

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3672

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JANE ROE,

PLAINTIFF-APPELLANT,

V.

**WISCONSIN PATIENTS COMPENSATION FUND
AND PHYSICIANS INSURANCE COMPANY
OF WISCONSIN, INC.,**

DEFENDANTS-RESPONDENTS,

GARY ROCHON, M.D.,

DEFENDANT.

APPEAL from judgments of the circuit court for Milwaukee County:
LEE E. WELLS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Jane Roe appeals from the trial court's grant of summary judgment dismissing her cause of action against Physicians Insurance Company of Wisconsin, Incorporated, and the Wisconsin Patients Compensation Fund. Roe argues that the trial court erred in concluding that the damages she alleged in her cause of action against Gary Rochon, M.D., Physicians Insurance and the Fund, were not covered by Rochon's insurance policy with Physicians Insurance or the Fund. We affirm.

BACKGROUND

The facts, as alleged in Roe's complaint, reflect that from November of 1994 to May of 1995, Roe was Rochon's patient and was "receiving counseling, psychotherapy, assessment and treatment involving [her] mental and emotional illness." Roe alleged that "[d]uring the course of such therapy, acts of medical negligence occurred in that sexual contact occurred between Dr. Rochon and patient, Jane Roe." Roe further alleged that "[a]s a result of the foregoing acts of negligence, plaintiff, Jane Roe, has suffered and continues to suffer serious and permanent emotional distress, pain, embarrassment, loss of self esteem, disgrace, humiliation, loss of enjoyment of life and psychological damage, and has incurred and will continue to incur expenses for medical and psychological treatment, resulting in damage in an unspecified amount."¹

¹ Roe's allegations further stated:

9. At all times pertinent, the plaintiff was receiving psychotherapy, counseling, or other assessment or treatment for a mental or emotional illness or condition. While such psychotherapy, counseling or other assessment or treatment was ongoing, sexual contact occurred between the defendant and plaintiff which caused injury and damage, as set forth above.

(continued)

Based on Rochon's alleged misconduct, Roe brought this cause of action against Rochon and his insurer, Physicians Insurance. Roe also named the Fund as a defendant, pursuant to § 655.27, STATS.² Both Physicians Insurance and

10. As a result of said sexual contact, the defendant is liable under Sec. 895.70, Wis. Stats., which provides:

895.70 Sexual exploitation by a therapist.

(2) Cause of action. (a) Any person who suffers, directly or indirectly, a physical, mental or emotional injury caused by, resulting from or arising out of sexual contact with a therapist who is rendering or has rendered to that person psychotherapy, counseling or other assessment or treatment of or involving any mental or emotional illness, symptom or condition has a civil cause of action against the psychotherapist for all damages resulting from, arising out of or caused by that sexual contact. Consent is not an issue in an action under this section, unless the sexual contact that is the subject of the action occurred more than 6 months after the psychotherapy, counseling, assessment or treatment ended.

11. As a result of the violation of Sec. 895.70, Wis. Stats., and the damages which were sustained, the plaintiff claims damages from the defendant in an unspecified amount.

² Section 655.27(1), STATS., provides:

There is created a patients compensation fund for the purpose of paying that portion of a medical malpractice claim which is in excess of the limits expressed in s. 655.23 (4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater, paying future medical expense payments under s. 655.015 and paying claims under sub. (1m). The fund shall provide occurrence coverage for claims against health care providers that have complied with this chapter, and against employees of those health care providers, and for reasonable and necessary expenses incurred in payment of claims and fund administrative expenses. The coverage provided by the fund shall begin July 1, 1975. The fund shall not be liable for damages for injury or death caused by an intentional crime, as defined under s. 939.12, committed by a health care provider or an employee of a health care provider, whether or not the criminal conduct is the basis for a medical malpractice claim.

(continued)

the Fund moved for summary judgment, arguing that they were not liable for the damages alleged in Roe's complaint because the damages arose from Rochon's criminal conduct.³ The trial court agreed and dismissed Physicians Insurance and the Fund from Roe's cause of action.

DISCUSSION

We review *de novo* the trial court's grant of summary judgment. *See Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The interpretation of a statute and the construction of an unambiguous contract are questions of law, subject to *de novo* review. *See Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis.2d 226, 233, 568 N.W.2d 31, 34 (Ct. App. 1997) (statutory interpretation); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis.2d 226, 244, 271 N.W.2d 879, 887 (1978) (contract interpretation).

Section 939.12, STATS., provides: "A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime."

³ Section 940.22(2), STATS., provides:

SEXUAL CONTACT PROHIBITED. Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination, is guilty of a Class C felony. Consent is not an issue in an action under this subsection.

As noted, § 655.27(1), STATS., provides that “[t]he fund shall not be liable for damages for injury or death caused by an intentional crime, as defined under s. 939.12, committed by a health care provider or an employee of a health care provider, whether or not the criminal conduct is the basis for a medical malpractice claim.” Similarly, Rochon’s insurance policy with Physicians Insurance also excluded coverage for damages arising from criminal conduct.⁴ The policy provided:

1. What Is Covered

a. Individual Professional Liability: We will pay on your behalf **damages** that you are legally obligated to pay because of any negligent act or omission in the furnishing of **professional medical services** by you or by any person for whose acts or omissions you are legally responsible, as provided in this policy.

