STATE OF MICHIGAN

COURT OF APPEALS

PENNY M. RITZEMA and CRAIG E. RITZEMA,

Plaintiffs-Appellees,

v

BAILEY CHURCH OF CHRIST and JARY IRBY,

Defendants,

and

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Garnishee-Defendant-Appellant.

UNPUBLISHED
February 23, 2001

No. 222344
Muskegon Circuit Court
LC No. 94-031992-CZ

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order entering judgment in favor of plaintiffs. We affirm.

Plaintiffs began this garnishment action against defendant following entry of a settlement and consent judgment in an underlying action. In the underlying action, plaintiffs brought suit against Bailey Church of Christ and one of its former pastors, Jary Irby, based on his alleged inappropriate advice to and improper conduct with plaintiff Penny Ritzema.

Plaintiff Penny Ritzema attended Bailey Church of Christ since 1985 and in May 1989 she requested pastoral counseling. At her one and only appointment with the pastor she discussed three issues including a disagreement with her mother-in-law, the fact that her husband did not take her side in that disagreement, and the mutual resentment between herself and her husband because she attended church and wanted him to attend also, but he wanted her to be home with him on Sunday mornings. The pastor's advice to her was that neither her husband nor mother-in-law were Christians, so unless they asked for her forgiveness first, she had no obligation to forgive them.

Even though there were no more formal appointments with the pastor, he continued to ask, both at church and when visiting her home, how she was doing. The pastor also encouraged Penny to get more involved at the church. Penny became involved in at least four different programs at the church and her priorities shifted so that church was first, her children second, and her husband was not much of a priority.

Approximately six months after the initial advice was given by the pastor, Penny began to work in the church office, where she filled in while the regular secretary was in the hospital. After Penny began to work at the church, the pastor sexualized their relationship, and that continued from November 1989 to the fall of 1991 with some, but not all, of their encounters being consensual.

The church had insurance policies with defendant from December 6, 1987, to December 6, 1990. In December 1990, the church obtained insurance from Brotherhood Mutual Insurance. In 1993, Brotherhood Mutual received notice of a claim by plaintiffs, and, in 1994, plaintiffs filed a formal complaint and an amended complaint. Brotherhood Mutual notified defendant of the claim in 1993. Subsequently, Brotherhood Mutual retained an attorney to represent the church, and that attorney had multiple correspondences with defendant requesting contribution and participation in the defense. Defendant repeatedly declined involvement because it believed that the conduct complained of was excluded under many different provisions including one that excluded liability as a result of actual or alleged conduct of a sexual nature.

In the case at hand, the conduct of a sexual nature is not at issue. The only conduct in question here was that which occurred for six months from May to October 1989, before the relationship was sexualized. The trial court found that conduct in question was not of a sexual nature and was within the policy's "counseling professional liability insurance endorsement." Therefore, the trial court found that defendant breached its duty to defend the church and it ordered defendant to pay that portion of the settlement that was attributed to the pastor's inappropriate advice given before the relationship was sexualized.

Defendant argues that it did not breach its duty to defend because the activities complained of were the pastor's espousal of his religious doctrine and did not fall within the meaning of "counseling activities." We disagree.

The interpretation of contractual language is an issue of law which is reviewed de novo on appeal. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). We are guided by the following principles:

> It is well settled that "if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." Further,
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> "[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third-party's allegations to analyze whether coverage is possible. In a case of

doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor."

Also, the following fundamental principles of insurance law apply:

"It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify. In order to determine whether an insurer has a duty to defend its insured, this Court must look to the language of the insurance policy and construe its terms to find the scope of coverage of the policy. Generally, an insurance policy is a contract between the insurer and the insured. If a trial court is presented with a dispute between these parties over the meaning of the policy, the trial court must determine what the agreement is and enforce it. When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all the terms contained within the policy. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. However, if the contract is unambiguous, the trial court must enforce it as written." [*Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 138-139; 610 NW2d 272 (2000), citing *Royce v Citizens Ins Co*, 219 Mich App 537, 542-543; 557 NW2d 144 (1996) (citations omitted).]

In this case, both the complaint and the first amended complaint presented the following factual allegations:

9. When Penny Ritzema sought counseling from Jary Irby about a marital concern, Irby used the counseling process to tear down the marriage.

10. During the next six months, Jary Irby encouraged Penny Ritzema to become more involved in the church, and to disregard whatever consequences that might have on her marriage.

