IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AMERICAN STRATEGIC INSURANCE CORPORATION, a Florida Corporation, *Plaintiff/Appellee*,

v.

EMILEIGH CLARK and TYLER CLARK, Husband and Wife, *Defendants/Appellants*.

No. 1 CA-CV 12-0881
FILED 12-19-2013

Appeal from the Superior Court in Maricopa County
No. CV2012-000684
The Honorable John Christian Rea, Judge

AFFIRMED

COUNSEL

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Counsel for Plaintiff/Appellee ASI

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Counsel for Defendants/Appellants Clark

MEMORANDUM DECISION

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Donn Kessler joined.

B R O W N, Judge:

¶1 Emileigh Clark appeals the trial court's order granting summary judgment in favor of American Strategic Insurance Corporation ("ASI"). For the following reasons, we affirm.

BACKGROUND

¶2 The pertinent facts, which the parties do not dispute for purposes of resolving this appeal, are as follows. On the morning of January 31, 2011, Ryan Masi was walking his two dogs, a Schnauzer and a tan Pit Bull. At some point, Clark was awakened when she heard someone yelling from behind her house. Clark observed that a brown Pit Bull was fighting with the tan Pit Bull Masi had on a leash. Clark called out to Masi and he asked for help. Clark jumped over her fence and grabbed the unleashed brown Pit Bull, separating it from the tan Pit Bull and thus ending the fight.

¶3 Moments later, however, the tan Pit Bull escaped from Masi's control and severely bit Clark's hand. After Masi was able to get his Pit Bull under control, Clark asked him several times if his dog had its shots. Masi responded that he would go put his dogs away and then come back. Clark tried to persuade Masi to stay at the scene but he left and did not return.

¶4 Clark received medical attention for the wound she sustained from dog bite. Because Masi did disclose whether the dog had its shots, Clark underwent treatment to prevent her from contracting rabies. Consequently, Clark developed a "serious and debilitating infection that could have been more aptly treated but for . . . Masi's disappearance."

¶5 Clark sued Masi for personal injuries she suffered, alleging Masi acted negligently by (1) failing to control his dog and (2) failing to render aid by informing Clark whether the dog had been properly vaccinated for rabies. Clark alleged Masi's failure to inform "needlessly

compounded and exacerbated" her injuries. Clark also alleged that Masi's failure to report the dog bite to law enforcement as required by state statute was negligence per se.

¶6 Masi's homeowner's insurance policy, in effect at the time of the incident, was issued by ASI. In pertinent part, the policy provided Masi liability coverage as follows:

> If 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, we will:
>
> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable.

The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results . . . in . . . '[b]odily injury'." The policy excluded any coverage for damages caused by animals, but Masi purchased an animal liability endorsement, which provided coverage for "loss caused by animals" that he "owned or kept." This expanded coverage, however, specifically excluded coverage for certain breeds of dogs, including Pit Bulls:

> **SECTION II – EXCLUSIONS**
>
> Under **E**. Coverages **E – Personal Liability and F – Medical Payments to Others** Coverages **E** and **F** do not apply to the following:
>
> Item **10**. is replaced by the following:
>
> **10**. "Bodily Injury" or "property damage" caused by:
>
> **a**. prohibited breeds of dogs;
>
> . . .
>
> owned or kept by you or any insured, resident or guest whether or not the damage occurs on your premises or any other location.
>
> Prohibited breeds of dogs include . . . Pit Bulls . . . . Any mixed breed made up of one or more

> of the breeds listed above is also considered a prohibited breed of dog.

¶7 During the pendency of the underlying negligence case between Clark and Masi, ASI filed a complaint for declaratory judgment against Masi and Clark. ASI alleged it had no duty to defend or indemnify Masi for personal liability involving alleged damages as a result of a dog bite because all injuries Clark sustained were caused by a prohibited breed of dog as defined in the insurance policy. ASI then moved for summary judgment. In response, Clark contended that the physical injuries she suffered as a result of Masi's negligence in failing to inform her of the dog's medical condition were not "caused by" the dog bite.

