STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2010

Laura Nelson, plaintiff/judgment creditor,
Respondent,

vs.

Randall Voeks,
Defendant/Judgment Debtor,
and
Everest National Insurance Company, garnishee,
Appellant.

Filed November 18, 2008
Reversed
Stoneburner, Judge

Hennepin County District Court
File No. 27CV01003204

Joseph M. Sokolowski, Teresa M. Thompson, Norah E. Olson Bluvshtein, Fredrikson & Byron, P.A., Suite 4000, 200 South Sixth Street, Minneapolis, MN 55402-1425 (for respondent)

James F. Dunn, 180 Grand Oak Office Center, 860 Blue Gentian Road, Eagan, MN 55121; and

Stephen P. Brown, Plunkett Cooney, Suite 2000, 38505 Woodward Avenue, Bloomfield Hills, MI 48304 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

In this garnishment action, appellant insurer of a mental-health practitioner challenges the district court's grant of summary judgment awarding the full policy limits of $1 million to a former client of the insured pursuant to a *Miller-Shugart* agreement. Insurer argues that (1) coverage for the claims asserted against the insured is limited to $25,000 under the policy's sublimit for claims involving sexual misconduct or excluded under applicable exclusions in the policy; (2) the *Miller-Shugart* agreement is unreasonable, unenforceable, and voided the policy; and (3) material fact questions about the reasonableness of the agreement make summary judgment inappropriate. Because we conclude that all of respondent's claims are subject to the unambiguous $25,000 sublimit contained in the policy, we reverse.

FACTS

At all relevant times, appellant Everest National Insurance Company (Everest) insured defendant/judgment debtor Randall Voeks, a mental-health practitioner, under a Mental Health Practitioner's Professional Liability Policy. The policy provided liability limits of $1,000,000 for "each wrongful act or each occurrence subject to a $25,000 sublimit of liability for all 'wrongful acts' involving 'sexual misconduct'."

In 2001, respondent Laura Nelson, a former patient of Voeks, sued Voeks, his clinic and his partners for: Count I: professional negligence based on mismanagement of psychological conditions; Count II: professional negligence based on failure to provide competent treatment; Count III: professional negligence based on encouragement of

unhealthy dependence; Count IV: professional negligence based on abandonment of treatment; Count V: professional negligence based on encouragement of sexual intimacy; Count VI: professional negligence based on failure to discontinue sexual intimacy; Count VII: negligent transmission of herpes; Count VIII: assault and battery; and, Count IX: intentional infliction of emotional distress. Counts X and XI, both asserting negligence, were asserted only against Voeks's supervisor and the clinic respectively. Claims against the clinic and other therapists were subsequently dismissed on summary judgment, leaving only Nelson's claims against Voeks.

Voeks tendered defense of the action to Everest. Everest provided a defense but notified Voeks that "this claim is being handled under a full Reservation of Rights." Everest's reservation-of-rights letter notes the policy's exclusion of coverage for intended "wrongful acts" among other exclusions, and states: "To the extent that any alleged acts or omissions on your part are determined to fall within these exclusions, there would be no coverage under the policy." The letter also notes that Nelson's claim exceeds the $25,000 sublimit for sexual misconduct.

Voeks admitted that he engaged in a sexual relationship with Nelson for three months in 2000 while Nelson was his patient. Voeks admitted in his deposition that he knew that sexual contact with a patient is strictly prohibited by his profession. Before engaging in the sexual relationship, he told Nelson that it is illegal and unethical for a therapist to have a sexual relationship with a patient, even if the relationship is consensual.

Nelson retained expert witnesses and provided interrogatory answers stating that, in the opinion of expert witness Dr. Linda Ledray, Voeks's behavior was a serious violation of ethical standards for psychotherapists and deviated from the standards of practice. Ledray further opined that Voeks's sexual victimization of Nelson caused Nelson's posttraumatic stress disorder to worsen and become more long-term, and caused Nelson a profound and likely irreversible intensification of her pre-existing symptoms and permanent impairment of her ability to form healthy emotional relationships.