Additionally, the policy provision in question, which determines the scope of coverage, is as follows:

COUNSELING PROFESSIONAL LIABILITY INSURANCE ENDORSEMENT

In consideration of an additional premium paid, it is agreed that the Bodily Injury and Property Damage Liability coverages provided by the policy are extended to include damages because of any acts, errors, or omission of the Insured, arising out of counseling activities of the Insured or counseling activities of others for which the Insured is liable.

The term "counseling activities" was not defined in the contract. The trial court defined counseling according to *Webster's New Collegiate Dictionary* (1995): "advice or guidance,

especially as solicited from a knowledgeable or experienced person." Another dictionary, however, defines counseling as "professional guidance in resolving personal conflicts and emotional problems." *Random House Webster's Unabridged Dictionary* (1998), p 460. Defendant also suggests another, more technical definition of counseling. Even though technical and strained definitions are to be avoided, we find that the term counseling activities can reasonably be understood in different ways and, therefore, it is ambiguous. Accordingly, the policy will be construed against defendant insurer and in favor of coverage. Therefore, we affirm the trial court's finding that defendant breached its duty to defend.

Because this question is solely a question regarding the duty to defend which can be determined by reviewing the underlying allegations and the insurance policy, this case does not require us to examine the substance of the pastor's advice.

Defendant also argues that it had no obligation to defend in this case because there was no request from the church, its insured. We disagree.

When an insurance company retains counsel to represent its insured, there is no attorney-client relationship between the attorney and the insurer. *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 197 Mich App 482, 492; 496 NW2d 373 (1992), aff'd 445 Mich 558; 519 NW2d 864 (1994). "The attorney's sole loyalty and duty is owed to the client, not the insurer." *Id*. In this case the attorney retained to represent the church sent defendant copies of the complaint, the amended complaint, and multiple letters requesting participation or contribution to the defense. Those correspondences from the church's attorney must be considered to be from the church and not Brotherhood Mutual because the attorney's client was the church. Accordingly, defendant's claim that it had no duty to defend because it did not receive a request from the church lacks merit.

Defendant's claim that the right of defense is personal to the insured and can only be asserted by the insured also lacks merit. Defendant cites two cases which say that an insurance company's duty to defend is personal to the insured, and the victims in those cases had no right or interest to that duty: *Allstate Ins Co v Maloney*, 174 Mich App 263, 268; 435 NW2d 448 (1988), and *State Farm Fire & Casualty Co v Moss*, 182 Mich App 559, 564; 452 NW2d 816 (1989). Neither of those cases, however, contained circumstances similar to this case where there was a consent judgment, and the insured assigned its rights against defendant to the victim. The assignment and consent judgments in this case conferred rights and an interest to plaintiffs.

Because we find that defendant breached its duty to defend, we do not need to address defendant's arguments that various provisions of the insurance policy were violated when the church assumed liability or obligations without defendant's consent, and an amount of damages was determined without a trial or defendant's agreement. "An insured is released from any agreement not to settle without the insurer's consent where the insurer has denied liability and wrongfully refused to defend." *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989). When an insurer breaches its duty to defend, it is "bound by any reasonable settlement entered into in good faith between the insured and the third party." *Id.* We find that defendant is bound by this settlement.

Defendant also argues that the theory of dual causation precludes recovery in this case. We disagree.

Cases involving dual or concurrent causation "involve the convergence of two or more causes of an indivisible injury to the insured" where one of the causes was insured and one or more additional causes were not. *Vanguard Ins Co v Clarke*, 438 Mich 463, 466; 475 NW2d 48 (1991); *United States Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 495; 506 NW2d 527 (1993).

Previous cases dealing with dual causation contained dual causes that were not independently capable of producing the injury for which relief was sought. In *Vanguard*, three members of a family were killed by carbon monoxide fumes when the father, after consuming alcohol, drove his car into the home's attached garage, left the engine running, and then closed the garage door, allowing the fumes to build up and go throughout the house. *Vanguard, supra*, 438 Mich 467. In that case our Supreme Court held that the homeowner's insurance policy was clear when it excluded damages arising out of the use or operation of an automobile, and that unambiguous exclusion precluded recovery under that policy. *Id.*, 475. While the negligent closing of the garage door would have been covered in other situations such as if it had injured someone by closing on his foot, it did not cover the carbon monoxide poisoning because the door alone was not the death producing instrumentality. *Id.*, 473.

As noted by the trial court, that type of dual causation scenario, where the causes could not independently create the harm, is distinct from the case at hand where either the advice or the conduct could have produced the damages claimed. Therefore, we affirm the trial court's decision that the theory of dual or concurrent causation does not prevent recovery of damages in this case.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey