COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 31, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-2204, 96-2205

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

NO. 96-2204

EKATRINA PRATCHENKO,

PLAINTIFF-RESPONDENT-
CROSS APPELLANT,

V.

DONALD FULLER AND ANTOINETTE FULLER,

DEFENDANTS-RESPONDENTS-
CROSS APPELLANTS,

INTERNATIONAL EDUCATION FORUM,

DEFENDANT,

STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANT-APPELLANT-
CROSS RESPONDENT.

NO. 96-2205

BRENDA HRIC,

PLAINTIFF-RESPONDENT,

V.

DONALD FULLER AND ANTOINETTE FULLER,

DEFENDANTS-RESPONDENTS-CROSS APPELLANTS,

STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANT-APPELLANT-CROSS RESPONDENT.

APPEAL and CROSS-APPEAL from orders[1] of the circuit court for St. Croix County: SCOTT R. NEEDHAM and ERIC J. LUNDELL, Judges. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. State Farm Fire and Casualty Company appeals orders denying its motion for summary judgment in each case on the grounds that its homeowner's insurance policy does not provide coverage to its insureds, Donald and Antoinette Fuller. Antoinette cross-appeals the trial court's order, contending that there are no disputed facts as to whether the intentional acts exclusion applies to her. Both trial courts denied State Farm's and Antoinette's motions, concluding that there are disputed issues of material facts.[2] Because State Farm's policy

[1] Petitions for leave to appeal were granted August 28, 1996.

[2] These cases were consolidated for appeal.

excludes coverage for mental harm or any similar injury unless it arises out of an actual physical injury, which neither plaintiff alleged in their complaints, we conclude that State Farm's motion for summary judgment should be granted. Therefore, we reverse both orders and remand to the trial courts for dismissal of State Farm from the actions. This holding also renders Antoinette's cross-appeal moot.

The underlying material facts to these actions are undisputed. During the summer of 1989, the Fullers began hosting in their home female foreign exchange students who were attending high school and college. Unbeknown to the students, Donald Fuller cut a hole in the back wall of his bedroom closet in order to secretly videotape the students while they showered or changed clothes in an adjoining bathroom. He recorded their activities while they were naked and without their consent or knowledge. Later, he would often watch these videotapes for his sexual gratification. Antoinette discovered her husband's videotaping activity in 1990 and, although she had opportunities to attempt to stop her husband from continuing to videotape the students, she chose not to.

While investigating another matter relating to Donald Fuller, the police discovered twelve videocassettes containing over 100 shower scenes of more than sixty females Fuller had videotaped while the students and their guests were at his home. Ekatrina Pratchenko was videotaped on two occasions during the spring of 1994, and Brenda Hric was videotaped once in the spring of 1994. After learning that the police had discovered the videotapes showing them naked, the plaintiffs filed an action against both of the Fullers, alleging intentional infliction of emotional distress, invasion of privacy, assault and battery and negligence. Pratchenko alleges in her complaint that she suffered "extreme emotional distress" and "great mental anguish" as a result of the Fullers' actions.

Hric alleges in her complaint that she suffered "severe and disabling emotional distress" and "extreme and disabling emotional injury" as a result of the Fullers' actions.

State Farm filed its motion for summary judgment arguing that it had no duty to defend or indemnify the Fullers for four reasons: the policy excludes coverage for the plaintiffs' injuries under the intentional acts exclusion; the plaintiffs' claims for damages were not caused by an accident and, therefore, were not occurrences; the plaintiffs' mental suffering did not arise from physical injuries; and no reasonable insured would expect coverage for these complained acts. Both trial courts in similar memorandum decisions denied the motion on the ground that due to the plaintiffs' allegations of injuries, disputed issues of material fact existed as to whether the "bodily injury exclusion" in the policies applied. The courts also concluded that because the Fullers videotaped the plaintiffs in secret solely for the purpose of their own sexual gratification and with no intention to disseminate the tapes, there was a question of disputed fact as to whether the Fullers intended injury or harm to result from their acts.

The relevant terms of State Farm's policy provides:

> SECTION II - LIABILITY COVERAGES
>
> COVERAGE L - PERSONAL LIABILITY
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable;

The policy defines "occurrence" and "bodily injury" as:

> [O]ccurrence, when used in Section II of this policy, means an accident, including exposure to conditions, which results in:
>
> a. bodily injury ….
>
> [B]odily injury means physical injury, sickness, or disease to a person. This includes required care, loss of services and death resulting therefrom.
>
> *Bodily injury does not include …*
>
> *c. emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury unless it arises out of actual physical injury to some person.* (Emphasis added.)

The applicable policy exclusions read as follows:

> SECTION II - EXCLUSIONS
>
> 1. Coverage L and Coverage M do not apply to:
>
> a. bodily injury or property damage:
>
> (1) which is either expected or intended by an insured; or
>
> (2) to any person or property which is the result of willful and malicious acts of an insured;

In summary, in order for coverage to apply, there must be an "occurrence," defined under the policy as an "accident," which results in "bodily injury," defined under the policy as physical injury, sickness or disease and specifically defined not to include "emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury unless it arises out of actual physical injury …."