In 2002, Everest made an offer of judgment to Nelson in the amount of $25,000. Nelson rejected that offer. Before trial, counsel for Nelson and Voeks advised Everest that they were contemplating a *Miller-Shugart* agreement. Everest retained separate counsel who acknowledged receiving notice of the negotiations, and advised counsel that Everest did not concur in the terms of the proposed settlement. Everest's counsel also advised that Everest reserved all of its rights and defenses to the *Miller-Shugart* agreement and all of its defenses under the policy.

Nelson and Voeks entered into an agreement providing that Nelson would accept the $25,000 previously tendered by Everest, but reserved the right to satisfy the balance of the judgment from Everest. Voeks assigned to Nelson "any bad-faith claim he may have against Everest." The agreement reserved claims or causes of actions that Nelson had against other named defendants, or any other persons or entities, for her damages. The agreement did not allocate damages among intentional-act counts, negligence counts, and claims involving sexual misconduct subject to the sublimit. The agreement provided that without further notice, motion, or hearing, an order for judgment against Voeks

would be entered by the court in the amount of $1,000,000. Nelson's counsel nonetheless scheduled an evidentiary hearing. Everest, which was not a party to the underlying action, did not participate in the evidentiary hearing. Only Nelson testified at the hearing after which the district court adopted the Findings of Fact, Conclusions of Law and an Order for Judgment submitted by Nelson's attorney. The findings, in part, state that Nelson was injured by Voeks's "negligence" and describe the injuries identified by Dr. Ledray as having been caused by Voeks's "sexual victimization" of Nelson.

Nelson then brought a declaratory-judgment garnishment action against Everest and moved for summary judgment in that action. The district court granted summary judgment declaring that the policy covered Nelson's injuries up to the $1 million limit and that the *Miller-Shugart* agreement was reasonable and enforceable. Because Nelson had already received the $25,000 sublimit, the district court entered judgment against Everest for $975,000.

This appeal followed.

D E C I S I O N

Standard of Review

On appeal from summary judgment, a reviewing court must determine whether the district court erred in its application of the law and whether there are any genuine issues of material fact. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In so doing, a reviewing court views the evidence in the light most favorable to the non-movant (i.e. Everest). *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "Insurance coverage issues and the interpretation of insurance contract language are questions of law,

reviewed *de novo." Jenoff, Inc. v. New Hampshire Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). "In interpreting insurance contracts, we must ascertain and give effect to the intentions of the parties as reflected in the terms of the insuring contract." *Id.* Unambiguous language must be accorded its plain and ordinary meaning. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995). A court "must not create an ambiguity where none exists in order to afford coverage to the insured." *Progressive Cas. Ins. Co. v. Metcalf*, 501 N.W.2d 690, 692 (Minn. App. 1993). A contract should be read in such a way as not to render any provision meaningless. *Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 266 Minn. 426, 436, 123 N.W.2d 793, 799-800 (1963).

The insured bears the burden of demonstrating coverage under an insurance policy. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). If this burden is met, it is the insurer that must establish the applicability of exclusions. *Id.* Exclusions are construed strictly against the insurer. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002).

I. The scope of the policy's limitation of coverage for sexual misconduct

Nelson argues that the policy language limiting coverage for sexual misconduct does not apply to all of her claims. She acknowledges that Everest had the right and ability to limit coverage for all of her claims, but asserts that the language in Everest's policy does not do so. We disagree.

Having previously held that a professional liability policy did not cover claims against a medical doctor who took sexual liberties with patients that he was treating, the Minnesota Supreme Court first held in *St. Paul Fire & Marine Ins. Co. v. Love* that sexual misconduct that is inextricably related to a therapeutic relationship could be within the coverage of a therapist's professional liability insurance policy. 459 N.W.2d 698, 702 (Minn. 1990) (construing the scope of coverage under a policy that covered damages resulting from professional services that the insured provided or should have provided).

