COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 25, 1997

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(1), STATS.

NOTICE

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

No. 96-0680

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

CATHERINE M. DOYLE AND KARL ROHLICH,

Plaintiffs,

v.

WARD ENGELKE, MISSIONARIES TO THE PREBORN YOUTH FOR AMERICA-NATIONAL, YOUTH FOR AMERICA-MILWAUKEE, WISCONSIN, JOSEPH L. FOREMAN, MATTHEW TREWHELLA, KELLY DYKEMA, TIMOTHY L. RUCHTI, KURT L. SONNENBURG, BRYAN LONGWORTH AND ADVOCATES FOR LIFE MINISTRIES,

Defendants,

WISCONSIN VOICE OF CHRISTIAN YOUTH, INC., AND VIC ELIASON,

Defendants-Appellants,

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,

Intervenor-Defendant-Co-Appellant,

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Intervenor-Defendant-Respondent,

MATTHEW TREWHELLA,

Defendant-Counter-Plaintiff-Third Party Plaintiff,

v.

PLANNED PARENTHOOD OF WISCONSIN, INC., PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., MILWAUKEE CLINIC PROTECTION COALITION SEVERA AUSTIN, LINDA MELLOWES, JOHN DOES AND JANE DOES,

Third Party Defendants.

APPEALS from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

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

MYSE, J. Wisconsin Voice of Christian Youth, Inc. (WVCY), Vic Eliason and Employers Insurance of Wausau appeal a summary judgment in favor of St. Paul Fire & Marine Insurance Company dismissing the claims against the appellants' insurance company based upon the trial court's determination that St. Paul's policy afforded no coverage to the defendant on any of the claims being made against them. WVCY, Eliason and Employers concede that eight of the eleven claims asserted by the plaintiffs do not fall within the coverage granted by St. Paul's policy. In granting summary judgment, the trial court concluded that there was no coverage under the three disputed claims and therefore St. Paul had no duty to defend or indemnify WVCY and Eliason. Appellants contend, however, that the three claims for

slander of title, invasion of privacy and negligent supervision of employees are covered by St. Paul's policy and that the trial court erred by granting summary judgment dismissing St. Paul as a defendant in this action. Because this court concludes that no coverage is afforded under the St. Paul policy for any of Doyle's claims, the judgment is affirmed.

The facts giving rise to this lawsuit emanate from a demonstration at an abortion clinic in 1993. As a result of incidents that occurred during and after the demonstration, Catherine Doyle filed a complaint charging that the Engelkes falsely accused Doyle of cursing at and kicking Ekaterina (Katie) Engelke, a child, in the face. Doyle further contends that the Engelkes attempted to file a malicious prosecution against Doyle for her actions and that WVCY, its affiliates and officers published and broadcasted news accounts of Doyle's alleged assault against Katie. In addition, two employees of WVCY filed a false security agreement encumbering certain of Doyle's property.

Three amended complaints have been filed containing eleven different causes of action. The parties agree, however, that there is no coverage under St. Paul's policy for any cause of action other than the claims asserted by the plaintiffs for invasion of privacy, slander of title and a claim involving WVCY's negligent supervision of its employees.

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. ***Professional Office Bldgs., Inc. v. Royal Indem. Co.,*** 145 Wis.2d 573, 580, 427 N.W.2d 427, 429 (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. ***Atlantic Mut. Ins. Co. v. Badger Medical 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.

We start our examination with the claim that WVCY was negligent in the supervision of its employees based on its employees filing a false security agreement encumbering Doyle's property and serving a false subpoena at Doyle's home.[1] The trial court found that no coverage was afforded for this claim based upon the intentional acts exclusion contained in the insurance policy, the definition of bodily injury as defined in the policy and the definition of an event as defined in the policy.

The applicable provisions of the insurance policy are as follows:

> **Bodily Injury and property damage liability**. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury ... that:
> • happens while this agreement is in effect; and
> • is caused by an event.
> ...
> *Bodily injury* means any physical harm, including sickness or disease, to the physical health of other persons. It includes any of the following that results at any time from such physical harm, sickness or disease:
> • Mental anguish, injury or illness.
> • Emotional distress.
> • Care, loss of services, or death.

The complaint alleges that Doyle suffered severe emotional distress resulting in "disabling" injuries. For the purposes of this analysis, we assume the existence of the facts alleged in the complaint. *See* ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 224, 522 N.W.2d 261, 266 (Ct. App 1994). We also construe the allegations of the complaint liberally in determining whether insurance coverage is afforded. ***Atlantic Mut.***, 191 Wis.2d at 241-42, 528 N.W.2d at 491.

