiguous, we simply enforce it as written. ***Marnholtz v. Church Mut. Ins. Co.***, 2012 WI App 53, ¶10, 341 Wis. 2d 478, 815 N.W.2d 708. However, we construe ambiguous policy language against the insurer and in favor of coverage. ***Id.*** Policy language is ambiguous if it is susceptible to more than one reasonable interpretation. ***Folkman v. Quamme***, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857.

¶10 We follow a three-step procedure to determine whether a policy provides coverage for a claim. ***American Girl***, 268 Wis. 2d 16, ¶24. First, we examine the facts of the claim to determine whether the policy's insuring agreement makes an initial grant of coverage. ***Id.*** If so, we next consider whether any of the policy's exclusions preclude coverage. ***Id.*** If a particular exclusion applies, we then determine whether any exception to that exclusion reinstates coverage. ***Id.***

¶11 The insuring agreements in the Farmers policies state that Farmers will pay damages and defense costs "[i]f a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' … caused by an 'occurrence' to which this coverage applies[.]" Farmers and Pekin assert this language does not provide an initial grant of coverage for the claims against Mary because Kenadie R.'s bodily injury was not caused by an "occurrence." They contend the same analysis applies to the Pekin policies. However, we need not decide whether the policies make initial grants of coverage because, even if they do, the sexual molestation exclusions unambiguously bar coverage. *See* ***Sweet v.***

Berge, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one issue is dispositive). We therefore assume, without deciding, that the policies make initial grants of coverage for the claims against Mary, and we proceed to an analysis of the sexual molestation exclusions.[5]

¶12 The Farmers policies exclude coverage for "'[b]odily injury' … arising out of sexual molestation[.]" Similarly, the Pekin policies exclude coverage for "[l]iability … arising out of sexual molestation[.]" The phrase "arise out of" is commonly defined as "occur as a result of[.]" NEW OXFORD AMERICAN DICTIONARY 84 (2001); *see also* ***Weimer v. Country Mut. Ins. Co.***, 216 Wis. 2d 705, 722-23, 575 N.W.2d 466 (1998) (When a policy term is undefined, we may look to a recognized dictionary for guidance in interpreting its ordinary meaning.). It is undisputed that all the claims against Mary allege injuries that occurred as a result of William's sexual molestation of Kenadie R. Thus, the sexual molestation exclusions unambiguously bar coverage of those claims.

¶13 Grant R. does not assert that the sexual molestation exclusions are ambiguous in and of themselves. Instead, he argues the exclusions become ambiguous when read in conjunction with the policies' severability clauses. *See* ***Wadzinski v. Auto-Owners Ins. Co.***, 2012 WI 75, ¶18, 342 Wis. 2d 311, 818 N.W.2d 819 (explaining that an otherwise unambiguous policy provision may

[5] We note, however, that while Farmers and Pekin assert the same initial grant of coverage analysis applies to all the policies, the insuring agreements in the Pekin policies are significantly different from those in the Farmers policies. The Pekin policies merely state, "We will pay **damages** on behalf of the **insured**, subject to the exclusions." Farmers and Pekin fail to explain how their initial grant of coverage argument, which turns on the word "occurrence," applies to the Pekin policies.

become ambiguous when read in the context of other policy language). The severability clauses in the Farmers policies state, "This insurance applies separately to each 'insured.' This condition will not increase our limit of liability for any one 'occurrence.'" The Pekin policies contain nearly identical severability clauses. Because the severability clauses state that the insurance provided by the policies applies separately to each insured, Grant R. argues a reasonable insured in Mary's position could conclude the sexual molestation exclusions would not bar coverage for claims against her arising out of sexual molestation committed by William.

¶14 In support of his contextual ambiguity argument, Grant R. cites ***Northwestern National Insurance Co. v. Nemetz***, 135 Wis. 2d 245, 400 N.W.2d 33 (Ct. App. 1986). In ***Nemetz***, an insurer argued its policy did not cover claims against its insured stemming from damage caused when the insured's husband, who was also an insured, intentionally set fire to the couple's tavern. ***Id.*** at 250. The insurer relied on the policy's intentional acts exclusion, which stated the insurer would not cover property damage "[e]xpected or intended by *an* insured person." ***Id.*** at 253-54 n.2 (emphasis in ***Nemetz***). Because the husband was "an insured person," the insurer argued the exclusion barred coverage for the claims against the wife, even though she did not expect or intend the property damage. ***Id.*** at 253-54. We disagreed, concluding the intentional acts exclusion was ambiguous when read in conjunction with the policy's severability clause. ***Id.*** at 254-56. We therefore construed the policy against the insurer and in favor of coverage. ***Id.*** at 256.

¶15 However, the sexual molestation exclusions in this case do not use the term "an insured person." They simply state there is no coverage for injuries "arising out of sexual molestation[.]" The exclusions do not contain any limitation

as to who commits the act of molestation. Instead, they remove from coverage an entire category of injuries—those caused by sexual molestation. The exclusions focus on the cause of the harm, rather than the identity of the person who committed the harm. The severability clause does not render these otherwise clear exclusions ambiguous.[6]

¶16 We therefore conclude the sexual molestation exclusions in the Farmers and Pekin policies bar coverage of Grant R.'s claims against Mary. Grant R. does not argue that any exception to the sexual molestation exclusions reinstates coverage. Accordingly, the circuit court properly granted Farmers and Pekin declaratory judgment and dismissed them from the case. Because we conclude the sexual molestation exclusions apply, we need not address the insurers' alternative argument that the intentional acts exclusions bar coverage. *See* ***Sweet***, 113 Wis. 2d at 67.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[6] Grant R. also argues the Farmers policies cover his claims against Mary because William and Mary purchased a "preferred deluxe" homeowner's endorsement, which provides additional "personal injury" coverage that is not subject to a sexual molestation exclusion. This argument is meritless. The endorsement specifically defines "personal injury" as injury arising out of false arrest, malicious prosecution, wrongful eviction, publication of slander or libel, and publication of material that violates a person's right to privacy. The injuries alleged in Grant R.'s complaint clearly do not fit within the endorsement's definition of "personal injury."