COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0552

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

S.J.A.J.,

PLAINTIFF-APPELLANT,

V.

FIRST THINGS FIRST,

DEFENDANT-CO-APPELLANT,

DAVID B. HATCH AND FRONTIER INSURANCE COMPANY,

DEFENDANTS,

CHICAGO INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

THE TRAVELERS INSURANCE, AETNA LIFE INSURANCE COMPANY AND BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANTS.

APPEAL from an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. S.J.A.J. and First Things First, Incorporated, appeal from the trial court's grant of summary judgment dismissing Chicago Insurance Company from S.J.A.J.'s lawsuit against her former therapist, David B. Hatch, Ph.D, and the company for which Hatch worked, First Things First, along with their respective insurance carriers.[1] They argue that the trial court erred in concluding that the cause of action S.J.A.J. alleged against Hatch was not covered by his professional liability insurance policy with Chicago Insurance.[2] We affirm.

BACKGROUND

¶2 S.J.A.J. received psychotherapy and counseling from Hatch, at First Things First, from November of 1993 through 1995. During the course of S.J.A.J.'s treatment, she and Hatch developed a sexual relationship. After the relationship ended, S.J.A.J. disclosed the details of the relationship to the police, and Hatch was criminally prosecuted and convicted of sexual exploitation by a therapist. *See* WIS. STAT. § 940.22(2) (1997-98).[3]

---

[1] Pursuant to WIS. STAT. § 895.70(2)(b) (1997-98), the plaintiff has chosen to substitute the initials S.J.A.J. for her name.

[2] First Things First erroneously labels its appeal as a cross-appeal. First Things First is a co-appellant rather than a cross-appellant because First Things First and S.J.A.J. both seek reversal of the trial court's grant of summary judgment to Chicago Insurance. *See* WIS. STAT. § 809.10(2) (1997-98).

[3] All references to the Wisconsin Statutes are to the 1997-98 version. WISCONSIN STAT. § 940.22(2) provides:

(continued)

¶3 Thereafter, S.J.A.J. filed a civil action against Hatch, First Things First, and their respective insurance companies, alleging that she sustained injuries as a result of her improper relationship with Hatch. Hatch's professional liability insurance provider, Chicago Insurance, moved for summary judgment dismissing it from the lawsuit, arguing that S.J.A.J.'s claim against Hatch fell within an exclusion in Hatch's insurance policy that precluded coverage for "any claims made or suits brought against any insured alleging, in whole or in part, … behavior which threatened, led to or culminated in any sexual act." The trial court concluded that S.J.A.J.'s claim against Hatch fell within the exclusion and granted summary judgment dismissing Chicago Insurance from the lawsuit.

DISCUSSION

¶4 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). WISCONSIN STAT. § 802.08(2), 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.

¶5 "The construction of words and phrases in insurance policies is generally a matter of law and is controlled by the same rules of construction as are

---

> 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.

applied to contracts generally." ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156, 163 (1984). "Where no ambiguity exists in the terms of the policy, we will not engage in construction, but will merely apply the policy terms." ***Id.***, 119 Wis. 2d at 736, 351 N.W.2d at 163.

¶6 The exclusion in Hatch's insurance policy provided:

> This insurance does not apply:
>
> ….
>
> G. *to any* ***Claims*** *made or Suits brought against any* ***Insured*** *alleging, in whole or in part,* sexual assault, abuse, molestation, or *licentious, immoral, amoral or other behavior which threatened, led to or culminated in any sexual act* whether committed intentionally, negligently, inadvertently or with the belief, erroneous or otherwise, that the other party is consenting and has the legal and mental capacity to consent thereto, that was committed, or alleged to have been committed by the **Insured** or by any person for whom the **Insured** is legally responsible.
>
> This exclusion applies regardless of the legal theory or basis upon which the **Insured** is alleged to be legally liable or responsible, in whole or in part, for any **Damages** arising out of such actual or alleged behavior, including but not limited to, assertions of improper or negligent hiring, employment or supervision, failure to protect the other party, failure to prevent the sexual misconduct, failure to prevent assault and battery or failure to discharge the employee.

(Emphasis added.)

¶7 S.J.A.J.'s complaint alleged the following cause of action against Hatch:

> 13. In the course of his treatment of S.J.A.J., Dr. David B. Hatch was negligent and failed to comport his treatment with prevailing standards of care among similar professionals and was negligent in his delivery of said care *in that he negligently had sexual contact with S.J.A.J. and committed other similar acts of malpractice.*

> 14. As a direct and proximate result of said negligence, Plaintiff S.J.A.J. has suffered severe and catastrophic temporary and permanent physical and psychological injuries. As a result of said injuries, Plaintiff S.J.A.J. has suffered great pain and believes there will be additional great pain and suffering in the future. Additionally, Plaintiff S.J.A.J. has incurred hospital, medical, drug, wage loss, and miscellaneous expenses and believes similar expenses will be incurred in the future, all to the detriment and damage of S.J.A.J. in an amount to be adduced at the time of trial.

(Emphasis added.)

¶8 S.J.A.J. and First Things First argue that although Hatch's policy excludes coverage for Hatch's sexual conduct, it nonetheless covers S.J.A.J.'s injuries because Hatch's improper relationship with S.J.A.J., apart from the sexual contact, constitutes an independent concurrent cause of her injuries. They also assert that Hatch's failure to properly treat S.J.A.J. for the problems about which she sought therapy constitutes an independent concurrent cause of her injuries. *See* ***Smith v. State Farm Fire & Cas. Co.***, 192 Wis. 2d 322, 331, 531 N.W.2d 376, 380 (Ct. App. 1995) ("'Where a policy expressly insures against loss caused by one risk but excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause.'"). We disagree.

