SJC-12856

DORCHESTER MUTUAL INSURANCE COMPANY vs. TIMOTHY KRUSELL & others.[1]

Norfolk. April 6, 2020. - August 13, 2020.

Present: Gants, C.J., Lenk, Lowy, Budd, Cypher, & Kafker, JJ.

Insurance, Homeowner's insurance, Construction of policy, Insurer's obligation to defend, Coverage, Settlement of claim. Consumer Protection Act, Unfair act or practice, Insurance, Offer of settlement. Words, "Physical abuse."

Civil action commenced in the Superior Court Department on November 12, 2015.

The case was heard by Thomas A. Connors, J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Charles S. Beal for the defendants.
Kevin M. Truland for the plaintiff.
Kathy Jo Cook, Thomas R. Murphy, Kevin J. Powers, J. Michael Conley, & John T. Ford, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

[1] Michele K. Krusell and Peter W. Krusell.

LENK, J. At issue in this case is whether a homeowners' insurance policy issued by Dorchester Mutual Insurance Company (Dorchester Mutual) to the parents[2] of Timothy Krusell requires Dorchester Mutual to indemnify the Krusells in a personal injury suit. The principal question we must resolve is the scope of an exclusion in that policy precluding coverage for "[b]odily injury . . . arising out of sexual molestation, corporal punishment or physical or mental abuse," and whether it applies where, as here, Krusell pushed Robert Christian Haufler during a conversation on a public sidewalk, causing him to fall and sustain serious injuries.

Haufler commenced a personal injury action in the Superior Court against the Krusells. Arguing that Krusell's conduct was a form of "physical abuse" for which coverage was unavailable, Dorchester Mutual sought a declaratory judgment that it had no duty to indemnify the Krusells for Haufler's personal injury claims. The Krusells responded that because the term "physical abuse" is ambiguous, the "abuse and molestation" exclusion did not preclude coverage. They maintained as well that Dorchester Mutual's refusal to engage in settlement talks constituted an unfair settlement practice in violation of G. L. c. 93A and

[2] Because the defendants share a last name, we refer to Timothy Krusell's parents individually by their first names, and to the defendants collectively as "the Krusells."

G. L. c. 176D. A Superior Court judge concluded that the exclusion precluded coverage and granted Dorchester Mutual's motion for summary judgment. The judge also determined that Dorchester Mutual's refusal to enter into settlement discussions did not violate G. L. c. 93A and G. L. c. 176D.

We conclude that the term "physical abuse," as used in the policy, is ambiguous, but that a reasonable insured would interpret the term as not precluding coverage for Haufler's claim. Accordingly, the order granting summary judgment in favor of Dorchester Mutual with respect to its duty to indemnify the Krusells was error and must be reversed. We discern no error, however, in the allowance of summary judgment on so much of the Krusells' cross claim as asserted violations of G. L. c. 93A and G. L. c. 176D.[3]

1. Facts. We recite the facts in the light most favorable to the Krusells as the nonmoving party. See Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 474-475 (2013).

a. The incident. At approximately 12:30 A.M on September 13, 2014, Krusell, then twenty-three years old, and a college friend were walking in downtown Newport, Rhode Island. They struck up a conversation with Haufler, then sixty-two, and his companion; Haufler's companion and Krusell's friend were

[3] We acknowledge the amicus brief of the Massachusetts Academy of Trial Attorneys.

acquaintances, but Krusell and Haufler had never met. Krusell and Haufler were discussing a record-breaking swordfish Haufler said he had caught, about which Krusell expressed some skepticism. While the events immediately preceding the push are disputed, it is uncontested that, at some point, Krusell pushed Haufler, causing him to lose his balance and fall onto a parked automobile before striking the pavement.[4] Krusell ran from the scene after Haufler hit the vehicle, purportedly to avoid getting into a fight, and did not see Haufler fall to the ground. Haufler suffered broken bones and other injuries requiring hospitalization, which ultimately resulted in permanent damage to his right arm.

In October of 2014, Haufler filed a civil complaint against Krusell asserting negligence, reckless indifference, intentional infliction of emotional distress, and assault and battery. Krusell's parents were joined in their capacity as cotrustees of

[4] Krusell asserted that he was surprised when Haufler, who was standing two feet away, raised his cellular telephone to Krusell's face to show him a photograph of the fish, and that Krusell instinctively pushed the device away from his face, causing Haufler to lose his balance. Haufler, in contrast, reported that Krusell had been sitting on a wall approximately five to six feet away from Haufler and the other men when Krusell overheard Haufler's account of setting a State record for catching swordfish. Krusell said, "That's not your fish," stood up, walked slowly, and then ran at Haufler, body slamming him with both fists out, causing Haufler to fly through the air.

a real estate trust in which Krusell held a beneficiary interest (the family home).[5]

b. Claim settlement. Dorchester Mutual agreed to defend the claim under a reservation of rights, citing a coverage exclusion in the Krusells' policy for intentional acts (intentional acts exclusion).[6] The Krusells sought to settle the claim with Haufler, and repeatedly urged Dorchester Mutual to participate in settlement negotiations. Dorchester Mutual declined to do so, on the ground that it had insufficient information to reach a final determination whether the claim would be covered.[7] It was unable to obtain a statement of the events from Krusell because he faced criminal charges in connection with the incident; on advice of counsel, he declined

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[5] At the time of the incident, Krusell was living in his parents' house and thus was covered under their homeowners' insurance policy.

