IN THE SUPREME COURT OF THE STATE OF NEVADA

EMPIRE FIRE AND MARINE INSURANCE COMPANY,
Appellant,
vs.
MICHAEL NELSON, A MINOR CHILD, NATURAL SON OF JIM NELSON AND JULIE NELSON; JIM NELSON AND JULIE NELSON, HUSBAND AND WIFE; JULIE NELSON, LICENSED CHILD CARE PROVIDER; DAVID ALLEN CROUSE AND JENNIFER CROUSE, HUSBAND AND WIFE; TRAVIS CROUSE, BY AND THROUGH HIS GUARDIAN AD LITEM, JENNIFER CROUSE; AND NICOLE ROBBINS, INDIVIDUALLY AND ON BEHALF OF JASON ROBBINS AND PERRY ROBBINS,
Respondents.

No. 43295

FILED

JUL 11 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order denying summary judgment in an action seeking a declaration of non-coverage under a commercial liability insurance policy. Because the district court finally resolved all of the relevant coverage issues in its order, we treat the order as a final judgment denying appellant's complaint for a declaratory judgment. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

Appellant Empire Fire and Marine Insurance Company filed a complaint for declaratory judgment concerning two separate cases of alleged child molestation by the thirteen-year-old son of the insured under a policy protecting a day care service. Empire Fire sought a declaration that it was not required to indemnify its insureds in the two underlying actions, both of which were grounded in the molestation allegations.

Subsequently, Empire Fire filed a motion for summary judgment on its declaratory judgment claim in January 2004, based upon an express policy exclusion precluding indemnity for damages arising or resulting from sexual abuse or molestation caused by an insured. The district court denied the motion for summary judgment and stated that Empire Fire "does owe a duty to indemnify the Nelsons for any damages for which they may be found liable in the underlying actions." Empire Fire appeals, arguing that the exclusion applies and that is it not required to indemnify the insured.

This court reviews a summary judgment order de novo.[1] "Summary judgment is only appropriate when, after a review of the record viewed in the light most favorable to the non-moving party, there remain no issues of material fact."[2] The district court's order embraces two issues. First, whether the policy effectively excluded coverage for the acts of insureds' adolescent child. Second, whether the acts of the child constitute an occurrence under the policy.

Exclusion language

Exclusions are to be interpreted narrowly against the drafter.[3] Therefore, ambiguities in the exclusion will be construed in favor of coverage. The exclusionary language in question here states as follows:

> We will not pay for any damages the insured or the insured's employee's may be legally liable to pay as a result of claims arising out of or resulting

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[1]Medallion Dev. v. Converse Consultants, 113 Nev. 27, 31, 930 P.2d 115, 118 (1997).

[2]Id.

[3]National Union Fire Ins. v. Reno's Exec. Air, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984).

> from sexual abuse, licentious, immoral or sexual acts, whether caused by, or at the instigation of, or at the direction of, the insured or the insured's employees.

After carefully examining the language of the exclusion, we consider the phrase "whether caused by" to be ambiguous. It is unclear from the language of the exclusion which party's causal acts a court should focus on in determining whether coverage is mandated. Moreover, we note that other policies have delineated a sexual molestation exclusion with greater force and particularity.[4]

Occurrence issues

We now turn to the question of whether the incidents in question fall within the policy's definition of an occurrence. We must initially determine from whose vantage point the court should view the triggering act. The district court stated that in determining whether an "occurrence" exists, the court must look at which acts are being considered. Focusing on the insureds' act of negligence, the district court determined that the "proper perspective is from the standpoint of the insured and not the underlying acts of a third party which determine if coverage exists." We agree. The acts of the offender may be separated from the acts of the insured.[5] Therefore, it is from the standpoint of the insured, and the alleged negligence, that this court will evaluate whether there was an "occurrence" sufficient to create an indemnity obligation.

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[4]Community Action v. American Alliance Ins., 757 A.2d 1074, 1077 n.6 (Conn. 2000).

[5]USF&G v. Open Sesame Child Care Center, 819 F. Supp. 756, 760 (N.D. Ill. 1993).

An "occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While the policy does not define the term "accident," this court has recently stated that "a common definition of the term is 'a happening that is not expected, foreseen, or intended.'"[6] We conclude that the alleged events fall within the definition of an occurrence. In keeping with our holding in Washoe County v. Transcontinental Insurance Company, we resolve the issue in favor of indemnification coverage.[7] It is the insureds' alleged acts of negligent supervision that constitute an "occurrence" and accident under the policy. It is clear the insureds' conduct was not expected, intended or foreseen.

The central issue in Washoe County was how to construe the policy term "occurrence" and whether the multiple acts of molestation committed should be considered one act of negligence on the County's part.[8] The policy in question provided for claims in excess of $50,000 per occurrence. If each instance of molestation were a separate occurrence, then no coverage would have existed as to the multiple claims, because no one claim exceeded that amount. This court held that the County's negligence amounted to a single "occurrence" under the policy.[9] Additionally, this court determined that the proper focus "needs to be

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[6]Beckwith v. State Farm Fire & Cas. Co., 120 Nev. 23, 26, 83 P.3d 275, 276 (2004) (concluding that an intoxicated individual's act of striking another individual was intentional and not a covered occurrence under a homeowner's insurance policy) (quoting Webster's New World Dictionary 8 (3d ed. 1988)).

[7]110 Nev. 798, 878 P.2d 306 (1994).

[8]Id. at 800-01, 878 P.2d at 308.

[9]Id., 878 P.2d at 307.

considered with an eye towards the County's involvement, not towards [the offender's] involvement."[10] "Occurrence" was interpreted in favor of coverage,[11] and we apply that interpretation in the present case.

We conclude that Washoe County provides sufficient rationale to hold that the parents' acts in this instance amount to an occurrence. Having considered the arguments in depth, we hold that Empire Fire has an indemnity obligation under the policy. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

cc: Hon. Peter I. Breen, District Judge
Dryden Margoles Schimaneck & Wertz
Woodburn & Wedge
Arrascada & Arrascada, Ltd.
Margaret S. Evans
Carl F. Hylin
Jim Nelson
Julie Nelson
Washoe District Court Clerk

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[10]Id. at 802, 878 P.2d at 308.

[11]Id. at 805, 878 P.2d at 310.