In *Love*, the patient claimed that the therapist mishandled the "transference phenomenon,"[1] resulting in a sexual relationship that was harmful to her. *Id.* at 700. The court concluded that where there is a substantial connection between the sexual conduct and the professional services, then the conduct is seen as a consequence of those services. *Id.* at 701. The supreme court stated that when sexual conduct occurs in the handling of the transference phenomenon, "it seems to us best understood as inextricably related to the dynamics of the therapeutic relationship" and, despite being aberrant and unacceptable, "is so related to the treatment contemplated that it comes within the scope of the insurance coverage for professional services provided or withheld." *Id.* at 702.

[1] "[Transference] is '[t]he process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, . . . and responds to the therapist accordingly.' S. Waldron-Skinner, *A Dictionary of Psychotherapy* 364 (1986). Transference is common in psychotherapy. The patient, required to reveal her innermost feelings and thoughts to the therapist, develops an intense, intimate relationship with her therapist and often 'falls in love' with him . . . . A further phenomenon that may occur is countertransference, when the therapist transfers his own problems to the patient . . . . [At this point,] he must discontinue treatment and refer the patient to another therapist." *Id*. at 700.

But, the supreme court suggested in *Love* that insurers could exclude coverage for particular peril. *Id.*

Following *Love*, insurers began excluding or limiting coverage for sexual misconduct in their professional liability insurance policies and reviewing courts upheld these provisions as not against public policy. *See American Home Assurance Co. v. Stone*, 61 F.3d 1321, 1324–31 (7th Cir. 1995) (holding sublimit for "all claims against [insured] involving any actual or alleged erotic physical contact, or attempt thereat or proposal thereof" by an insured with or to a former or current patient was not against public policy); *American Home Assurance Co. v. Levy*, 686 N.Y.S.2d 639, 649 (1999) (holding that the sexual misconduct sublimit provision in the policy was unambiguous and enforceable, applied when both erotic and non-erotic physical contacts claims were made, and was not against public policy); *McConaghy v. RLI Ins. Co.*, 882 F. Supp. 540, 541 (E.D.Va. 1995) (involving a sublimit for sexual contact, holding that the limitation did not violate public policy as applied to non-sexual malpractices associated with a patient-couple's sexual relationship).

In this case, the district court relied heavily on *Love* to conclude that Nelson's claim that Voeks mishandled transference is more appropriately labeled "malpractice" than "sexual misconduct," qualifying Nelson's claims for coverage beyond the sublimit. We conclude that the district court's reliance on *Love* was erroneous because the policy at issue in *Love* did not purport to exclude or limit liability for sexual misconduct. The issue in *Love* was "whether a claim for damages arising out of a patient's sexual relationship with [his/her] treating psychologist can ever be a claim for damages resulting

from professional services provided or which should have been provided." *Id.* at 699-700. *Love* does not support the conclusion reached by the district court that Everest's sublimit does not apply to Nelson's claims of mishandled transference.

Everest's policy covering Voeks provides, in relevant part:

> **NOTICE: A SUBLIMIT OF LIABILITY APPLIES TO "CLAIMS"[2] ARISING OUT OF "SEXUAL MISCONDUCT"**
>
> **ITEM 5: LIMITS OF LIABILITY:**
> $1,000,000 *EACH WRONGFUL ACT[3] OR EACH OCCURRENCE SUBJECT TO A $25,000 SUBLIMIT OF LIABILITY FOR ALL "WRONGFUL ACTS" INVOLVING "SEXUAL MISCONDUCT."[4]*
> $3,000,000 AGGREGATE[.]
>
> . . . .
>
> **III. LIMITS OF LIABILITY**
>
> . . . .
>
> B. The Aggregate Limit is the most the Company will pay for the sum of damages for:
> 1. All "wrongful acts," including "wrongful acts" involving "sexual misconduct[.]" . . .

[2] "Claims" means an oral or written notice from any party of their intent to hold an "insured" responsible for any "wrongful act," "bodily injury," or "property damage."
[3] "Wrongful act" means any actual or alleged negligent act, error, or omission . . . .
[4] "Sexual misconduct" means any:

> 1. Action or behavior; or
> 2. Physical contact or touching;
>
> that is intended to lead to or which culminates in any sexual act, arising out of the professional treatment and care of [the insured]. "Sexual misconduct" includes such action, behavior, physical contact or touching . . . .

