IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent, v. CATHERINE ANDERSON and DONALD ANDERSON, individually and as partners in a former marital community, KENDALL DUNN and THERESA DUNN, individually, as partners in a marital community, and as guardians of A.D., a minor child, Appellants.	)	No. 66337-2-I (Linked with No. 65602-3-I) DIVISION ONE UNPUBLISHED OPINION FILED: September 17, 2012

Schindler, J. — Donald Anderson sexually molested the eleven-year-old daughter of Kendall and Theresa Dunn. Kendall Dunn and Theresa Dunn, individually and as the guardians of A.D., challenge the court's determination that the "Personal Umbrella Liability Policy" issued by Mutual of Enumclaw Insurance Co. (MOE) does not provide coverage for the negligence claims against Catherine Anderson. Because the unambiguous language of the policy precludes coverage, we affirm.

FACTS

Donald and Catherine Anderson owned a cabin in Chelan. On July 23, 2006, Kendall Dunn, his spouse Theresa, their eleven-year-old daughter A.D. and her friend

D.J. arrived at the cabin to stay for a week. Before Catherine left the next day, she asked the Dunns if Donald and her son could also stay at the cabin that week.[1] That evening, Donald sexually molested A.D.

In February 2007, Donald pleaded guilty to two counts of child molestation in the first degree and one count of assault in the fourth degree with sexual motivation. In June 2007, Catherine and Donald divorced.

On July 9, 2007, Kendall Dunn and Theresa Dunn, individually and as the guardians of A.D., filed a complaint for damages against Donald Anderson and Catherine Anderson; Dunn v. Anderson, Snohomish County Superior Court Cause No. 07-2-05741-1. The Dunns alleged breach of the duty of care and violation of the Sexual Exploitation of Children Act, chapter 9.68A RCW. As to Catherine, the complaint alleged that she knew or should have known that Donald would molest A.D., and failed to warn the Dunns or protect A.D. from the reasonably foreseeable harm caused by Donald.[2]

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[1] We refer to the parties by their first names for purposes of clarity and mean no disrespect by doing so.

[2] The complaint alleges, in pertinent part:

> Catherine Anderson . . . owed a duty of care to protect her business invitees from the reasonably foreseeable criminal misconduct of third parties. As such, she owed a duty to A.D. and her parents.
>
> . . . Catherine Anderson knew that Donald Anderson was a predatory pedophile who sexually abused her niece on hundreds of occasions and had sexually abused his sister. She knew or should have known that he would again prey on minor children.
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> . . . Catherine Anderson knowingly allowed, permitted and encouraged Donald Anderson to abuse young girls, including Plaintiff, in one of the following ways:
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> . . . failing to warn Theresa and Kendall Dunn that Donald W. was a sexual predator of young girls and that unsupervised contact with A.D. . . . would place [her] in danger; and
>
> . . . representing to the plaintiffs that Donald Anderson was an honorable man worthy of trust when to the contrary Catherine Anderson knew him to be a child molester and predatory pedophile.
>
> . . . Catherine Anderson violated her duty to Plaintiffs for failing to protect them from the reasonably foreseeable harm cause[d] by Donald W. Anderson and by her and is liable to Plaintiffs.

Donald and Catherine Anderson were the named insureds under a homeowners policy and a Personal Umbrella Liability Policy issued by MOE for March 10, 2006 to March 10, 2007. Catherine tendered defense of the claims against her in Dunn v. Anderson to MOE. MOE accepted the tender of defense under a reservation of the "right to decline coverage and discontinue the defense upon the confirmation of the absence of coverage."

In November 2007, MOE filed a complaint for a declaratory judgment against Catherine and Donald Anderson, and Kendall and Theresa Dunn, individually and as the guardians for A.D. The declaratory judgment action sought a ruling on "whether, and to what extent, coverage exists" under the umbrella policy for the claims alleged in Dunn v. Anderson.

In February 2009, Catherine Anderson and Kendall Dunn and Theresa Dunn, individually and as the guardians for A.D., entered into a "Stipulated Judgment, Assignment of Claims, and Covenant Not to Execute." Catherine stipulated to entry of a $400,000 judgment against her for the claims asserted by the Dunns. The judgment was enforceable only against the umbrella policy. Catherine assigned her rights under the umbrella insurance policy to the Dunns.[3]

In November 2009, the court granted the Dunns' "Motion for Order of Voluntary Nonsuit of Defendant Donald Anderson," and dismissed all claims against Donald in Dunn v. Anderson.

The bench trial on the declaratory judgment action took place on October 13,

[3] MOE challenges the court's determination in the reasonableness hearing on the stipulated covenant judgment settlement agreement in the linked case, Dunn v. Mutual of Enumclaw Insurance Co., No. 65602-3-I.

2010. The Dunns conceded the homeowners policy did not provide coverage for the claims against Catherine in Dunn v. Anderson. The parties agreed that the only issue was whether as a matter of law, the umbrella policy provided coverage for the negligence claims against Catherine in Dunn v. Anderson. The Dunns and Catherine stipulated that Catherine "neither expected nor intended" the sexual assault against A.D.

