Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00673-CV

USAA TEXAS LLOYD'S COMPANY,
Appellant

v.

John **DOE** and Jane Doe, Individually and as Next Friends of XXX, a Minor,
Appellees

From the County Court at Law No. 5, Bexar County, Texas
Trial Court No. 392757
Honorable Walden Shelton, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: June 28, 2017

REVERSED AND RENDERED IN PART; AFFIRMED IN PART

This is an appeal from a summary judgment granted in favor of appellees, John and Jane Doe (collectively, "the Does"), on their request for declaratory relief as well as their breach of contract and Texas Prompt Payment of Claims Act claims against appellant, USAA Texas Lloyd's Company ("USAA"). On appeal, USAA argues the trial court erred in declaring it owed the Does a duty to defend because the Does' renters' insurance policy excludes coverage and the trial court's ruling violates public policy. We reverse the judgment of the trial court and render judgment in favor of USAA.

BACKGROUND

USAA issued a renters' insurance policy to the Does. The Does and their thirteen-year-old son, XXX, were named insureds under the policy. As a result of an incident involving their son, the Does submitted a claim to USAA seeking a defense under the policy. The basis of their claim arose out of an allegation that XXX sexually assaulted a five-year-old girl in front of her twin brother. After reviewing the claim, USAA denied coverage, stating the claim did not meet the definition of "an occurrence" under the policy and, alternatively, the claim was barred under the intentional act exclusion provision of the policy.

In January of 2014, the parents of the twins filed a lawsuit against the Does and XXX, alleging XXX had sexually assaulted their daughter in front of their son. Specifically, the petition alleged that while XXX was alone with the twins, he suggested "playing doctor" with the twins and explained that "they were going to be delivering babies." According to the petition, XXX inserted his finger as well as a plastic toy thermometer from a toy doctor's kit inside the girl's vagina in front of her twin brother. With regard to XXX, the petition alleged causes of action for negligence and assault, stating XXX breached a duty not to harm others by acting intentionally, knowingly, and recklessly when he made contact with the girl's body and such contact caused bodily injury to the girl. With regard to the Does, the petition alleged the Does were negligent in failing to supervise XXX and failing to warn the parents of the twins that XXX had a history of sexual aggression toward other children.

After being served with the lawsuit, the Does submitted another claim to USAA, demanding it provide them with a defense to the lawsuit pursuant to the terms of their renters' insurance policy. USAA again denied coverage, reiterating the claim did not meet the definition of "an occurrence" under the policy and, alternatively, the claim was barred under the intentional

act exclusion provision of the policy. The relevant portions of the renters' insurance policy read as follows:

> LIABILITY
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> …
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false, or fraudulent.
>
> …
>
> Occurrence means 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.
>
> …
>
> LIABILITY AND MEDICAL PAYMENT EXCLUSIONS
>
> 1. LIABILITY and MEDICAL PAYMENT TO OTHERS do not apply to bodily injury or property damage:
> a. Caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in bodily injury to any person or property damage to any property.

The Does, individually and as next friends of XXX, ultimately filed a declaratory judgment action, seeking to construe the terms of the renters' insurance policy. Specifically, the Does sought a declaration that USAA owed them a duty to defend against the suit filed against them by the parents of the twins. In addition to their declaratory judgment action, the Does also alleged USAA: (1) violated the Texas Deceptive Trade Practices Act ("DTPA") by engaging in false, misleading, or deceptive acts on which they relied and which resulted in damages; (2) breached its insurance contract by failing to provide coverage and defend them in the suit; and (3) violated the Texas Prompt Payment of Claims Act by failing to timely provide them with a defense to the suit. The parents of the twins subsequently intervened in the lawsuit against USAA.

USAA moved for summary judgment, alleging it did not owe a duty to defend the Does as a matter of law because: 1) the intentional act exclusion provision of the policy excluded coverage, and 2) the suit against the Does did not allege "an occurrence" as defined by the policy. In its motion, USAA further contended that because it did not owe a duty to defend, it could not be held liable for any of the claims filed by the Does against it. Attached to its motion were copies of the petition in the lawsuit against the Does, the Does' renters' insurance policy, and correspondence from USAA to the Does, informing the Does that the renters' insurance policy did not provide coverage or a defense for the matter involving XXX.