¶9 First, the only negligent conduct identified in S.J.A.J.'s complaint is Hatch's sexual contact with S.J.A.J. S.J.A.J. did not allege that she was injured as a result of any negligent conduct other than Hatch's "sexual contact" and "similar

acts of malpractice."[4] These acts of negligence are clearly excluded by the sexual-act exclusion.

¶10 Second, the exclusion in Hatch's policy unambiguously excludes coverage for injuries suffered as a result of sexual contact, even when there is an independent and concurrent cause of those injuries that would be covered absent the sexual conduct. The policy excludes coverage for "any **Claims** made or Suits brought against any **Insured** *alleging, in whole or in part*, … licentious, immoral, amoral or other *behavior which threatened, led to or culminated in any sexual act*." (Emphasis added.) Were we to read the policy as providing coverage for claims alleging that an injury was caused both by sexual contact and by an otherwise covered act, the phrase "in whole or in part" would be rendered superfluous. "An insurance policy should not be construed so as to render any part of it useless." ***Smith***, 192 Wis. 2d at 330, 531 N.W.2d at 379. We therefore conclude that the policy excludes coverage of S.J.A.J.'s claim that she was injured by Hatch's sexual contact with her, regardless of whether Hatch's non-sexual malpractice was a concurrent cause of S.J.A.J.'s injuries.

¶11 S.J.A.J. further argues that the policy provides coverage for sexual conduct when that conduct constitutes malpractice because malpractice falls within the policy coverage. In support of her argument, S.J.A.J. relies on ***L.L. v. Medical Protective Co.***, 122 Wis. 2d 455, 362 N.W.2d 174 (Ct. App. 1984). In ***L.L.***, this court concluded that a policy exclusion "for 'payment of damages … if

[4] As noted, S.J.A.J. alleged that Hatch "was negligent and failed to comport his treatment with prevailing standards of care among similar professionals and was negligent in his delivery of said care *in that he negligently had sexual contact with S.J.A.J. and committed other similar acts of malpractice.*" (Emphasis added.) Her allegations of negligence clearly center on Hatch's sexual contact with her.

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. In coming to this conclusion, however, 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 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.

¶12 Unlike the policy at issue in ***L.L.***, Hatch's policy with Chicago Insurance unambiguously excludes coverage for the claim S.J.A.J. alleges in her complaint. As noted, the policy clearly excludes coverage of claims alleging, *in whole or in part*, behavior that "led to or culminated in any sexual act." Thus, if Hatch's alleged malpractice is a sexual act, the policy does not provide coverage. The fact that the Chicago Insurance policy covers malpractice claims, but excludes malpractice claims alleging sexual acts does not render the policy ambiguous. Indeed, the exclusion would not be necessary if Hatch's alleged malpractice did not fall within the policy coverage in the first place; the exclusion comes into play only when the alleged conduct would otherwise be covered by the terms of the policy. The policy, therefore, clearly excludes coverage for S.J.A.J.'s malpractice claim. *See* ***Smith***, 192 Wis. 2d at 330, 531 N.W.2d at 379 ("We must consider the insurance policy as a whole and give each exclusion its common and ordinary meaning before determining whether an ambiguity exists.").[5]

[5] S.J.A.J. cites various other cases from foreign jurisdictions that are similarly inapposite in light of the clear language of the exclusion in Hatch's policy.

¶13 First Things First additionally argues that the exclusion is ambiguous because the phrase "led to or culminated in any sexual act," can be read narrowly to apply only to acts that directly result in sexual activity, or broadly to apply to acts that are remotely related to the sexual activity. "Ambiguities in coverage are to be construed in favor of coverage, while exclusions are narrowly construed against the insurer." ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597, 598 (1990). The alleged ambiguity is of no consequence here, however, because the summary-judgment submissions all indicated that the improper relationship between Hatch and S.J.A.J. culminated in sexual contact, and that the sexual contact would not have occurred in the absence of the improper relationship that Hatch negligently allowed to develop. Thus, the improper relationship is not covered under Hatch's narrow reading of the exclusion. Moreover, as noted, S.J.A.J. did not allege any negligence apart from Hatch's sexual contact with her. Thus, any alleged ambiguity as to whether conduct preceding the sexual contact is covered by the policy is irrelevant.

¶14 Finally, S.J.A.J. argues that the exclusion should not be enforced because it is against public policy. She argues that therapists frequently commit malpractice by engaging in sexual relationships with their clients, and that insurers should not be permitted to exclude such conduct from coverage because it would encourage patients to conceal the sexual relationship in order to recover from the therapist's insurer damages sustained as a result of the therapist's non-sexual malpractice.

¶15 We reject S.J.A.J.'s public policy argument. We conclude that it is consistent with public policy to hold therapists personally responsible for criminal sexual conduct with their patients. We will not rewrite Hatch's insurance policy to impose upon his insurer the responsibility to provide coverage for which Hatch

neither bargained nor paid. *See* ***Smith v. Katz***, 226 Wis. 2d 798, 807, 595 N.W.2d 345, 350 (1999) ("'[A] contract of insurance is not to be rewritten by the court to bind an insurer to a risk which the insurer did not contemplate and for which it has not been paid.'").

By the Court.—Order affirmed.

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