The court ruled that because there was no dispute that the sexual molestation of A.D. was "expected and/or intended by [Donald]" as an insured under the policy, under the terms of the umbrella policy, there was no coverage for the negligence claims against Catherine in Dunn v. Anderson. The conclusions of law state:

> 1. The parties agree and the Court concludes there is no coverage provided by the Mutual of Enumclaw Homeowners Policy for either intentionally or negligently caused damage by either Donald Anderson or Catherine Anderson.
> 2. Donald Anderson's sexual molestation of A.D., the minor daughter of T[h]eresa and Kendall Dunn, produced injuries expected and/or intended by him, and there is no coverage as to him under either policy.
> 3. There is no coverage in the Mutual of Enumclaw umbrella policy as to the claims of negligence against Catherine Anderson because the effects of Donald Anderson's molestation of A.D. were expected and/or intended by him, and he was an insured under the policy.

The "Declaratory Judgment" order states, in pertinent part:

> Homeowner Policy Number HO11141253, effective March 10, 2006 to March 10, 2007, and Umbrella Policy Number H299754, effective March 10, 2006 to March 10, 2007, issued by Mutual of Enumclaw to Donald and Catherine Anderson, supplied no coverage for either Donald Anderson or Catherine Anderson for the claims of either intentionally or negligently caused injury brought by T[h]eresa Dunn, Individually, and as Gaurdian of A.D., a minor child, and Kendall Dunn v. Donald Anderson and Catherine Anderson, husband and wife and the marital community thereof, Snohomish County Superior Court Cause No. 07-2-05741-1.

ANALYSIS

The Dunns contend that the trial court erred in concluding there was no coverage under the umbrella policy.[4]

Interpretation of an insurance contract is a question of law which we review de novo. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 424, 38 P.3d 322 (2002). "The insurance contract must be viewed in its entirety; a phrase cannot be interpreted in isolation." Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). Further, in determining a contract's legal effect, "a court must construe the entire contract together so as to give force and effect to each clause." Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 797, 881 P.2d 1020 (1994).

Because insurance policies are contracts, the principles of contract interpretation apply. See, e.g., Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). If the language in an insurance contract is not ambiguous, the court must enforce it as written and may not modify the contract or create an ambiguity where none exists. State Farm Mut. Auto. Ins. Co. v. Ruiz, 134 Wn.2d 713, 721, 952 P.2d 157 (1998). A provision is ambiguous if, on its face, it is fairly susceptible to more than one reasonable interpretation. Daley v. Allstate Ins. Co., 135 Wn.2d 777, 784, 958 P.2d 990 (1998). And while ambiguity is construed against the drafter, a strict application should not trump the plain, clear language such that a strained or forced construction results. See Findlay v. United Pac. Ins. Co., 129 Wn.2d 368, 374, 379, 917 P.2d 116 (1996); Transcont. Ins. Co. v. Wash. Pub. Util. Dists.' Util. Sys., 111 Wn.2d 452, 457, 760 P.2d 337 (1988).

[4] The Dunns do not assign error to the other conclusions of law.

The party seeking to establish coverage under an insurance policy bears the initial burden to prove that coverage under the policy has been triggered. Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 337, 983 P.2d 707 (1999).

Donald Anderson and Catherine Anderson are the "Named Insured" on the Personal Umbrella Liability Policy issued by MOE. The policy defines "Insured" to mean "you and also: . . . Any member of your household." The MOE umbrella policy provides coverage according to the terms of the "Insuring Agreement." The Insuring Agreement states that MOE will pay an insureds loss for personal injury or property damage "caused by an occurrence during the policy period." The Insuring Agreement also states coverage applies separately to each insured.

> INSURING AGREEMENT
>
> We will pay the Insured's ultimate net loss in excess of the retained limit for personal injury or property damage caused by an occurrence during the policy period.
>
> This coverage applies separately to each Insured. This does not increase our limit of liability for any one occurrence.

The policy defines "occurrence" to mean "an accident which happens anywhere during the policy period, whose effects are neither expected nor intended from the standpoint of any insured, which results in: . . . personal injury." "Accident" is not defined in the policy. However, for purposes of insurance coverage, our supreme court defines "accident" as "an unusual, unexpected, and unforeseen happening." Grange Ins. Co. v. Brosseau, 113 Wn.2d 91, 95, 776 P.2d 123 (1989). And in Detweiler v. J. C. Penney Casualty Insurance Co., 110 Wn.2d 99, 751 P.2d 282 (1988), the supreme court held that " 'an accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs

which produces or brings about the result of injury or death. The means as well as the result must be unforeseen, involuntary, unexpected and unusual.' " Detweiler, 110 Wn.2d at 104 (quoting Unigard Mut. Ins. Co. v. Spokane Sch. Dist. No. 81, 20 Wn. App. 261, 263-64, 579 P.2d 1015 (1978)[5]).