In response, the Does filed a partial summary judgment with respect to USAA's duty to defend, arguing their renters' insurance policy afforded them a defense as a matter of law. According to the Does, the factual allegations in the petition filed against them accused them and XXX of negligent conduct as opposed to intentional conduct; therefore, the allegations in the petition did not trigger the intentional act exclusion provision. The parents of the twins, as intervenor-plaintiffs, also filed a motion for partial summary judgment. In addition to joining the Does' argument that the intentional act exclusion provision did not preclude coverage, the intervenor-plaintiffs argued the negligence allegations against the Does constituted an "occurrence" as defined by the renters' insurance policy. After a hearing on the parties' motions, the trial court signed an interlocutory order declaring USAA did not have a duty to defend XXX, but the policy provided coverage with regard to the lawsuit against the Does.

Thereafter, the parents of the twins nonsuited their claims against USAA, and the Does dropped their DTPA claim against USAA. The Does subsequently filed a motion for summary judgment with respect to their breach of contract and Texas Prompt Payment of Claims Act claims. USAA also moved for summary judgment, asking the court to set aside its prior order and reiterating its previous argument that it owed no duty to defend the Does in the underlying suit,

and therefore, it did not breach its renters' insurance contract as a matter of law. After reviewing the parties' motions, the trial court signed a final judgment declaring USAA did not owe a duty to defend XXX in the underlying lawsuit but owed a duty to defend the Does. The trial court further granted summary judgment in favor of the Does as to their breach of contract and Texas Prompt Payment of Claims Act claims against USAA. The trial court further awarded the Does damages for their breach of contract and Texas Prompt Payment of Claims Act claims as well as attorneys' fees. USAA then perfected this appeal.

ANALYSIS

On appeal, USAA contends the trial court erred in granting summary judgment in favor of the Does by declaring it owed them a duty to defend. In support of its position, USAA argues the intentional act exclusion provision in the Does' renters' insurance policy excludes coverage for claims involving bodily injuries caused intentionally by any insured under the policy. According to USAA, the suit against the Does arose out of the intentional act of their son, XXX, who was an insured under the policy; therefore, the Does' claim was excluded from coverage as a matter of law. USAA also contends the trial court's ruling violates public policy because it rewrites the policy to assume a specified risk that was not calculated in its premium. USAA further argues that because it does not owe the Does a duty to defend as a matter of law, the trial court erred in granting summary judgment in favor of the Does on their breach of contract and Texas Prompt Payment of Claims Act claims as those claims were premised on the trial court's erroneous declaration that USAA owed a duty to defend the Does.

In response, the Does contend the trial court did not err because their claim is covered by the renters' insurance policy as a matter of law. The Does assert because the acts alleged in the petition were negligent as opposed to intentional, the intentional act exclusion provision does not preclude coverage. The Does also assert that even assuming XXX's conduct was intentional, his

intentional conduct does not preclude coverage for their claim. For support, the Does point to the severability clause in the policy, arguing the clause serves to provide them coverage for the negligence suit against them even if XXX acted intentionally.

Standard of Review

We review de novo a trial court's grant of summary judgment. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010); *Tex. Farm Bureau Underwriters v. Graham*, 450 S.W.3d 919, 921 (Tex. App.—Texarkana 2014, pet. denied). In a traditional summary judgment motion, the movant bears the burden to demonstrate no genuine issue of material fact exists. *Graham*, 450 S.W.3d 919, 921-22; *see also* TEX. R. CIV. P. 166a(c). "Once the movant has established a right to summary judgment, the burden of proof shifts to the nonmovant to respond to the motion and present to the trial court any issues that would preclude summary judgment." *Graham*, 450 S.W.3d 919, 922 (citing *Thompson v. Weaver*, 429 S.W.3d 897, 901 (Tex. App.—Tyler 2014, no pet.)). We examine the entire record in the light most favorable to the nonmovant, resolving any doubts and indulging every reasonable inference against the movant. *Id*. When, as is the case here, there are cross-motions for summary judgment, we must review the summary judgment evidence produced by both sides and determine all questions presented. *Id*. If we find that the grant of one summary judgment was improper, we may reverse and render the judgment the trial court should have rendered. *Id.*

Applicable Law

In determining whether an insurer has a duty to defend, Texas courts follow the eight corners rule. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 380 (Tex. 2012) (explaining that eight corners refers to the four corners of the complaint and four corners of the insurance policy); *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). Under that rule, "an insurer's duty to defend is determined by the third-party plaintiff's pleadings,

considered in light of the policy provisions, without regard to the truth or falsity of those allegations." *Zurich*, 268 S.W.3d at 491 (quoting *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex.2006)). Allegations in the pleadings are liberally construed and all doubts regarding the duty to defend are resolved in the insured's favor. *Id.* In reviewing the pleadings and making the foregoing determinations, courts look only to the factual allegations showing the origin of the damages claimed, and not to the legal theories or conclusions alleged. *Ewing Const. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014). The duty to defend is not affected by facts discovered before suit, developed in the course of litigation, or by the outcome of the suit. *Zurich*, 268 S.W.3d at 491. As highlighted by the Texas Supreme Court, "[i]f a complaint potentially includes a covered claim, the insurer must defend the entire suit." *Id.* (citing 14 COUCH ON INSURANCE § 200:1).

