NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. WN144245,

Plaintiff-Appellee,

v.

THE VISION AFH, LLC, a Washington Limited Liability Company; ESTHER IRUNGU,

Defendants,

and

FREEDOM NITSCHKE, as Personal Representative of the estate of Timothy L Nitschke,

Defendant-Appellant.

No. 21-36035

D.C. No. 3:20-cv-05662-TLF

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Theresa Lauren Fricke, Magistrate Judge, Presiding

Argued and Submitted October 18, 2022
Seattle, Washington

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: TALLMAN, R. NELSON, and FORREST, Circuit Judges.

This insurance dispute arises out of the intentional assault of the decedent, Timothy Nitschke, by a fellow resident of The Vision Adult Family Home (Vision), a senior adult care facility in Lakewood, Washington. Vision had a general and professional liability insurance policy issued by Underwriters at Lloyd's, London (Underwriters) in effect at the time of the incident. Underwriters maintained that the insurance policy did not cover the assault because it contained a physical-abuse exclusion that removed from coverage intentional physical contact resulting in injury. The representative of Nitschke's estate, Freedom Nitschke (Freedom), argued that the exclusion violates Washington public policy and moved the district court to certify the public policy question to the Washington Supreme Court.

The district court granted Underwriters' motion for summary judgment and denied certification. Freedom appeals both decisions and asks this court to certify the public policy question. We have jurisdiction under 28 U.S.C. § 1291 and review de novo the district court's grant of summary judgment. *Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1038 (9th Cir. 2021). We review the district court's denial of certification for abuse of discretion. *Thompson v. Paul*, 547 F.3d 1055, 1059 (9th Cir. 2008). We affirm and also deny certification.

1. ***Physical-Abuse Exclusion***. Washington insurers may limit their contractual liability so long as the limitations are not contrary to statute or public

policy. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wash. 2d 691, 702 (2014) (en banc). The parties dispute whether there is an applicable state public policy requiring adult family homes to have insurance coverage to compensate residents injured by the intentional acts of third parties. Assuming arguendo that such a public policy exists, we find that the insurance exclusion does not violate it.

"An insurer is free to limit its risks by excluding coverage when the nature of its risk is altered by factors not contemplated by it in computing premiums . . . ." *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wash. 2d 203, 209 (1982) (en banc). "[E]xclusions that have been held violative of public policy generally have been those manifesting no relation to any increased risk faced by the insurer, or when innocent victims have been denied coverage for no good reason." *Mendoza v. Rivera-Chavez*, 140 Wash. 2d 659, 667 (2000) (quoting *Eurick v. Pemco Ins. Co.*, 108 Wash. 2d 338, 343–44 (1987) (en banc)). But exclusions do "not violate public policy where the clause directly relates to an increased risk on the part of the insurer." *Planet Ins. Co. v. Wong*, 74 Wash. App. 905, 910 (1994).

In *Wiscomb*, the Washington Supreme Court struck down an automobile insurance clause excluding coverage for injuries to persons related to and living with the negligent driver as violative of the state's public policy because it improperly focused on who was injured, not upon the risk to the insurance company, and "exclude[d] from protection an entire class of innocent victims for no good reason."

97 Wash. 2d at 208. Similarly, in *Mendoza*, the court struck a felony exclusion from an automobile insurance policy that excluded coverage based on the extent of the injuries to the victims—not the risk to the insurer. 140 Wash. 2d at 669–70.

The feature that triggers the application of the exclusion at issue here is the type of conduct causing the loss—intentional physical abuse by a third party—not the type of victim as in *Wiscomb* or the extent of injury as in *Mendoza*. Additionally, the conduct excluded in this case is directly related to the nature of the risk faced by the insured. *See Wong*, 74 Wash. App. at 910–11. Accordingly, even if an applicable state public policy exists, on these facts the physical abuse exclusion does not violate it under the framework of *Wiscomb* and *Mendoza*.

2. ***Certification.*** The decision to certify a question to a state supreme court is within the "sound discretion of the federal court." *Pacheco v. United States*, 21 F.4th 1183, 1187 (9th Cir. 2022) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). The district court did not abuse its discretion by declining to certify the question to the Washington Supreme Court given the existing Washington caselaw addressing whether insurance exclusions violate public policy. *See Syngenta Seeds, Inc. v. County of Kauai*, 842 F.3d 669, 681 (9th Cir. 2016). We also decline to certify the public policy question posed to the Washington Supreme Court. *See Murray v. BEJ Mins., LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019).

AFFIRMED.