[6] The intentional acts exclusion in the Krusells' policy precludes coverage for "'[b]odily injury' . . . which is expected or intended by an 'insured' even if the resulting 'bodily injury' . . . (a) is of a different kind, quality or degree than initially expected or intended; or (b) is sustained by a different person . . . than initially expected or intended." Dorchester Mutual believed this exclusion applied because Haufler's claim alleged intentional conduct.

[7] Dorchester Mutual declined to enter into settlement discussions on numerous occasions; it demurred first to a demand letter from Haufler seeking $800,000 or, if less, the maximum allowed under the Krusells' policy. The Krusells sought to offer $400,000, and later indicated their intent to offer a sum in excess of the $500,000 limit under their policy.

to provide a statement while those charges were pending.[8] As a result, Dorchester Mutual had only the information in Haufler's complaint, a copy of the police report, and a brief account from Krusell's attorney.

After Dorchester Mutual declined to participate in settlement negotiations, the Krusells eventually settled the claim for $750,000; they believed that $500,000 would be covered under their insurance policy. Dorchester Mutual, however, informed the Krusells that due to the "pending coverage, liability and damage issues," it remained unable to consider payment.

2. Prior proceedings. Dorchester Mutual commenced an action in the Superior Court seeking a judgment declaring that it had no duty to indemnify the Krusells under the terms of their homeowners' insurance policy. The Krusells counterclaimed; they argued that Dorchester Mutual's refusal to indemnify, and its refusal to participate in settlement discussions, constituted a breach of contract, a breach of the

[8] Krusell was charged in Rhode Island with assault on a person sixty years of age or older causing serious bodily injury, in violation of R.I. Gen. Laws § 11-5-10.1. As discussed, see note 25, infra, the judge ultimately reduced the charge to simple assault and placed it on file for one year; the charge was to be expunged so long as Krusell did not commit any crimes during that period.

implied covenant of good fair and fair dealing, and a violation of G. L. c. 93A and G. L. c. 176D.

Dorchester Mutual argued -- for the first time in its motion for summary judgment -- that even if Krusell did not intend to injure Haufler and the intentional acts exclusion was thus inapplicable, a different exclusion precluded coverage. This exclusion, known as the "abuse and molestation exclusion,"[9] precluded coverage for "'[bodily injury' or 'property damage' arising out of sexual molestation, corporal punishment or physical or mental abuse." Dorchester Mutual argued that the phrase "physical abuse" unambiguously described Krusell's conduct, and that the exclusion thereby precluded coverage.

The judge agreed that Krusell's conduct constituted physical abuse, and thus that the abuse and molestation exclusion precluded coverage. Accordingly, the judge granted Dorchester Mutual's motion for summary judgment on both the question of indemnification and the G. L. c. 93A and G. L. c. 176D claims. The Krusells filed an appeal in the Appeals Court, and we transferred the case to this court on our own motion.

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[9] See, e.g., 2 New Appleman Law of Liability Insurance § 13.06[12] (2019), citing Fire, Casualty, & Surety Bulletins, at Hpe-7 (describing this type of exclusion as "abuse and molestation exclusion").

3. Discussion. The Krusells assert error in the judge's conclusion that the abuse and molestation exclusion precludes coverage of Haufler's claim. They also argue that Dorchester Mutual waived its right to raise the exclusion, or is estopped from doing so, because Dorchester Mutual did not mention the exclusion when reserving its right to deny coverage, instead relying on the intentional acts exclusion.[10] In addition, the Krusells contend that the judge erred in granting Dorchester Mutual's motion for summary judgment on the G. L. c. 93A and G. L. c. 176D claims.

a. Standard of review. "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). We review decisions allowing

[10] The Krusells maintain that, by not mentioning the physical abuse exclusion in its letter reserving its rights, Dorchester Mutual waived the right to rely on the exclusion as a defense or should be estopped from doing so. These claims are unavailing. Express policy coverage limits are not subject to waiver. See Merrimack Mut. Fire. Ins. Co. v. Nonaka, 414 Mass. 187, 191 (1993). Estoppel requires a showing that "one has been induced by the conduct of another to do something different from what otherwise would have been done and that harm has resulted." Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc. 419 Mass. 462, 468 (1995). We discern no evidence that Dorchester Mutual engaged in any conduct on which the Krusells reasonably could have relied.

summary judgment de novo. See Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012). "An order granting or denying summary judgment will be upheld if the trial judge ruled on undisputed material facts and his [or her] ruling was correct as a matter of law" (citation omitted). Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London, 449 Mass. 621, 628 (2007).