The insured bears the initial burden to establish coverage under the policy. *Ewing Const. Co.*, 420 S.W.3d at 330. If the insured meets this burden, the insurer must prove one of the policy's exclusion provisions applies in order to avoid liability. *Id.* In the event the insurer proves that an exclusion provision applies, then the burden shifts back to the insured to establish that an exception to the exclusion reinstates coverage. *Id.*

Discussion

With the above principles in mind, we turn to the coverage dispute between USAA and the Does, focusing on whether the intentional act exclusion provision excludes the claim submitted by the Does from coverage. The crux of the parties' dispute centers on whether the underlying suit against the Does arose out of an intentional act and the effect of the severability clause in the policy on the exclusion provision.

1. Effect of Severability Clause

We begin our discussion by analyzing the effect of the severability clause in determining whose conduct – if any – must be intentional for a claim to be excluded from coverage. The Does contend the policy's severability clause requires the policy to be read as if they were the only named insureds, so coverage is only excluded for claims that are the result of their intentional conduct. According to the Does, the underlying petition contains no allegation that they intentionally engaged in conduct that caused the twins' bodily harm. Rather, the allegations against them are premised on their negligence, alleging they failed to supervise their son and failed to warn the twins' parents about XXX's history of sexual aggression.

In response, USAA disputes the Does' interpretation of the effect of the severability clause. USAA contends that despite the policy's inclusion of the severability clause, the use of the phrase "any insured" in the exclusion provision excludes coverage for any claim that involves bodily injury caused by the intentional conduct of any insured under the policy. USAA does not argue the Does' actions were intentional; rather, USAA argues XXX's conduct was intentional, and because the claim submitted by the Does arose out of XXX's intentional conduct, the claim was excluded from coverage.

We interpret insurance policies under the same rules that guide us in our construction of contracts. *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017); *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, 208 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Our primary concern in construing a contract is to ascertain the parties' true intent as expressed by the plain language of the instrument. *Primo*, 512 S.W.3d at 893; *Maxey*, 110 S.W.3d at 208. Terms used in a contract are given their plain and ordinary meaning unless the contract itself provides particular definitions to replace that meaning. *Primo*, 512 S.W.3d at 893; *Maxey*, 110 S.W.3d at 208. We review the provisions of the contract as a whole, ensuring that no provision is rendered

meaningless and refusing to insert additional language or provisions that the parties did not use. *Primo*, 512 S.W.3d at 893; *Maxey*, 110 S.W.3d at 209. If the language of the contract is so worded that it can be given a definite legal meaning, then it is not ambiguous and will be construed as a matter of law. *Primo*, 512 S.W.3d at 893; *Maxey*, 110 S.W.3d at 208. If a contract is determined to be ambiguous, however, then it will be interpreted in favor of the insured. *Maxey*, 110 S.W.3d at 209.

Turning to the Does' renters' insurance policy, the policy excludes coverage for claims in which the bodily injury was "caused by intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in bodily injury to any person or property damage to any property." The policy also contains a severability clause, which provides, "This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence."

As pointed out by the Does, a severability clause generally serves to provide coverage to an "innocent" insured who did not commit the intentional conduct excluded by the policy. *Id.* at 210 (citing *State Farm Fire & Cas. Ins. Co. v. Keegan*, 209 F.3d 767, 769 (5th Cir. 2000)). Each insured against whom a claim is brought is treated as if he or she is the only insured under the policy, and thus, stands alone with respect to exclusion provisions. *Id.*; *Williamson v. Vanguard Underwriters Ins. Co.*, No. 14-97-00276-CV, 1998 WL 831476, at *1 (Tex. App.—Houston [14th Dist.] Dec. 3, 1998, pet denied.) (op.). However, when, as in this case, a policy includes a severability clause and an exclusion provision that refers to "any insured," we find the approach of our sister court in *Bituminous Cas. Corp. v. Maxey* persuasive. 110 S.W.3d at 203. In that case, Bituminous Casualty Corporation ("Bituminous") argued it had no duty to indemnify one of its insureds, L&R Timber Co., Inc. ("L&R"), after L&R was sued for damages by a third party who was injured in an auto accident. *Id*. at 207-08. The accident was caused by an employee of Triple