St. Paul contends that bodily injury is not alleged because Doyle claims her emotional distress caused her injury and that for coverage to exist,

[1] The parties do not argue and we do not decide whether a claim for negligent supervision states a cause of action under Wisconsin law.

the policy requires emotional distress to result from a physical harm, sickness or disease. We disagree. Doyle's complaint alleges she suffered "severe and disabling emotional distress." The complaint alleges a "disabling" injury as a result of the insured's act. Whether her disabling injury was the first link in the chain from the action or resulted from emotional distress which was the result of the insured's action makes no difference in this case because the policy covers bodily injury which is alleged to have been suffered by Doyle.

Under the policy, "bodily injury means any physical harm, including sickness or disease." The conclusion that emotional distress falls within the meaning of "bodily injury" under the policy is compelled by our holding in ***Tara N. by Kummer v. Economy Fire & Cas. Ins. Co.***, 197 Wis.2d 77, 540 N.W.2d 26 (Ct. App. 1995). In ***Tara N.***, the Wisconsin Court of Appeals concluded that the term "bodily injury" encompassed claims for emotional or psychological harm. The court said:

> 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."

Id. at 87, 540 N.W.2d at 30. Because St. Paul's insurance policy included both sickness and disease, we consider the holding of ***Tara N.*** to compel the conclusion that the emotional harm alleged by Doyle falls within the first sentence of St. Paul's definition of "bodily injury." We therefore do not consider the subsequent language expanding coverage for emotional distress or mental anguish resulting from physical harm, sickness or disease as limiting the definition which provides coverage for emotional distress as a "bodily injury" itself. Because we accept the allegations as true, this allegation sufficiently alleges a bodily injury.

St. Paul next contends that Doyle's claim for negligent supervision of WVCY's employees is not covered because the filing of a false financial statement encumbering Doyle's property is not an "event" as defined by the

policy. "Event" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." We conclude that the negligent conduct alleged against WVCY, a failure to properly supervise its employees, is a claim of negligence falling within the meaning of "accident" as that term is used in the definition of "event."

The distinction between a negligent act and an accident for the purpose of this discussion is difficult to discern. The definition of "accident" is defined as a "sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result." WEBSTER'S THIRD NEW INT'L DICTIONARY 11 (Unabr. 1976). "Negligence" is "characterized chiefly by inadvertence, thoughtlessness, inattention, and the like ...." BLACK'S LAW DICTIONARY 1032 (6th ed. 1990). Because of the similarity between these definitions, a reasonable insured would expect to have coverage for this sort of negligence under the "accident" term in the policy.

Finally, St. Paul contends that there is no liability under the claimed negligent supervision of employees because of the intentional acts exclusion of the insurance policy. The policy contains the following exclusion: "[W]e won't cover bodily injury or property damage that's expected or intended by the protected person." A "protected person" includes employees "only for work done within the scope of their employment by you." St. Paul argues that the conduct giving rise to liability specified in the complaint involved intentional conduct within this exclusion. The appellants argue that we should focus on the allegation that WVCY was negligent in supervising its employees. Although negligence is the nature of the allegation against WVCY, the complaint alleges the acts which form the basis of the complaint were performed by WVCY employees within the scope of their employment. Under the policy, employees acting within the scope of their employment are protected persons. Therefore, the complaint itself alleges that the conduct giving rise to liability was the intentional act of the insured.

The complaint alleges two employees of WVCY, Kanz and Shierbach, filed a false security agreement with the secretary of state on which Kanz forged Doyle's signature and falsely stated that Kanz had a lien on Doyle's assets and the assets of her law partners. The complaint alleges the false security agreement was filed "in an attempt to prevent or hinder her from performing her lawful acts and in order to intimidate, harass, frighten and upset

her." Kanz is alleged to have directed three individuals to serve a false subpoena signed by him upon Doyle in order to harass and intimidate her. Finally, the complaint alleges that when Kanz performed these activities he "was in the scope of or aided by his employment with WVCY and was acting in furtherance of WVCY's interests."

For the intentional act exclusion to apply, the protected person must have expected or intended bodily injury. The complaint does not allege that any of the WVCY employees intended or expected bodily injury, rather it is alleged that they intended to cause emotional distress. We have already explained that "bodily injury" includes emotional distress. Therefore, as long as the employees intended emotional distress to Doyle, they intended bodily injury.