b. Whether the abuse and molestation exclusion precludes coverage. The crux of the parties' dispute is whether, in the context of a homeowners' insurance policy, the term "physical abuse" in the abuse and molestation exclusion precludes coverage for Krusell's conduct. The Krusells contend that the term "physical abuse" is ambiguous and should be read to require intentional conduct, or should be limited to conduct involving a sexual element, neither of which would preclude coverage here. Construing the term much more broadly, Dorchester Mutual maintains that the phrase "physical abuse" in the exclusion provision encompasses any form of physically harmful treatment, and that the abuse and molestation exclusion precludes coverage.[11]

[11] In its brief, Dorchester Mutual also argues that the intentional acts exclusion -- which precludes coverage for "'[b]odily injury' . . . which is expected or intended by an insured" -- provides a separate ground on which to affirm the allowance of summary judgment. We do not agree. As discussed,

For the reasons discussed infra, we conclude that the term "physical abuse" in the exclusion provision is ambiguous. We therefore consider what an objectively reasonable insured would expect to be covered, and conclude that a reasonable insured would interpret the term "physical abuse" as not precluding coverage for the conduct at issue here.

i. Policy provisions. The Krusells' homeowners' policy provides "personal liability" coverage for a claim or lawsuit "brought against an 'insured' because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies." An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. 'Bodily injury'; or b. 'Property damage.'"

Personal liability coverage under the policy is excluded for a number of enumerated reasons. As relevant here, one such exclusion, entitled "Sexual Molestation, Corporal Punishment Or Physical Or Mental Abuse," excludes coverage for "'[b]odily injury' or 'property damage' arising out of sexual molestation,

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see note 4, supra, it remains disputed whether Krusell "expected" or "intended" to injure Haufler. Because a material fact pertaining to the application of the intentional acts exclusion remains in dispute, summary judgment on this ground is unwarranted. See Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

corporal punishment or physical or mental abuse." While the policy defines "personal injury" and "property damage," it does not define "sexual molestation," "corporal punishment," "physical abuse," or "mental abuse."

ii. Interpretation of insurance contracts. "The proper interpretation of an insurance policy is a matter of law to be decided by a court . . . ." Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012). "[L]anguage in an insurance contract 'is no different from . . . [language in] any other contract, and we must construe the words of the policy in their usual and ordinary sense." Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 634-635 (2013), quoting Metropolitan Prop. & Cas. Ins. Co. v. Morrison, 460 Mass. 352, 362 (2011). We assume that every word in an insurance contract serves a purpose, and "must be given meaning and effect whenever practicable" (citation omitted). Metropolitan Life Ins. Co., supra at 635.

Where unambiguous, the terms of an exclusion "should be construed 'in their usual and ordinary sense'" (citation omitted). See Bagley v. Monticello Ins. Co., 430 Mass. 454, 457 (1999). "Any ambiguities in the language of an insurance contract," however, "are interpreted against the insurer who used them and in favor of the insured." Allmerica Fin. Corp., 449 Mass. at 628. This rule "applies with particular force to exclusionary provisions," Hakim v. Massachusetts Insurers'

Insolvency Fund, 424 Mass. 275, 282 (1997), and an insurer bears the burden of proving that a particular exclusion is applicable, see Allmerica Fin. Corp., supra. When in doubt as to the proper meaning of a term in an insurance policy, we "consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered" (citation omitted). See Metropolitan Prop. & Cas. Ins. Co., 460 Mass. at 362. See also James B. Nutter & Co. v. Estate of Murphy, 478 Mass. 664, 670 (2018), quoting Golchin v. Liberty Mut. Ins. Co., 466 Mass. 156, 159-160 (2013) ("standard insurance policies must be interpreted in light of 'what an objectively reasonable insured . . . would expect to be covered'").

Accordingly, to resolve the question here, we first must determine whether the term "physical abuse" is ambiguous; if it is, we proceed to consider how an objectively reasonable insured would interpret the term, in other words, whether a reasonable insured would expect the exclusion to preclude coverage in this case.

iii. Whether the term "physical abuse" is ambiguous. A term is not rendered ambiguous merely by virtue of the fact that the parties disagree as to its meaning. See Sullivan v. Southland Life Ins. Co., 67 Mass. App. Ct. 439, 443 (2006). Rather, a term is ambiguous where "it is susceptible of more than one meaning and reasonably intelligent persons would differ

as to which meaning is the proper one." Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998).

When deciding whether a term is ambiguous, we initially do not consider any extrinsic evidence of the intended meaning. See Bank v. Thermo Elemental Inc., 451 Mass. 638, 648 (2008). Instead, we look "both to the contested language and to the text of the [insurance policy] as a whole" (citation omitted). See James B. Nutter & Co., 478 Mass. at 670. In attempting to ascertain possible relevant meanings, we consider dictionary definitions; we also look to case law to determine whether courts have adopted a consistent interpretation. Cf. Suffolk Constr. Co. v. Illinois Union Ins. Co., 80 Mass. App. Ct. 90, 94 (2011), citing BloomSouth Flooring Corp., v. Boys' & Girls' Club of Taunton Inc., 440 Mass. 618, 622-623 (2003).