¶8 Following oral argument, the trial court granted ASI's motion, finding that the exclusion contained in the animal liability endorsement "is valid and applies to the bodily injuries caused by the Pit Bull." The court also found that Clark's argument of liability based on Masi's acts after the dog bite "does not eliminate the original cause of the injuries, which was the dog bite." Consistent with its ruling, the court entered judgment in favor of ASI, declaring that ASI "has no duty to defend and/or indemnify" Masi for the claims alleged by Clark in the underlying lawsuit. Clark then timely appealed.[1]

DISCUSSION

¶9 We review the trial court's grant of summary judgment, which is based upon its interpretation of ASI's homeowner's insurance policy, de novo. *California Cas. Ins. Co. v. Am. Family Mut. Ins. Co.*, 208 Ariz. 416, 418, ¶ 5, 94 P.3d 616, 618 (App. 2004). We may affirm the court's ruling if it is correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, 111, ¶ 14, 32 P.3d 31, 36 (App. 2001). When reviewing a contract, it must be "read as a whole in order to give a reasonable and harmonious meaning and effect to all of its provisions." *Nichols v. State Farm Fire & Cas. Co.*, 175 Ariz. 354, 356, 857 P.2d 406, 408 (App. 1993). We also interpret insurance contracts according to their plain and ordinary meaning, and if unambiguous, we will not create ambiguity to benefit one party to the detriment of another. *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶ 11, 13 P.3d 785, 788 (App. 2000). "In determining

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[1] As Masi did not appeal the trial court's judgment, on the court's own motion, we amend the caption as reflected.

whether an ambiguity exists in a policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business." *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982).

I. Whether Masi's Failure to Inform is Excluded From Coverage

¶10 Clark concedes that the allegation in her underlying complaint that Masi's failure to control his Pit Bull falls within the policy exclusion rejecting coverage for certain breeds of animals. Instead, she focuses on Masi's failure to inform her whether the dog had timely received rabies shots. Clark asserts that Masi's negligence in failing to convey that information to her constitutes a separate "occurrence" under the policy. We disagree.

A. Occurrence

¶11 As a threshold matter, we examine whether Masi's failure to inform Clark about the medical condition of his dog is an "occurrence," which is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results . . . in . . . '[b]odily injury'." An "accident" does not include intentional behavior. *See Century Mut. Ins. Co v. S. Ariz. Aviation, Inc.*, 8 Ariz. App. 384, 386, 446 P.2d 490, 492 (1968) (noting that the term "accident" has been construed to mean an "undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by the manifestation of force[.]") (internal quotation omitted); Black's Law Dictionary 15 (9th ed. 2009) (defining "accident" as "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated"). Clauses limiting coverage to conduct that result in unexpected and unintentional injuries are "designed by the insurer to exclude indemnification when the insured suffers a loss resulting from the exercise of his own volition[.]" *Transamerica Ins. Group v. Meere*, 143 Ariz. 355, 356, 694 P.2d 181, 186 (1984). Therefore, intended conduct is excluded from coverage because the insured "is assumed to have controlled the risk." *Id.* (quoting 7A Appleman, *Insurance Law and Practice*, § 4492.01 at 21 (1979)).

¶12 Viewing the evidence in the light most favorable to Clark, after she was injured by the dog, Masi told her to let him go put his dogs away and he would "come back." Clark then alleged that Masi "never returned to help . . . and never provided information about the dog or the

status of its health." Masi therefore made a conscious decision to not inform Clark of the dog's medical condition or return after he restrained his dog to answer her questions. As such, his actions were not part of an "undesigned, sudden, and unexpected event[.]" *S. Ariz. Aviation*, 8 Ariz. App. at 386, 446 P.2d at 492. Because intentional conduct falls outside the definition of an accident, Masi's failure to inform is not a covered "occurrence" according to the plain language of Masi's policy.[2]

B. "Caused by"

¶13 Clark argues that the term "caused by" in the animal liability endorsement should not be interpreted to include coverage for Masi's separate conduct. Specifically, Clark contends that if bodily injury was "caused by" some other agency than a prohibited breed of dog, the policy's exclusion does not apply.