L. Express, Inc., also an insured under the policy, who was driving a truck maintained by L&R. *Id*. Under the policy's exclusion provision, coverage was excluded for any claims involving bodily injuries arising out of "the ownership, maintenance, use or entrustment to others of" a commercial vehicle "owned or operated by or rented or loaned to *any insured*." *Id*. at 209 (emphasis added). The policy also included a severability clause. *Id*. at 209-10. To determine the effect of the severability clause on the exclusion provision, the court focused on the language of the exclusion provision. *Id.* at 214. Giving effect to the plain and ordinary meaning of the phrase "any insured" in the exclusion provision, the court held the application of the severability clause had no effect on the exclusion provision. *Id.* at 211. Therefore, any claim that involved bodily injury arising out of the conduct specified above by any insured under the policy was excluded from coverage. *Id.* at 214. The court reasoned that to hold otherwise would render the phrase "any insured" to mean "the insured," collapsing the distinction between "the" and "any." *Id.* Accordingly, the court held that because the claim involved a bodily injury which arose from the maintenance of a commercial truck operated by an insured—Triple L. Express, Inc., Bituminous Casualty had no duty to indemnify L&R for liability under the plain language of the exclusion provision. *Id.* at 215.

In this case, the intentional act exclusion provision excludes coverage for claims involving bodily injuries "arising out of an intentional or purposeful act of *any* insured." (emphasis added). USAA's decision to use the phrase "any insured" indicates its intent to consider the purposeful or intentional conduct of anyone insured under the policy when determining whether a claim should be excluded from coverage. *See Vanguard*, 1998 WL 831476, at *7 ("If its intention was to exclude this type of risk, its remedy was to draft its policy to expressly exclude coverage for injuries or damages resulting from the intentional conduct of *an* insured or *any other person.*"). Like the court in *Maxey*, and contrary to the Doe's assertion, we conclude the severability clause

has no effect on the exclusion provision. 110 S.W.3d at 214. To conclude otherwise would render the phrase "any insured" meaningless as well as alter its plain meaning, ultimately leading to an unreasonable construction of the policy. *See Primo*, 512 S.W.3d at 893; *Maxey*, 110 S.W.3d at 214-15.

The Does attempt to distinguish *Maxey* in a number of ways, each of which we find unpersuasive. The Does first argue that when construing the terms of the policy, we must consider how a reasonable person would interpret the policy, and in this case, a reasonable person is a "layperson acquiring a renter's policy," who would have reasonably expected to be covered. Contrary to the Does' assertion, we interpret the language of an insurance policy by its plain and ordinary meaning. *Primo*, 512 S.W.3d at 893; *Maxey*, 110 S.W.3d at 208. Texas courts have consistently determined the phrase "any insured" should not be construed the same as the phrase "the insured." *See Maxey*, 110 S.W.3d at 214 (citing *National Union v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991)); *Vanguard*, 1998 WL 831476, at *7 (citing *State Farm Gen. Ins. Co. v. White*, 955 S.W.2d 474, 477 (Tex. App.—Austin 1997, no pet.)). The Does also urge us to follow the reasoning of the Kansas Supreme Court and hold the inclusion of the severability clause renders the policy's exclusion provision ambiguous. *See Brumley v. Lee*, 913 P.2d 1224, 256 Kan. 810 (1998). We decline to do so, following the approach of our sister court in *Maxey*, which we find persuasive. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (stating that opinions from any federal or state court may be relied on as persuasive authority); *see also ReadyOne Indus., Inc. v. Torres*, 394 S.W.3d 720, 723 (Tex. App.—El Paso 2012, no pet.) (relying on sister court for persuasive authority). Accordingly, we hold the intentional act exclusion provision excludes coverage for claims involving bodily injuries caused intentionally by any insured, including XXX, under the policy.

2. Whether Conduct Was Intentional

We now turn to the issue of whether XXX's conduct as alleged in the petition was intentional. As indicated above, USAA does not argue the Does' conduct was intentional; rather USAA argues XXX's conduct as alleged in the petition was intentional because the injury incurred by the twins was the natural result of XXX's conduct. Moreover, USAA argues this case is governed by the inferred intent rule, because it involves sexual abuse of a minor, and under that rule, intent to cause bodily injury is inferred as a matter of law. The Does, however, contend that whether XXX's conduct was intentional is a question of fact, arguing there is no evidence indicating XXX was aware of the consequences of his conduct because he was a minor.