To begin, we note that the term "physical," in context, is not ambiguous; it reasonably is understood to mean "of or pertaining to the body." Webster's New Universal Unabridged Dictionary 1461 (2003). The question remains, however, whether "abuse" is an ambiguous term.

Dictionary definitions indicate at least two plausible strands of interpretation. One -- advanced by Dorchester Mutual -- interprets the term broadly to include any form of physically harmful treatment. See, e.g., Webster's New Universal Unabridged Dictionary, supra at 9 (ninth definition of

"abuse" is "bad or improper treatment"); Webster's Ninth New Collegiate Dictionary 47 (1991) (fifth definition of "abuse" is "physical maltreatment"). The second strand recognizes that the term "abuse" contemplates conduct that is more circumscribed than simply any form of physically harmful treatment, such that "abuse" implies a qualitative aspect to the treatment beyond the fact that it causes harm. See, e.g., Black's Law Dictionary 12 (11th ed. 2019) (defining "abuse" as "[c]ruel or violent treatment of someone; [specifically] physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury" [emphasis supplied]). Cruelty, in turn, implies a disposition to inflict pain or suffering on the part of the abuser. See Webster's New Universal Unabridged Dictionary, supra at 483 ("cruel" means "willfully or knowingly causing pain or distress to others"; Webster's Ninth New Collegiate Dictionary, supra at 311 (defining "cruel" as "disposed to inflict pain or suffering: devoid of humane feelings").

Those courts that explicitly have interpreted the term "abuse" in the context of abuse and molestation exclusions have relied upon one or other of these divergent approaches.[12] Some

[12] In many other cases considering whether an exclusion provision is applicable, the terms "abuse" or "physical abuse" are not specifically addressed, generally because the conduct at

courts, as did the judge here, have adopted the broad interpretation that physical abuse includes any harmful physical treatment. See, e.g., Miglino v. Universal Prop. & Cas. Ins. Co., 174 So. 3d 479, 481 (Fla. Dist. Ct. App. 2015) (defining "abuse" as "physical . . . maltreatment" and holding that physical abuse exclusion barred coverage for shooting where insured loaned firearm to sister); American Family Mut. Ins. Co. v. Chiczewski, 298 Ill. App. 3d 1092, 1095 (1998) (construing word "abuse" in provision excluding coverage for "physical abuse of a minor" as "physically harmful treatment").[13] Numerous others have concluded that physically abusive conduct is a subset of physically harmful treatment. See, e.g., Riley v. Maison Orleans II, Inc., 829 So. 2d 479, 491 (La. Ct. App. 2002) ("Physical abuse, as opposed to simple assault, is generally the act of a person in control, dominance, or authority who misuses

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issue unquestionably falls within the more narrow definition and the issue is not raised. In cases challenging application of an exclusion, the dispute more frequently involves whether the term "physical abuse" in an abuse and molestation exclusion requires intent. See, e.g., Merrimack Mut. Fire Ins. Co. v. Ramsey, 117 Conn. App. 769, 772-773 (2009) (where abuse and molestation provision used same language as at issue in this case, parties disputed whether "physical abuse" required insured's intent; court concluded that it did not, by reading this provision in conjunction with provision excluding coverage for intentional acts).

[13] See also Smyth vs. Scherer, Mass. Super. Ct., No. ESCV2016189 (Essex County May 02, 2017).

his [or her] position to harm or mistreat a person over whom he [or she] exercises such control" [emphasis supplied]).[14]

In sum, as evinced by the several dictionary definitions and the varying interpretations in different courts, there appears to be no judicial consensus as to whether abuse -- here "physical abuse" -- connotes any conduct whatsoever that causes physical harm, or, instead, a subset of physically harmful conduct characterized by an "abusive" quality, such as an imbalance of power. In light of these diverging interpretations, we conclude that the term "abuse" is susceptible of more than one meaning and reasonably intelligent persons could differ as to which meaning is the proper one. Hence, the term is ambiguous. See Citation Ins. Co., 426 Mass. at 381.

iv. A reasonable insured's expectations as to coverage. As we have concluded that the term "physical abuse" is ambiguous, we turn to consider "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." See Metropolitan Life Ins. Co., 464 Mass. at 635, quoting Hazen Paper Co. v. United States Fid. & Guar. Co., 407

[14] See also Lexington Ins. Co. vs. New Mexico Ass'n of Counties, U.S. Dist. Ct., No. 07-464 RB/LAM (D.N.M. June 28, 2010) (rejecting definition of "abuse" that included all forms of "mistreat[ment]"); Quincy Mut. Fire Ins. Co. vs. Kim, Mass. Super. Ct., No. 1483CV00847 (Plymouth County July 28, 2015).

Mass. 689, 700 (1990). If a reasonable insured in the Krusells' position would construe the phrase "physical abuse" as not encompassing the conduct at issue, the exclusion does not preclude coverage.

When read in the context of the abuse and molestation exclusion and the policy as a whole, the broad definition of "physical abuse" as including any conduct that causes physical harm proves unworkable.[15] Words are, at least in part, defined by the company they keep, and such a broad reading, among other things, would render superfluous the exclusion's references to "sexual molestation" and "corporal punishment," because both are forms of physically harmful treatment. See Metropolitan Life Ins. Co., 464 Mass. at 634-635.

In addition, interpreting the term to apply to any form of physically harmful conduct arguably would preclude coverage for physical injuries resulting from an accident. Imagine, for example, that a homeowner injured a guest by accidentally spilling coffee on the guest's arm. If any physically harmful treatment constituted physical abuse, the exclusion almost certainly would preclude coverage for such an accident. Where,

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[15] Because the abuse and molestation exclusion in the policy explicitly includes not only "sexual molestation," but also nonsexual forms of "corporal punishment" and "physical or mental abuse," we also reject any interpretation of physical abuse as limited exclusively to sexual conduct.

as here, an insurance policy is designed to provide coverage for "occurrences," which are defined in part as "accidents," such a broad interpretation of "physical abuse" would undermine the basic purpose of a homeowner purchasing such a policy.[16] Cf. Quincy Mut. Fire Ins. Co. v. Abernathy, 393 Mass. 81, 84-85 (1984) ("Equating the word 'expected' [in policy exclusion for expected injuries] with negligent conduct would result in a severe and inequitable curtailment of such insurance coverage . . .").

Moreover, the history of the adoption of abuse and molestation exclusions confirms that their terms were not intended to be read as broadly as Dorchester Mutual suggests. An abuse and molestation exclusion originally was added to liability insurance policies to "reinforce" the intentional acts exclusion. See, e.g., 2 New Appleman Law of Liability Insurance § 13.06[12] (2019), citing Fire, Casualty, & Surety Bulletins, at Hpe-7. Broadly speaking, the exclusion shields insurers in two situations where the intentional acts exclusion proves inadequate.

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[16] Indeed, judges in other cases have rejected overly broad definitions of abuse exclusions for this very reason. See, e.g., Quincy Mut. Fire Ins. Co., Mass. Super. Ct., No. 1483CV00847, supra (defining "physical abuse" as physically harmful treatment renders exclusion "meaningless because it invites all harmful conduct to fit into the exclusion's definition").

The first is where a victim of abuse seeks to recover for an insured party's negligent supervision of a third-party assailant. The abuse and molestation exclusion originated in the 1980s in response to an increasing number of far-reaching sexual abuse claims against organizations that alleged harm to children arising from negligent hiring or supervision, rather than from the abuse itself. See Bartley, The Liability Insurance Regulation of Religious Institutions After the Catholic Church Sexual Abuse Scandal, 16 Conn. Ins. L.J. 505, 517-518, 530 (2010).[17] Because the basis for such claims was the negligent conduct of a third party, rather than the intentional conduct of the alleged abuser, existing policy exclusions for intentional acts were insufficient to shield insurers from coverage obligations. See id.[18]

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[17] See also Nonprofits Insurance Alliance, Improper Sexual Conduct and Physical Abuse Liability, https://insurancefornonprofits.org/coverages/nonprofits-own/improper-sexual-conduct [https://perma.cc/4X76-N5TP] ("Any organization that provides services to youth, developmentally disabled individuals of any age, or senior citizens should consider this type of insurance. The intent of this coverage is to respond to allegations of sexual abuse").

[18] Although such negligent supervision claims generally are associated with organizations such as the Boy Scouts and certain religious entities, the theory also has been applied, for example, in domestic settings such as supervision of family members and child care providers, as well as against administrators in school settings. Thus, from its roots in liability insurance for organizations, abuse and molestation exclusions took root in homeowners' insurance policies as well

A second set of circumstances is where a claim generally would be brought directly against an abuser, but the abuser is deemed incapable of intentional conduct by virtue of a mental disease or defect. Even though, ordinarily, abuse is intentional conduct, in such a situation the abuser's inability to act with intent renders the intentional acts exclusion inapplicable. See, e.g., Merrimack Mut. Fire Ins. Co. v. Ramsey, 117 Conn. App. 769, 770, 772-773 (2009) (abuse and molestation exclusion precluded coverage where insured sexually assaulted romantic partner but insurer could not rely upon exclusion for intentional acts because insured suffered from psychiatric disorder and could not act with intent). See also