¶14 Here, the animal coverage endorsement excludes bodily injuries "*caused by* prohibited breeds of dogs." (Emphasis added). A Pit Bull is one of the prohibited breeds listed. Ordinarily, courts addressing causation surrounding an "occurrence" under an insurance contract will examine whether "there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages." *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 134, 735 P.2d 451, 456 (1987) (internal citation and quotations omitted). Thus, "even though there have been multiple causative acts, there will be a single 'occurrence' if the acts are causally *related to each other* as well as to the final result." *Id.* at 135-36, 735 P.2d at 457-58.

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[2] Clark asserts that "ASI has never claimed that Masi's additional actions in refusing to provide information and failing to provide any assistance to [Clark] are excluded under the policy" and that it cannot do so on appeal because an insurer bears the burden of proving an exclusion to coverage otherwise afforded under an insurance policy. *See Pacific Indem. Co. v. Kohlhase*, 9 Ariz. App. 595, 597, 455 P.2d 277, 279 (1969). However, "[w]hen recovery is sought under an insurance contract, the insured has the burden of proving that his loss was due to an insured risk." *Id.* at 597, 455 P.2d at 279. Therefore, Clark bore the burden below of establishing that her loss was due to an insured risk covered by the existence of a separate "occurrence."

¶15 The unambiguous language of Masi's policy excludes coverage for bodily injury "caused by" a Pit Bull. *See Roberts v. State Farm Fire & Cas. Co.*, 146 Ariz. 284, 286, 705 P.2d 1335, 1337 (1985) (finding the following policy language unambiguous involving damage caused by bees: "We insure for all risks of physical loss to the property . . . except for loss caused by . . . bees . . . ."); *Nationwide Mut. Fire Ins. Co. v. Creech*, 431 F. Supp. 2d 710, 717-18 (E.D. Ky. 2006) (finding no coverage existed based on unambiguous policy exclusion, which stated that there was no coverage for injuries "caused by" animals owned or in the care of the insured); *see also Am. Strategic Inc. Co. v. Lucas-Solomon*, 927 So.2d 184, 186-87 (Fla. App. 2006) (concluding that policy provision excluding liability coverage for bodily injury "caused by" any dog owned or kept was unambiguous).

¶16 Clark was bitten by Masi's Pit Bull and received medical treatment (including additional shots) because of that incident. As such, although Clark alleged separate injuries based on her treatment, those injuries were plainly "caused by" the dog bite. Thus, Masi's alleged negligence in failing to inform Clark of the dog's medical status was part of an uninterrupted and continuing cause that was caused by the excluded dog bite. *See Helme*, 153 Ariz. at 134, 735 P.2d at 456.

II. **Concurrent Causation**

¶17 Even assuming that Masi's conduct subsequent to the dog bite does constitutes an "occurrence" as defined by the policy and does not fall within the exclusion governing prohibited breeds, we address Clark's argument that ASI must provide coverage under the doctrine of concurrent causation, which may arise when an accident involves damages that are caused both by an insured risk and by an excluded risk. *See Scottsdale Ins. Co. v. Van Nguyen*, 158 Ariz. 476, 477-79, 763 P.2d 540, 541-43 (App. 1988). When two such risks constitute concurrently proximate causes of an accident, the carrier will be responsible for coverage if one of the causes of the accident is covered by the policy. *Id*.

¶18 On appeal, Clark relies on *Van Nguyen* in support of her assertion that the prohibited breed exclusion does not include her failure to inform claim against Masi. 158 Ariz. at 477, 763 P.2d at 541. In that case, Van Nguyen's business, Interstate Industrial Movers, was sued for wrongful death relating to the death of one of its workers that occurred while transporting a building. *Id*. The worker was electrocuted while riding atop a two-story house, which had been "jacked up on dollies and placed on steel and wooden beams," making it a "rolling building," towed by a tractor. *Id*.