Whether summary judgment should be granted is a question of law. ***Wegner v. Heritage Mut. Ins. Co.,*** 173 Wis.2d 118, 123, 496 N.W.2d 140, 142 (Ct. App. 1992). Summary judgment is to be granted where there is no genuine

issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

Whether a claim falls within the purview of an insurance policy presents a question of law which this court determines without deference to the trial court's determination. ***Smith v. Atlantic Mut. Ins. Co***., 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990). In making this determination, we examine the allegations set forth in the complaint and apply those allegations to the terms of the insurance policy to determine whether coverage is afforded by the policy. *See* ***Professional Office Bldgs., Inc. v. Royal Indem. Co***., 145 Wis.2d 573, 580-81, 427 N.W.2d 427, 429-30 (Ct. App. 1988). We are required to liberally construe the allegations of the complaint and to assume all reasonable inferences arising from the allegations of the complaint. *See* ***Atlantic Mut. Ins. Co. v. Badger Med. Supply Co*.,** 191 Wis.2d 229, 241-42, 528 N.W.2d 486, 491 (Ct. App. 1995). In the event there is an ambiguity as to whether coverage is afforded, the ambiguity must be resolved in favor of coverage. ***Smith*,** 155 Wis.2d at 810-11, 456 N.W.2d at 598.

State Farm contends there is no coverage for the following reasons: the Fullers' conduct giving rise to the plaintiffs' claims was not an occurrence because it was not an accident; the harm suffered by the plaintiffs was because of the Fullers' willful and malicious acts and the harm was expected and intended as a matter of law; no person purchasing a homeowner's policy would reasonably expect liability coverage for the Fullers' conduct; there is no bodily injury because no actual physical injury is alleged to have caused the plaintiffs' alleged emotional sufferings. We address State Farm's last contention first because we determine it to be dispositive.

State Farm's definition of bodily injury is limited to physical injury, sickness or disease, but specifically excludes mental or emotional harm "unless it

arises out of actual physical injury to some person." Pratchenko alleges that she suffered "extreme emotional distress" and "great mental anguish" as a result of the Fullers' secretly videotaping her while she was naked. She also claims that Donald Fuller assaulted her by inappropriate touching. In the Fullers' deposition, they describe the "touching" as normal back rubs done at Pratchenko's request over a period of time when she resided with the Fullers. Pratchenko does not dispute the Fullers' description of the back rubs. There was nothing done out of the ordinary during these rubdowns, and no physical injury occurred. She claims to have suffered nightmares, sleeplessness and loss of appetite after learning of the videotapes. Hric alleges that she suffered "severe and disabling emotional distress" and "extreme and disabling emotional injury" because of the Fullers' secretly videotaping her. Importantly, neither Pratchenko nor Hric alleges any of these emotional harms arose from an actual physical injury.

The plaintiffs contend that under our holding in ***Tara N. v. Economy Fire & Cas. Ins. Co.***, 197 Wis.2d 77, 540 N.W.2d 26 (Ct. App. 1995), we are compelled to conclude that emotional distress falls within the meaning of bodily injury. In ***Tara***, we held:

> Mental, emotional or psychological conditions are commonly considered as sickness or disease by both lay persons and medical professionals. Such conditions are routinely treated by medical personnel employing medical procedures. A reasonable insured would understand such conditions to be included within the concepts of "sickness or disease" which the policy uses to define "bodily injury." *See* ***School Dist. of Shorewood v. Wausau Ins. Cos***., 170 Wis.2d 347, 367, 488 N.W.2d 82, 88-89 (1992). Thus, we conclude that Tara's psychological injury was covered as a "bodily injury" under the policy.

Id. at 87, 540 N.W.2d at 30.

The plaintiffs employ the reasoning in ***Tara*** and argue that because State Farm's policy defines bodily injury as physical injury, sickness or disease,

their emotional harm falls within the definition of bodily injury and the exclusion does not apply. We are not persuaded. Unlike the policy in ***Tara,*** State Farm's policy specifically restricts emotional injuries from the definition of bodily injury unless it arose out of an actual physical injury.

State Farm argues correctly that its policy clearly sets forth the cause and effect relationship required to bring the plaintiffs' emotional suffering within coverage. The emotional suffering is not included as bodily injury unless it arises from an actual physical injury. Obviously, neither Pratchenko nor Hric suffered a physical injury when Fuller secretly videotaped them. Their emotional suffering occurred only after learning of the videotapes. It is undisputed that the Fullers never caused any actual physical injury such as bruising, abrasions, contusions, scratches, cuts, scrapes or fractures.

The plaintiffs cite ***West Bend Mut. Ins. Co. v. Berger***, 192 Wis.2d 743, 754-55, 531 N.W.2d 636, 640 (Ct. App. 1995), for the proposition that loss of sleep or appetite constitute bodily harm. In ***West Bend***, the plaintiff suffered ulcers and a loss of sleep and weight as a result of sexual harassment at work. We held that these physical manifestations of her distress caused by sexual harassment were sufficient to constitute bodily injury under the Worker's Compensation Act. However, in ***West Bend,*** we were not interpreting the bodily harm as used in insurance policies. Rather, we were interpreting the phrase "assault intended to cause bodily harm" under the employee immunity exception contained in § 102.03(2), STATS., to a sexual harassment situation. ***Id.*** at 750, 531 N.W.2d at 639. Here, there was no actual physical injury that caused the loss of appetite or sleeplessness allegations, which were the symptoms of the emotional and mental distress.

We fail to see how coverage is activated for the plaintiffs' mental sufferings where there was no actual physical injury, which is a necessary

predicate to recover for emotional harm. Therefore, because coverage is not triggered under the policy for the alleged emotional harm, and it was not the result of an actual physical injury, State Farm must be dismissed from these actions against the Fullers. Because this issue is dispositive on the coverage issue, we need not address State Farm's arguments that the intentional acts exclusion applies, the principle of fortuity precludes coverage and there was no occurrence because it was not accidental.

In her cross-appeal, Antoinette contends that the trial court erred by concluding there were disputed facts to determine whether the intentional acts exclusion applied to her actions. Our holding renders her cross-appeal moot because we conclude there is no State Farm coverage for the damages sought by the plaintiffs. We therefore reverse both trial courts and remand the matters with directions to grant State Farm's motion for summary judgment on the coverage issue.

By the Court.—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.