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as in liability insurance in other industries. See, e.g., Hingham Mut. Fire Ins. Co. v. Smith, 69 Mass. App. Ct. 1, 6 (2007) (abuse and molestation exclusion precluded coverage of claim for negligent supervision of insureds' son, who sexually assaulted plaintiffs' children). See also, e.g., General Ins. Co. of Am. v. Okeke, 182 Conn. App. 83, 99, 101-102 (2018) (Okeke) (abuse and molestation exclusion precluded coverage of claim based on negligent supervision of child who beat and stabbed neighbor); Miglino v. Universal Prop. & Cas. Ins. Co., 174 So. 3d 479, 480-481 (Fla. Dist. Ct. App. 2015) (abuse and molestation exclusion precluded coverage of negligent supervision claim where insured lent firearm to sister, who used it to shoot her son-in-law); American Commerce Ins. Co. v. Porto, 811 A.2d 1185, 1189, 1201-1202 (R.I. 2002) (abuse and molestation exclusion precluded coverage of claim for negligent supervision of Boy Scout troop leader who abused child); S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 380, 383 (Ct. App. 2003) (abuse and molestation exclusion precluded coverage of negligent supervision claim brought against employer of child care worker claimed to have shaken child).

Frey, Allstate Ins. Co. v. Troelstrup: Application of the Intentional Acts Exclusion Under Homeowner's Insurance Policies to Acts of Child Molestation, 68 Den. U. L. Rev. 429, 433-434 (1991); 2 New Appleman Law of Liability Insurance § 13.06[12] (2019), citing Fire, Casualty, & Surety Bulletins, at Hpe-7.[19]

Because they often are not based directly on acts of the abuser, these claims also resulted in the now-common language for injuries "arising out of" an act of abuse or molestation. An abuse and molestation exclusion shields insurers from liability in such situations by precluding coverage for any claim "arising out of" abuse or molestation, as opposed to claims seeking recovery on the basis of intentional conduct. See Bartley, supra at 530.

The contexts in which abuse and molestation exclusions arose are instructive here. First, that the rationale for including such exclusions was to enforce the intentional acts exclusion in particular factual circumstances confirms that an

[19] A third rationale for the exclusion is that, in some insurance policies -- such as the policy at issue here -- the intentional acts exclusion applies only to "bodily injury," thereby allowing abuse victims to recover for emotional injuries resulting from intentional abuse. See 9 S. Plitt, D. Maldonado, J.D. Rogers, & J.R. Plitt, Couch on Insurance 3d § 127:25 (2019), citing Hartford Roman Catholic Diocesan, Corp. v. Interstate Fire & Cas. Co., 199 F. Supp. 3d 559 (D. Conn. 2016) (sexual abuse by priests was deemed "occurrence" under insurance policy of archdiocese that had placed priests in environments where they had opportunity to abuse children).

ordinary understanding of the term "physical abuse" remains limited to deliberately harmful treatment. Insurers did not adopt the abuse and molestation exclusion to expand the scope of conduct for which coverage was precluded so as to include any physically harmful treatment. Rather, the rationale was to shield themselves from liability for abuse or molestation claims where they unexpectedly could not rely upon the intentional acts exclusion to preclude coverage. In addition, the fact that one of the contexts in which such provisions first arose involved the physical or sexual abuse of parishioners by priests reaffirms that the term "abuse" implies a qualitative aspect, such as an imbalance of power, to the harmful conduct.

v. Analysis. To determine whether a reasonable insured would interpret the term "physical abuse" to preclude coverage in this case, we consider cases where insurers successfully have relied upon the abuse and molestation exclusion to preclude coverage for claims of physical abuse, as well as instances where they have not been successful. We look also to examples of physically harmful conduct that are characterized as "abuse" in our statutes and regulations. It is apparent from these sources that the characteristics that would render conduct "abusive" in the eyes of a reasonable insured are absent in the present case.

A. Prior cases. Cases where insurers successfully have relied upon the abuse and molestation exclusion to preclude coverage for claims arising from "physical abuse" generally involve more than mere physical harm. The conduct at issue in these cases yields differing characterizations of what renders physically harmful conduct "abusive." One frequent trait, however, is conduct that involves an imbalance of power.

The abuse and molestation exclusion has been used, for example, to preclude coverage for allegations of physical abuse arising in connection with claims of domestic violence (a type of physically harmful conduct that commonly is recognized as abuse),[20] and which, as with some other forms of abuse, often involves an imbalance of power.[21] See, e.g., Merrimack Mut. Fire Ins. Co., 117 Conn. App. at 772-773 (abuse and molestation exclusion precluded coverage where individual stabbed romantic partner twenty-four times); Miglino, 174 So. 3d at 480-482

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[20] See Black's Law Dictionary 1801 (10th ed. 2014) (domestic violence, also termed domestic abuse, includes violence between members of household, usually spouses; assault or violent act committed by one member of household against another; infliction of physical injury or creation of reasonable fear that physical injury will be inflicted, by parent or member or former member of child's household, against child or another member of household).

[21] See Opinion of the Justices, 427 Mass. 1201, 1208-1209 (1998) (discussing how, in domestic violence context, "victims of abuse are generally . . . dependent on abusers and will often be threatened with custody litigation by abusers if they leave").