Doyle asserts that whether the employees intended the amount of emotional distress she suffered is a fact question for the jury. The complaint, however, alleges the employees intended to inflict some degree of emotional distress. The employees are not required to intend the exact magnitude of the injury that occurs. *See* ***Pachucki v. Republic Ins. Co.***, 89 Wis.2d 703, 278 N.W.2d 898 (1979). Rather, as long as they intended any degree of emotional distress, it is sufficient to constitute "bodily injury" under the policy. They need not intend the degree of harm which was ultimately alleged to have been inflicted upon Doyle for the intentional act exclusion to be applicable. The intentional act exclusion requires only that some bodily harm be intended.

We do not decide whether an intention to inflict any degree of emotional distress states a cause of action. We decide only for coverage purposes that emotional distress is within the definition of "bodily injury."

Doyle's complaint alleges that the WVCY employees, while in the scope of their employment, served the subpoena and filed the security agreement in order to "harass," "intimidate, frighten and upset" Doyle. The complaint, therefore, alleges intentional conduct on behalf of an insured. Because the employees are alleged to have acted intentionally in the scope of the employment to inflict bodily injury to Doyle, we conclude that the claim for negligent supervision of employees is excluded from coverage under the intentional act exclusion.

We next turn to the slander of title and invasion of privacy claims. WVCY contends that because St. Paul's policy specifically grants coverage for a claim of slander, it must grant coverage to Doyle's claim of slander of title based upon the false financial statement filed by Kanz. We do not agree. Slander is an offense against the person which damages a person's reputation. ***Towne Realty v. Zurich Ins. Co.***, 193 Wis.2d 544, 555, 534 N.W.2d 886, 891 (Ct. App. 1995). Slander of title is a claim against property which involves damage to property. ***Kensington Dev. Corp. v. Israel***, 142 Wis.2d 894, 419 N.W.2d 241 (1988). Because slander and slander of title involve two and distinct types of claims, slander of title is not subsumed by the policy provision granting indemnity for the tort of slander.

Even if we were to conclude that the indemnification for slander is sufficiently broad to include slander of title, indemnification would not be required because liability resting on slander of title requires proof that the defendant knew the contents to be false, a sham or frivolous. Section 706.13, STATS. St. Paul contends that such a claim would come within the false material exclusion. The false material exclusion provides:

> False material. We won't cover personal injury or advertising injury that results from making known to any person or organizations false written or spoken material that:
> • was made known by or for the protected person; and
> • the protected person knew was false when it was made known.

Without any detailed analysis, the false material exclusion applies. St. Paul further argues that the claim of slander in title would also be excluded under the deliberately breaking the law exclusion. The exclusion reads: "We won't cover personal injury ... that results from ... the protected person knowingly breaking any criminal law." The policy further states that a "personal injury offense" includes "libel or slander." We agree that this exclusion would apply if slander included slander of title. Therefore, the policy excludes coverage for the claim of filing a false security agreement, regardless whether slander of title is included in slander.

We next turn to Doyle's claim that the allegation of invasion of privacy is covered by St. Paul's policy. St. Paul argues that this claim is not

covered by operation of the broadcasting exclusion in the policy. The invasion of privacy claim stems from the allegation that WVCY made widespread disclosure of the charge that Doyle kicked Katie during a demonstration at the abortion clinic, which was either known to be false or published in reckless disregard to its truthfulness. The complaint alleged a knowing publication of false confidential information in violation of § 48.981, STATS., requiring information regarding a juvenile be held confidential. The requirement that a personal injury claim must result from business activities other than broadcasting excludes damages flowing from the alleged false reporting of this incident.

Bodily injury liability is required to flow from business activities other than "broadcasting, publishing or telecasting" done by or for WVCY. The broadcasting exclusion specifically envisions claims based upon the publication of material alleging to give rise to personal injury. "Broadcasting" is defined by the policy as "transmitting any audio material by radio or transmitting or televising any audio or visual material by television for any purpose." The policy defines "publishing" as "creating or producing any printed material for distribution or sale to others for any purpose."

The claim for invasion of privacy rests upon the contention that WVCY disseminated false information alleging that Doyle kicked Katie during a demonstration. The complaint alleges that these false stories were broadcast over two news shows, that the statements were made over the radio and that the statements were disseminated to a variety of media sources. Because these acts fall within the definition of the broadcasting and publication exlcusion, the allegations of Doyle's complaint are insufficient to allege a business activity which provides indemnification under the policy. Because the allegations are insufficient to bring this claim within the purview of a covered business activity as defined by the policy, we conclude that there is no indemnification under St. Paul's policy for any damages arising from a claimed invasion of privacy.

We conclude that no coverage is afforded under the St. Paul policy for the claim of negligent supervision because the intentional act exclusion applies. We also conclude that no coverage exists for slander of title because it is not included within the meaning of slander and that no coverage is provided for the invasion of privacy claim because of the broadcasting exclusion.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.