"[A]n insured intends to injure or harm another if he intends the consequences of his act, or believes they are substantially certain to follow." *Lair v. TIG Indem. Co.*, No. 02-11-00241-CV, 2011 WL 6415163, at *3 (Tex. App.—Fort Worth Dec. 22, 2011, no pet.) (mem. op). (quoting *State Farm Fire & Cas. Co. v. S.S. & G.W.*, 858 S.W.2d 374, 378 (Tex. 1993)). In general, a person's intent to injure is a question of fact. *Id.*; *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 888 (Tex. App.—Dallas 2001, pet. denied). However, Texas courts have recognized that certain conduct is so extreme or outrageous that intent to injure may be inferred as a matter of law. *See Lair*, 2011 WL 6415163, at *3; *C.M.W.*, 53 S.W.3d at 888. "Sexual assault of a child has been considered to be of the type of extreme or outrageous conduct for which intent to harm may be inferred." *Lair*, 2011 WL 6415163, at *3; *see C.M.W.*, 53 S.W.3d at 888.

Here, the facts alleged in the petition were that XXX sexually assaulted a five-year-old girl with his finger and a toy thermometer in front of her twin brother. We agree with USAA that XXX's conduct was intentional because XXX's intent to injure may be inferred as a matter of law given his conduct involves the sexual assault of a child. *See Lair*, 2011 WL 6415163, at *3; *see C.M.W.*, 53 S.W.3d at 888. Although the Does contend such intent cannot be inferred when the

accused is a minor and argue the determination of whether XXX's conduct was intentional is a fact issue, we disagree. Whether sexual molestation of a minor is by an adult or another minor, the conduct alleged is inherently harmful. *See J.T. v. D.B.*, No. 05-94-01158-CV, 1995 WL 221970, at *4 (Tex. App.—Dallas Apr. 13, 1995, writ denied) (op.) ("It is the nature of the conduct that results in the inference of intent to injury as a mtter of law). We decline to distinguish between adult and child perpetrators when the sexual assault alleged involves a child victim because the same harm results regardless of the age of the perpetrator. *See id*. We therefore hold XXX's conduct as alleged in the petition may be inferred as intentional a matter of law, and as a result, the intentional act exclusion provision of the policy precludes coverage for the Does' claim.

Because the Does' claim is not covered by the policy, USAA does not owe a duty to defend the Does in the underlying suit against them as a matter of law. Accordingly, we hold the trial court erred in declaring USAA owed a duty to defend the Does.

The Does' Breach of Contract and Texas Prompt Payment of Claims Act Claims

We now turn to the trial court's order granting summary judgment in favor of the Does on their breach of contract and Texas Prompt Payment of Claims Act claims against USAA. After prevailing on their motion for partial summary judgment with regard to USAA's duty to defend, the Does filed an additional motion for summary judgment on their liability claims against USAA. With regard to breach of contract, the motion asserted USAA breached its policy because it failed to defend the Does. Because we have held USAA did not owe a duty to defend the Does, USAA did not breach its policy by failing to defend the Does. Therefore, the Does' breach of contract claim fails as a matter of law. *See Martinez v. State Farm Lloyds*, 2000 WL 35729222, at *9 (Tex. App.—Corpus Christi-Edinburg 2000, no pet.) (holding no breach of contract claim when insurer has no duty to defend and breach of contract claim premised on insurer's duty to defend).

Similarly, the Does' claim under the Texas Prompt Payment of Claims Act is based on the premise that USAA failed to pay the Does' claim. Damages are only available under the Texas Prompt Payment of Claims Act if an insurer delays in paying a claim after reviewing all items, statements, and forms reasonably requested. *See* TEX. INS. CODE. ANN. § 542.058(a) (West. Supp. 2016). Because the Does' claim was excluded from coverage under the renters' insurance policy, the Does did not incur any damages as a result of USAA's delay in making payments for which there was no coverage as a matter of law. *Marquis Acquisitions, Inc. v. Steadfast Ins. Co.*, 409 S.W.3d 815-16 (Tex. App.—Dallas 2013, no pet.). Accordingly, we hold the trial court erred in granting summary judgment in favor of the Does as to their breach of contract and Texas Prompt Payment of Claims Act claims.

CONCLUSION

Based on the foregoing, we reverse the portion of the trial court's judgment declaring USAA owed a duty to defend the Does and render judgment declaring USAA owed no duty to defend the Does in the lawsuit filed in cause number 2014CI00249 because their claim was excluded from coverage as a matter of law by the intentional act exclusion provision. Because the Does' breach of contract and Texas Prompt Payment of Claims Act claims are premised on the existence of a duty to defend which we have held USAA did not owe as a matter of law, the portion of the trial court's judgment awarding the Does damages and attorney's fees for those claims is also reversed, and judgment is rendered that the Does take nothing on those claims. The remainder of the trial court's judgment is affirmed.

Marialyn Barnard, Justice