(abuse and molestation exclusion precluded coverage where woman shot her son-in-law in midst of his divorce proceedings with her daughter).

Cases where courts have declined to apply the abuse and molestation exclusion also illustrate that abuse reasonably can be interpreted to refer to a limited subset of physically harmful treatment, and not the simple assault at issue here. In Riley, 829 So. 2d at 482, 490-491, for example, the court considered whether the abuse and molestation exclusion precluded coverage for a claim brought against a nursing home after one resident physically attacked another with a pipe. The court concluded that the incident did not involve "physical abuse" because "[p]hysical abuse, as opposed to simple assault, is generally the act of a person in control, dominance, or authority who misuses his [or her] position to harm or mistreat a person over whom he [or she] exercises such control" (emphasis supplied). See id. at 491.

Simply put, where insurers successfully -- or unsuccessfully -- rely upon the term "physical abuse" in an abuse and molestation exclusion to preclude coverage, the mere fact that the conduct at issue was physically harmful does not suffice to render it "physical abuse." While no single quality transforms physically harmful conduct into physically abusive

conduct,[22] a reasonable insured could, and likely would, understand the "abusive" quality of physical abuse to apply to a limited subset of physically harmful treatment, often characterized by an imbalance of power.[23]

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[22] For example, some cases where insurers successfully relied upon an abuse and molestation exclusion involve conduct that implies that the abuser is cruel or inhumane, that is, disposed to inflict pain or suffering. See, e.g., Auto-Owners Ins. Co. v. American Cent. Ins. Co., 739 So. 2d 1078, 1080-1082 (Ala. 1999) (abuse and molestation exclusion precluded coverage of claim involving physical and mental abuse where, inter alia, leaders of fraternity forced fraternity pledge to jump into ditch filled with urine and feces, and where "hazing" was defined as any willful action that "recklessly or intentionally endangers the mental or physical health of any student"); Okeke, 182 Conn. App. at 101-103 (abuse and molestation exclusion precluded coverage where fifteen year old male violently attacked, assaulted, and stabbed elderly female neighbor). This interpretation is consistent with one of the common dictionary definitions of "abuse." See Black's Law Dictionary 12 (11th ed. 2019) (defining "abuse" as "[c]ruel or violent treatment"); Webster's New Universal Unabridged Dictionary 483 (2003) ("cruel" means "willfully or knowingly causing pain or distress to others"); Webster's Ninth New Collegiate Dictionary 301 (1991) (defining "cruel" as "disposed to inflict pain or suffering: devoid of humane feelings").

[23] Indeed, a number of the cases Dorchester Mutual cites in its brief as instances where insurers successfully relied upon the abuse and molestation exclusion to deny coverage involve physically harmful treatment commonly recognized as forms of abuse, e.g., domestic violence, sexual abuse, or child abuse. See Safeco Ins. Co. of Am. vs. Vecsey, U.S. Dist. Ct., No. 3:08cv833 (JBA) (D. Conn. Sept. 30, 2010) (abuse and molestation exclusion precluded personal injury suit based on alleged incident of domestic violence); Covenant Ins. Co. vs. Sloat, Conn. Super. Ct., No. 385786 (May 23, 2003) (abuse and molestation exclusion precluded coverage of claim involving sexual abuse -- sodomy -- of mentally disabled student by his classmate); Smyth, Mass. Super. Ct., No. ESCV2016189, supra (abuse and molestation exclusion precluded coverage of claim

B. Statutes and regulations. Numerous statutes and regulations in the Commonwealth further illustrate that one hallmark of physically abusive -- as opposed to physically harmful -- conduct is an imbalance, or misuse, of power. The term routinely has been applied to conduct causing harm to a vulnerable type of victim, where the alleged abuser may be responsible for the vulnerable individual's care. Statutes enumerating crimes against a person, for example, reference "abuse" in connection with children and the elderly. See G. L. c. 265, § 13K (a 1/2) (abuse of elder); G. L. c. 265, § 23 (rape and abuse of child). See also Commonwealth v. Cruz, 88 Mass. App. Ct. 206, 208-210 (2015) (sufficient evidence of abuse and neglect where defendant caretaker wantonly and recklessly failed to provide adequate care to elderly mother, who died of sepsis after defendant failed to attend to mother's hygiene). Other potential victims of abuse, as defined by Massachusetts statutes and regulations, include (1) persons with disabilities, see 118 Code Mass. Regs. § 2.02 (2016); (2) inmates in a correctional facility, see 103 Code Mass. Regs. § 491.13 (2017); and (3) medical patients or residents in long-term care facilities, see 105 Code Mass. Regs. § 155.003 (2017).

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involving domestic violence -- husband strangled wife); Saunders ex rel. Wright vs. Sperry, Wis. Ct. App., No. 98-2929 (May 6, 1999) (abuse and molestation exclusion precluded coverage of claim involving child abuse -- homeowner shook child).