¶19 At the time of the accident, Van Nguyen had a comprehensive general liability and contractor's liability insurance policy, which excluded "bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading, or unloading of . . . any automobile or aircraft owned or operated by or rented or loaned to any insured." *Id*. The insurer argued unsuccessfully to the trial court that it was not obligated to provide coverage based on the automobile exclusion. *Id*.

¶20 On appeal, a majority of the panel affirmed, concluding that the doctrine of concurrent causation applied because there was negligence in both the preparation and movement of the structure, explaining as follows:

> The record shows . . . that the height, length and width of the structure moved was greater than that allowed by the city permit; the structure moved did not have the number of dollies required by the city permit; and appellees did not notify the utility company of the move, as required, nor seek its assistance as may have been prudent. Additionally, appellees used dangerously conductive galvanized guides which were intended to deflect overhead wires but were ineffective without manual assistance. There is further evidence that the instruction and supervision of those assisting in the move were inadequate. Van Nguyen himself directed movement of the house as it passed underneath the overhead power lines.

Id. The court recognized that the rolling house could have passed under the overhead power lines if it had been towed by "horses, oxen or people." *Id*. at 479, 763 P.2d at 543. In that regard, the movement of the house was separate from the tractor towing it, and the accident could have occurred without the tractor. *Id*. The use of the insured tractor was, therefore, only incidental to the death, and the automobile exclusion did not apply. *Id*.

¶21 Here, Masi's negligence in failing to inform Clark of the medical condition of his dog was not merely incidental to his negligence in failing to control his dog from biting Clark. Instead, Masi's failure to inform was directly related to his failure to control the dog. Therefore, the doctrine of concurrent causation does not apply to this case because Masi's negligence in failing to inform Clark of his dog's medical condition is necessarily tied to the dog bite. *See Am. Family Mut. Ins. Co. v. White*, 204

Ariz. 500, 508, 65 P.3d 449, 457 (App. 2003) (denying coverage for claim of negligent supervision against parents of child who engaged in excluded activity—violation of criminal law—because the negligent supervision claim "derives from the claim against [the child], which is excluded"); *Behrens v. Aetna Life & Cas.*, 153 Ariz. 301, 302, 736 P.2d 385, 386 (App. 1987) (finding that a claim for negligent entrustment or supervision was inseparable from the excluded negligent operation of a boat); s*ee also Nat'l Fire Ins. Co. of Hartford v. Lewis*, 898 F. Supp. 2d 1132, 1152 (D. Ariz. 2012) ("As a general matter, Arizona law is clear that negligence claims deriving from an excluded activity are themselves typically excluded"); *Colony Ins. Co. v. Events Plus, Inc.*, 585 F. Supp. 2d 1148, 1155 (D. Ariz. 2008) ("When the allegations raised against the party seeking coverage do not exist separate and apart from the excluded action, there is no coverage"); *American Family Mut. Ins. Co. v. Schmitz*, 793 N.W.2d 111, 118 (Wis. Ct. App. 2010) (For independent concurrent cause rule to apply, so that insured risk prevails over the excluded risk when there are multiple causes for a loss, some of which are insured and others of which are excluded, "the covered cause must provide the basis for a cause of action in and of itself and must not require the occurrence of the excluded risk to make it actionable").

III. **Attorney's Fees**

¶22 ASI requests an award of attorneys' fees incurred in this appeal under Arizona Revised Statutes section 12-341.01. In our discretion, we deny ASI's request. We award costs, however, to ASI subject to its compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶23 Because Clark's claimed damages were caused by a prohibited breed as defined by the insurance policy issued to Masi, we affirm the trial court's entry of summary judgment in favor of ASI.

Ruth A. Willingham · Clerk of the Court
FILED: mjt