> C. Subject to Paragraph (B.) above, the Each Wrongful Act/Each Occurrence Limit of Liability shown in the Declarations is the most the Company will pay for damages arising out of any one:
>
> 1. "Wrongful act," or series of continuous, repeated, or interrelated "wrongful acts;" or
>
> 2. "Occurrence."
>
> D. Subject to Paragraphs (B.) and (C.) above, *the twenty-five thousand dollars ($25,000) Sexual Misconduct Sublimit of Liability shown in the Declarations is the most the Company will pay for the sum of all damages arising out of "sexual misconduct."*

(Emphasis added).

Nelson argues that the language in Everest's policy is narrower than the policy language involved in cases found to exclude or limit coverage for all claims involving sexual misconduct and is comparable to the language involved in *Cranford v. Allwest Ins. Co.*, 645 F. Supp. 1440, 1442 (N.D. Cal. 1986) (in which the federal district court held that the mishandling-transference claim was subject to the sexual-misconduct exclusion, but the abandonment claim was not subject to the exclusion because it did not "involve" sexual intimacy; it was "wholly independent" of sexual intimacy).

The Allwest policy in *Cranford* excluded "damages awarded in suits . . . involving undue familiarity, sexual intimacy, or assault concomitant therewith." *Id.* The patient in *Cranford*, like Nelson, claimed mishandling of the transference phenomenon as well as abandonment of treatment. *Id.* at 1444. Nelson argues that the district court properly held that Everest drafted a narrow *Cranford*-like limitation on coverage that does not encompass the professional negligence claims asserted by Nelson. But the holding in *Cranford* that abandonment claims were not excluded was based on the fact

that, in that case, the abandonment alleged occurred *after* the sexual relationship had ended and was found to have been separate from the sexual misconduct but to have potentially contributed to the patient's damages. *See id.* (stating that the abandonment claim was wholly independent of the therapist's sexual intimacy with the patient, and consisted only of his failure to see that she continued treatment, but each claim was potentially a proximate cause of the patient's injuries). In this case, the sexual relationship itself is the basis of Nelson's abandonment claim. The record, construed in a light most favorable to Nelson, supports Everest's assertion that the abandonment asserted by Nelson occurred at the time Voeks began the sexual relationship "effectively discontinuing treatment" and did not occur independently of the sexual relationship. We do not find persuasive Nelson's argument that Everest's language is too narrow to limit coverage for her negligence claims insofar as the claims involve, arise out of, or culminated in sexual misconduct.

In several cases involving exclusions or coverage limitations for claims "*arising out of*" any sexual acts performed or alleged to have been performed by an insured with a patient, courts have concluded that the sexual relationship is so intertwined with malpractice claims as to be inseparable. *See Govar v. Chicago Ins. Co.*, 879 F.2d 1581, 1582 (8th Cir. 1989) (applying Arkansas law to hold that malpractice claims were excluded from coverage because they were intertwined with the sexual activity); *Chicago Ins. Co. v. Griffin*, 817 F. Supp. 861, 865-66 (D. Hi. 1993) (holding malpractice claims were excluded from coverage because they were so intertwined with the sexual activity as to be inseparable).

The Everest policy uses "arising out of" and "involving" interchangeably. An exclusion in an insurance policy for injuries "arising out of" a particular act sweeps more broadly than excluding coverage only for the particular act. *Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 77–78 (Minn. App. 1997). In *Franklin v. Prof. Risk Mgmt. Services, Inc.*, the court stated that the terms "involving," and "arising from," and "based . . . on" all suggest the need for a nexus between the sexual misconduct and the claims alleged. 987 F. Supp 71, 76 (D. Mass. 1997). Everest argues that such a nexus exists in all of the claims asserted by Nelson. We agree.