It is well established that a person who intentionally commits sexual assault intends harm as a matter of law. See Rodriguez v. Williams, 107 Wn.2d 381, 387, 729 P.2d 627 (1986). The Dunns concede that Donald's molestation of A.D. was not an accident. Unless the negligence claims against Catherine constitute an "accident," there is no "occurrence" that triggers coverage under the umbrella policy. In order to establish coverage for the negligence claims alleged against Catherine in Dunn v. Anderson, there must be an " 'additional unexpected, independent and unforeseen happening' " causing the personal injury. Detweiler, 110 Wn.2d at 104 (quoting Unigard, 20 Wn. App. at 264). Here, the undisputed facts do not establish an additional, independent, and unforeseen happening that caused of the injury to A.D.

But the Dunns assert that because the language of the umbrella policy states that "coverage applies separately to each Insured," MOE must indemnify Catherine on the negligence claims asserted against her in Dunn v. Anderson. In Safeco Insurance Co. of America v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992), the supreme court rejected the argument that coverage is triggered because the insurance policy applied separately to the named insureds.

In Butler, the insured Hap Butler fired shots at Eddie Zenker's truck. One of the shots ricocheted off the truck, hitting Zenker in the head and seriously injuring him.

[5] (Footnote omitted.)

Butler, 118 Wn. 2d at 386. The Zenkers sued Hap and his wife Geraldine. Hap and Geraldine were named insureds on a homeowners policy issued by Safeco. Butler, 118 Wn. 2d at 387. The Safeco policy provided coverage for " 'bodily injury . . . caused by an occurrence to which this policy applies.' " Butler, 118 Wn. 2d at 400. The policy defined an occurrence as " 'an accident . . . which results . . . in bodily injury.' " Butler, 118 Wn. 2d at 400. The court held that because the ricochet was foreseeable, the injury was not the result of an accident. Butler, 118 Wn. 2d at 401-02.

The Butlers argued that even if coverage was not triggered for Hap, Safeco still had to provide coverage for Geraldine because the policy applied separately to Hap and Geraldine. Butler, 118 Wn. 2d at 402. The court rejected this argument and held that because the injuries did not result from an accident, "there is no coverage under the policy." Butler, 118 Wn. 2d at 403.

Here, as in Butler, the policy expressly provides coverage for Donald and Catherine as named insureds based on an "occurrence" that is defined as an accident. Because the injury was not the result of an accident, there is no coverage under the umbrella policy.

Nonetheless, the Dunns argue that the severability clause requires the court to determine whether there is an accident based solely on Catherine's perspective. The Dunns assert that because Catherine neither expected nor intended the molestation of A.D., she is entitled to coverage for the negligence claims alleged against her in Dunn v. Anderson.

The Dunns' interpretation of the policy ignores the definition of the insureds and

the agreement to only provide coverage for a loss caused by an occurrence. Donald and Catherine are each named insureds. The policy defines insured to mean "you and also: . . . Any member of your household." While the severability clause of the policy states in general language that "coverage applies separately to each Insured," the determination of whether Donald's molestation of A.D. was an accident from Catherine's point of view has no bearing on whether there is coverage for an occurrence. The severability clause does not negate the unambiguous language that defines "occurrence."

The focus of the language in the policy that defines coverage for an occurrence is clearly on the event, not on the insured. The plain and unambiguous language of the umbrella policy only grants coverage for an occurrence that is defined as the effects of an accident that is "neither expected nor intended from the standpoint of any insured."[6] Accordingly, if any insured deliberately causes harm, there is no coverage under the policy.

The cases the Dunns rely on, Pacific Insurance Co. v. Catholic Bishop of Spokane, 450 F. Supp.2d 1186 (E.D. Wash. 2006); Unigard, 20 Wn. App. at 579; and United Fire & Casualty Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648 (Iowa 2002), are inapposite. In those cases, coverage or exclusion from coverage was defined in terms of "the insured," not "any insured." Unlike the MOE policy that excludes coverage for intentional acts that are expected or intended from the standpoint of any insured, where coverage and exclusions are defined in terms of "the insured," the excluded act of one insured does not bar coverage for insureds who have not engaged

[6] (Emphasis added.)

in the excluded act. Farmers Ins. Co. of Wash. v. Hembree, 54 Wn. App. 195, 199, 773 P.2d 105 (1989);[7] Truck Ins. Exch. v. BRE Props., Inc., 119 Wn. App. 582, 590-91, 81 P.3d 929 (2003). See Catholic Bishop, 450 F. Supp. 2d at 1202 (the Diocese's policies define coverage in terms of what is " 'neither expected nor intended from the standpoint of the insured' ");[8] Unigard, 20 Wn. App. at 262 (the policy excluded coverage for injury " 'which is either expected or intended from the standpoint of the insured' ");[9] Shelly Funeral Home, 642 N.W. 2d at 653 (the policy's intentional acts exclusion specifically applies to injury " 'expected or intended from the standpoint of the insured' ").[10]

We affirm the determination that Catherine is not entitled to coverage under the MOE umbrella policy.

WE CONCUR:

[7] (Emphasis added.)
[8] (Emphasis added.)
[9] (Emphasis added.)
[10] (Emphasis added.)