

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SAFECO INSURANCE COMPANY,

Plaintiff- Appellee,

v

RICHARD DITONTO, BEVERLY DITONTO, and  
DEBORAH FRIGERI,

Defendants,

and

JANE DOE and MARY DOE,

Defendants-Appellants.

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UNPUBLISHED

March 3, 2000

No. 211029

Oakland Circuit Court

LC No. 97-538760 CK

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition in favor of plaintiff. We affirm.

Defendant Jane Doe was injured in an automobile accident and sought assistance in caring for her minor child, defendant Mary Doe, who suffered from cerebral palsy. Defendant Jane Doe learned of The Arc of Oakland County (hereinafter "ARC"), a non-profit corporation which provides support services for parents of developmentally impaired children. ARC offered a program entitled "Shared Parenting" which allowed placement of a developmentally impaired child with "co-parents." Co-parents may take care of a placed child for one hundred days per year and are compensated for their services. The care of the child may include overnight stays. In the present case, a shared parenting agreement was executed by Jane Doe and defendant Beverly Ditonto. However, Beverly Ditonto lived with her husband, defendant Richard Ditonto, and Beverly's daughter, defendant Deborah Frigeri, and all three individuals were in contact with Mary Doe. Richard Ditonto was charged with the sexual abuse of Deborah Frigeri, his stepdaughter, and pleaded guilty to an offense for which he received jail time.

Thereafter, a lawsuit was filed on behalf of the Does against ARC, the Ditontos, and Frigeri. In the complaint, the Does alleged that Mary Doe was subjected to physical, emotional and sexual abuse by Richard Ditonto and Deborah Frigeri. The Ditontos were holders of a homeowner's insurance policy issued by plaintiff Safeco Insurance Co. at the time of the alleged sexual abuse. Initially, plaintiff assumed the defense of the underlying litigation, but later filed this action for declaratory judgment. Specifically, plaintiff alleged that the allegations in the underlying complaint were excluded from policy coverage. The trial court agreed and granted plaintiff's motion for summary disposition.

Defendants argue that the trial court erred in concluding that the day care exclusion of the policy operated to bar coverage. We disagree. Our review of summary disposition decisions is de novo. *Gumma v D & T Construction Co*, 235 Mich App 210, 214-215; 597 NW2d 207 (1999). Interpretation of an insurance contract presents a question of law that we likewise review de novo. *Nabozny v Pioneer State Ins Co*, 233 Mich App 206, 210; 591 NW2d 685 (1998). An insurance contract must be enforced in accordance with its terms, and we will not hold an insurance company liable for a risk that it did not assume. *Id.* The policy at issue provided, in relevant part:

**1. Coverage E - Personal Liability and Coverage F - Medical Payments to Others** do not apply to **bodily injury** or **property damage**:

a. which is expected or intended by any **insured**;

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g. arising out of or in connection with the operation of a **day care center**. [Emphasis in original.]

The policy further defined "day care center" and "insured" as:

4. "**day care center**" means a facility at the **residence premises** providing day care services for another's child or children:

a. with or without compensation;

b. on a regular basis; and

c. for periods of less than twenty-four hours.

Day care services do not include the activities of parents exchanging care of their children on a mutually cooperative basis, or the care of an exchange student at the **residence premises**.

5. "**insured**" means you and the following residents of your household:

a. your relatives;

b. any other person under the age of 21 who is in the care of any person named above.  
[Emphasis in original.]

Defendants argue that the Ditontos did not operate a day care center, were not licensed in accordance with state statutes to operate a day care, and permitted Mary Doe to stay for overnight visits. Therefore, the day care exclusion did not apply. We disagree. The Ditontos received compensation for each day a child placed by ARC was taken care of in their home, and Beverly Ditonto cared for up to seven children at a time. This service occurred on a regular basis. While defendants contend that Mary Doe did remain with the Ditontos for overnight visits, there was no documentary evidence to indicate that the overnight visits exceeded twenty-four hours in duration. Rather, Jane Doe testified that Mary Doe would attend school in the morning, then proceed to the Ditontos' residence. Accordingly, the day care center exclusion applies to bar policy coverage.

Defendants' contention that the Ditontos were not operating a day care center licensed by state law is without merit. The insurance policy obtained by the Ditontos did not require that any day care center conform with state law. Furthermore, the agent who provided the Ditontos with their insurance policy, John Shilcusky, testified that Richard Ditonto inquired about obtaining insurance coverage for a day care center because the Ditontos were thinking of opening a center. Shilcusky advised Richard Ditonto that plaintiff offered a policy which expressly addressed day care center needs, but it would not provide coverage for sexual abuse. The Ditontos did not make any additional inquiries and did not obtain a day care center policy.<sup>1</sup>

Finally, we note that the trial court also held that policy coverage was barred as to Richard Ditonto and Deborah Frigeri because their conduct in allegedly abusing Mary Doe constituted intentional conduct based upon *Weekley v Jameson*, 221 Mich App 34; 561 NW2d 408 (1997). This conclusion also applies to Beverly Ditonto because the act of abuse need only occur at the hands of any insured to bar coverage as to all policy holders.

Affirmed.

/s/ Harold Hood

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

<sup>1</sup> Curiously, while Beverly Ditonto testified that she did not operate a day care center, she listed "day care provider" as her occupation on her income tax returns. This factual contradiction has no bearing on our interpretation of the insurance policy definition of "day care center" and does not preclude summary disposition. Additionally, defendants submitted the affidavit of Kathleen Faller who opined that the activity engaged in by the Ditontos was not day care, but rather, constituted surrogate parenting. As previously stated, insurance interpretation presents a question of law for this Court. *Nabozny, supra*. The duty to interpret and apply the law is allocated to the courts, not the parties' expert

witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997). Accordingly, the affidavit has no bearing on our resolution of the issue.