....

6. What Your Policy Does Not Cover

a. Exclusions For Defense And Payment Of Damages

We will not defend or pay any **damages** on your behalf after it has been determined that there is no coverage under this policy as a result of any of the following exclusions:

....

(5) Any liability arising out of any intentional tort or any criminal or malicious act or omission, including fines, forfeitures and penalties.

⁴ The policy also contained the following exclusion:

b. Exclusion For Payment Of Damages

....

(2) We will defend you, but not pay any **damages** on your behalf, for any liability arising out of claims resulting from alleged acts of sexual intimacy, sexual molestation, sexual harassment, sexual exploitation or sexual assault.

Roe asserts that despite the foregoing statutory and contractual language, the Fund and Physicians Insurance are liable for the damages alleged in her complaint because Rochon's sexual relationship with her constitutes negligent treatment, and her damages arise from that negligent treatment, rather than from Rochon's intentional criminal conduct.⁵ In support of this argument, Roe relies on *L.L. v. Medical Protective Co.*, 122 Wis.2d 455, 362 N.W.2d 174 (Ct. App. 1984). In *L.L.*, the court concluded that a policy exclusion "for 'payment of damages ... if said damages are in consequence of the performance of a criminal act,'" did not exclude coverage of the plaintiff's malpractice claim against her psychiatrist for his alleged criminal sexual acts with her because the psychiatrist's alleged sexual relationship with the plaintiff also constituted malpractice. *See id.*, 122 Wis.2d at 463–464, 362 N.W.2d at 178–179.

Unlike the criminal statute involved here, the felony criminal statute involved in *L.L.* required lack of consent to the sexual activity. *See id.*, 122 Wis.2d at 463 n.1, 362 N.W.2d at 178 n.1. *L.L.* alleged, in essence, that the physician's malpractice led to her putative "consent," which was not the requisite "consent" set out in the statute. *See id.*, 122 Wis.2d at 464 n.3, 362 N.W.2d at 178 n.3. Additionally, the misdemeanor statute involved in *L.L.*, which has since been revised, made criminally liable both parties to an act of fellatio (the sex act in *L.L.*). *See id.*, 122 Wis.2d at 463 n.2, 362 N.W.2d at 178 n.2. Moreover, in *L.L.* the court held that the insurance policy at issue was ambiguous as to whether it covered acts that constituted both criminal conduct and malpractice; therefore, the

⁵ Roe also argues that there is a genuine issue of material fact regarding whether Rochon's sexual relationship with her was an "intentional crime," under § 655.27(1), STATS., and that a jury must decide this issue. We disagree. The allegations of Roe's complaint indicate that Rochon intentionally had sexual contact with Roe, in violation of § 940.22, STATS., and that he thus committed an intentional crime.

court construed the policy against the insurer and in favor of coverage. *See id.*, 122 Wis.2d at 464, 362 N.W.2d at 179.

Unlike the policy at issue in *L.L.*, § 655.27(1), STATS., and Rochon's policy with Physicians Insurance unambiguously exclude coverage for the damages Roe alleges in her complaint. Throughout her complaint, Roe consistently alleges that her damages arose from, and were caused by, her sexual contact with Rochon.⁶ As noted Rochon's intentional sexual contact with Roe constituted a crime under § 940.22, STATS., and § 655.27(1), STATS., unambiguously provides that the Fund is not liable for damages caused by an intentional crime, regardless of whether the criminal conduct is also the basis for a medical malpractice claim.⁷ Thus, unlike the policy at issue in *L.L.*, § 655.27 clearly does not cover damages caused by acts that constitute both criminal conduct and malpractice. The Fund is, therefore, not liable for the damages caused by Rochon's alleged criminal sexual contact with Roe.

Similarly, Rochon's policy with Physicians Insurance unambiguously provides that it will not pay damages that result from any liability arising out of any criminal act. Thus, if Rochon's alleged malpractice is also a criminal act, the policy does not provide coverage. Indeed, under the Physicians Insurance policy, if Rochon's alleged criminal act did not constitute an act taken

⁶ Roe asserts in her brief that Rochon engaged in negligent conduct apart from his sexual contact with her, and that the Fund and Physicians Insurance are liable for those distinct acts of negligence. Roe's complaint, however, does not allege any negligence apart from the sexual contact.

⁷ Roe argues in her reply brief that excluding her claim from coverage by the Fund denies her equal protection of the law. We do not address this argument because Roe raises it for the first time in her reply brief. *See Bilsie v. Swartwout*, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981) (appellate court generally will not consider issues raised for the first time in a reply brief).

“in the furnishing of professional medical services,” thereby forming the basis for a malpractice claim, it would not fall within the policy coverage in the first place; the exclusion comes into play only when the alleged conduct constitutes both malpractice and a criminal act. The policy, therefore, clearly excludes coverage for damages resulting from acts that constitute both criminal conduct and malpractice. Moreover, the Physicians Insurance policy contains an additional exclusion providing that it will not pay damages for any liability arising out of claims resulting from alleged acts of sexual intimacy or sexual exploitation. This exclusion clearly applies to Roe’s allegation that her damages arose from her sexual contact with Rochon. The trial court correctly concluded that neither the Fund nor Physicians Insurance is liable for the damages alleged in Roe’s complaint.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