Massachusetts statutes characterize domestic violence, which also often involves a power imbalance or element of control, as a form of "abuse." See G. L. c. 209A, § 1 (domestic abuse prevention statute defining "abuse" as acts between family or household members that cause, attempt to cause, or place another in fear of imminent serious physical harm).

In addition, some regulations formalize the requirement that "abuse" necessitates an imbalance of power or misuse of control. The Department of Developmental Services, for example, defines "abuse" as "an act or omission of a provider that results in serious [physical or emotional injury] to an individual." See 115 Code Mass. Regs. § 9.02 (2017).

We conclude that a reasonable insured would interpret "physical abuse" to apply only to a limited subset of physically harmful treatment, where the treatment is characterized by an "abusive" quality such as a misuse of power or, perhaps, conduct so extreme as to indicate an abuser's disposition towards inflicting pain and suffering. As the conduct at issue in this case involves no such hallmarks of abuse, a reasonable insured would interpret the term "physical abuse" in the policy as not precluding coverage here. Accordingly, Dorchester Mutual cannot rely upon the exclusion to deny liability for indemnification, and the allowance of summary judgment in its favor was error.

c. Violations of G. L. c. 93A and G. L. c. 176D. The Krusells contend that the judge erred in granting Dorchester Mutual's motion for summary judgment with regard to their claims for violations of G. L. c. 93A and G. L. c. 176D. In the Krusells' view, Dorchester Mutual engaged in an unfair claim settlement practice by failing to effectuate settlement once liability had become reasonably clear. We do not agree.

Pursuant to G. L. c. 176D, § 3 (9) (f), an insurer engages in an unfair claim settlement practice by "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." "An insurance company which in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy cannot ordinarily be said to have committed a violation of G. L. c. 93A." Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc. 419 Mass. 462, 468 (1995).

From the outset of its investigation, Dorchester Mutual maintained that the asserted conduct fell within the intentional acts exclusion. This exclusion precludes coverage for bodily injury that is "expected or intended by an insured." For such an exclusion to apply, the injury, and not just the conduct, must have been intentional. See Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 94 (1997).

The undisputed evidence in the record shows that, until just days before the settlement, the only full accounts of the incident available to Dorchester Mutual were Haufler's complaint and the police report; the police report indicated that Krusell had charged towards Haufler and had pushed him with sufficient force that he became airborne. During the initial months of the investigation, the only additional pieces of information that the Krusells provided Dorchester Mutual were (1) an article discussing how the prevailing jurisprudence on the intentional acts exclusion was unfavorable to insurers, and (2) a brief summary of the incident relayed by Krusell's attorney.

Just days before the Krusells agreed to settle with Haufler, they provided Dorchester Mutual with a report by a forensic psychiatrist who had been retained to evaluate Krusell in connection with the criminal proceeding. This report contained a more detailed summary of Krusell's recollection of the incident, including his explanation that he had pushed Haufler in an instinctive reaction when Haufler abruptly raised his cellular telephone to Krusell's face.[24]

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[24] According to that report, Krusell maintained that he had pushed Haufler in an instinctive reaction to Haufler's abruptly raising his cellular telephone toward Krusell's face; Krusell had been "startled by the sudden movement," and denied any intent to harm Haufler. Dorchester Mutual received this report sometime between September 19 and September 23, 2015.

Thus, until shortly before settlement, the information available to Dorchester Mutual indicated that Krusell intentionally had pushed Haufler, meaning that Haufler's claim would be excluded under the intentional acts exclusion in the Krusells' policy.[25] Although the psychiatrist's report contradicted Haufler's initial narrative, it remained a second-hand account of the incident. Accordingly, at the time that the Krusells agreed to a settlement, Dorchester Mutual reasonably could have concluded that liability remained unclear. Although we express no view as to whether the intentional acts exclusion in fact would preclude coverage in this case, we nonetheless discern no error in the decision to grant summary judgment to Dorchester Mutual on the G. L. c. 93A and G. L. c. 176D claims.

4. Conclusion. So much of the order granting Dorchester Mutual's motion for summary judgment with respect to the duty to

[25] The Krusells felt some urgency to settle the civil claim in part because the judge handling the criminal case had indicated that he would be inclined to reduce the criminal charges if a settlement were reached (thus likely allowing Krusell to avoid jail time). As of the day that they agreed to settle Haufler's claim, the Krusells had been advised that the criminal case would proceed to trial "without any further notice, possibly within days." The Krusells opted to settle before that could occur. This strategy proved successful. After the settlement was reached, the judge handling Krusell's criminal case reduced the charges to simple assault, and then placed them on file for one year, meaning that Krusell's not guilty plea would stand and, if Krusell did not commit any crimes during that year, the case would be expunged, leaving him with no criminal record.

indemnify is reversed. That part of the order granting summary judgment to Dorchester Mutual on the defendants' claims for violations of G. L. c. 93A and G. L. c. 176D is affirmed. The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.