Nelson also argues that Everest's definition of "sexual misconduct" does not encompass her negligence claims because the definition relates solely to affirmative acts such that Nelson's malpractice claims for omissions (inaction) fall outside the definition of sexual misconduct. We disagree. The policy defines "sexual misconduct" as:

> 1. Action or behavior; or
> 2. Physical contact or touching;
>
> that is intended to lead to or which culminates in any sexual act, arising out of the professional treatment and care of any client . . . .

Nelson argues, unpersuasively, that "behavior" cannot mean inaction. Furthermore, Everest's policy unambiguously applies a $25,000 limit for "wrongful acts" involving sexual misconduct, and "wrongful acts" is defined in the policy as any actual or alleged negligent act, error, or omission. We find no merit in Nelson's argument that her "omission" claims are not covered by the sublimit.

II. Application of sublimit to Nelson's claims

Nelson argues that her claims of abandonment of treatment, failure to refer, and failure to consult do not involve sexual misconduct and are distinct from any claims arising from or involving sexual misconduct and, therefore, the district court properly held that coverage for those claims is not limited by the sublimit. Nelson argues that these claims are rooted in standards of conduct governing therapists, which do not refer to sexual misconduct. Nelson asserts that Voeks, in his deposition, admitted that he abandoned treatment, failed to refer, and failed to consult with colleagues about Nelson's treatment before there was sexual contact—when he should have had a "gong" going off in his head. But Voeks's testimony was about a conversation with his own therapist. Voeks told his therapist about Nelson's request that Voeks describe what he finds erotic. Voeks told his therapist that he "had this little bell going off in the back of" his head, and the therapist replied that it "should have been a gong." Voeks went on to say in his deposition that "I should have recognized the potential vulnerability and/or the kind of erotic, charged energy that would come in doing that . . . ." Far from demonstrating that Voeks's behavior was separate from his sexual misconduct, the passage from his deposition is evidence of the fact that all of the claims alleged by Nelson relate to behavior that culminated in the sexual misconduct.

Following the evidentiary hearing on the *Miller-Schugart* agreement, the district court found that Nelson was injured by Voeks's "negligence." But the district court's memorandum accompanying the order granting summary judgment in the garnishment action makes it plain that Voeks's negligence involved, and Nelson's damages arose out

of, sexual misconduct. The district court described the judgment entered against Voeks as specifically finding "that Voeks's sexual relationship with Nelson constituted a serious departure from his professional standards and has caused Nelson to suffer certain . . . disorders[.]"

We conclude that all of Nelson's claims arose from or culminated in Voeks's sexual misconduct and are subject to the sublimit for such misconduct. All of the allegations in Nelson's complaint involve her sexual relationship with Voeks and its development. Voeks's and Nelson's sworn testimonies about the basis of the claims center on the sexual relationship between the two. Other conduct discussed, such as Voeks's failure to speak with his colleagues about his sexual relationship with Nelson, was plainly conduct related to the development of the sexual relationship. Even the district court noted that Nelson's claims of abandonment were "somewhat related to her sexual relationship with Voeks because in theory, Nelson would not have needed a new therapist if she and Voeks had not engaged in a sexual relationship." Because all of Nelson's claims are subject to the sublimit, we reverse the district court's entry of judgment against Everest for $975,000.

Because we have concluded that all of Nelson's claims are subject to the sublimit, we do not reach Everest's arguments that other exclusions apply to bar coverage for claims not covered by the sublimit or that the *Miller-Shugart* agreement is unenforceable and voided coverage. We also decline to reach Nelson's argument that an ambiguity concerning a reference to aggregate limits must be construed against Everest and results in coverage up to the aggregate limit ($3 million) for all wrongful acts, even those

involving sexual misconduct. The district court did not reach this argument, and generally we will not consider matters not considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if we were to reach this argument, we find it strained and without merit. "A court 'must not create an ambiguity where none exists in order to afford coverage to the insured.'" *Progressive Cas. Ins. Co. v. Metcalf*, 501 N.W.2d 690, 692 (Minn. App. 1993).

Reversed.