STATE OF MICHIGAN

COURT OF APPEALS

ATAIN INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellee,

v

KATALYST FITNESS, LLC, doing business as SWITCH CROSSFIT, HEATHER CONDON, SARA FOWLER, BRIANNA KOURCE, KATELYN VANMAELE, FRANK WILSON, AMY WISNIEWSKI, JOHN DOE 1-4, JANE DOE 1-10, LOUISA MARINE, JEN PERIAT, and CROSSFIT, INC.,

Defendants,

and

MATTHEW KRAKOWSKI,

Defendant/Counterplaintiff-Appellant,

and

RICHARD A. KRAKOWSKI and RICHARD M. KRAKOWSKI,

Defendants-Appellants.

UNPUBLISHED
May 20, 2021

No. 354005
Macomb Circuit Court
LC No. 2019-000355-CK

Before: RONAYNE KRAUSE, P.J., and RIORDAN and O'BRIEN, JJ.

PER CURIAM.

Defendants-appellants, Richard A. Krakowski, Richard M. Krakowski, and Matthew Krakowski (the Krakowski defendants), appeal as of right the trial court's order granting summary disposition in favor of plaintiff, Atain Insurance Company. This appeal concerns the scope of insurance coverage provided by plaintiff to the Krakowski defendants. At issue is whether plaintiff

was required to indemnify and defend the Krakowski defendants in two underlying lawsuits under the terms of the relevant insurance policy.[1] For the reasons set forth below, we affirm in part and reverse in part.

I. BACKGROUND

This appeal arises from a declaratory-judgment action brought by plaintiff to determine the scope of coverage provided under a policy issued by plaintiff to defendant Katalyst Fitness, LLC. According to plaintiff, the insurance policy was implicated in two separate lawsuits filed in Macomb Circuit Court against Katalyst and its owners, the Krakowski defendants: (1) *Condon v Katalyst Fitness, LLC*, Lower Court No. 18-004468-NO and (2) *Doe 1 v Katalyst Fitness, LLC*, Lower Court No. 19-001443-NO.[2] The Condon Complaint and Marine Complaint relate to allegations that Matthew installed hidden surveillance cameras in restrooms and changing facilities in Katalyst's gym to record its patrons.

The insurance policy at issue included a "combined coverage and exclusion endorsement," which contains an exclusion for "physical-sexual abuse." The "physical-sexual abuse" exclusion states:

> This insurance does not apply to any "occurence," [sic] suit, liability, claim, demand or causes of action arising out of or that in any way involves the physical abuse, sexual abuse or licentious, or immoral or sexual behavior, whether or not intended to lead to, or culminating in any sexual act, whether caused by, or at the instigation of, or at the direction of, or omission by:
>
> a. Any insured or the insured's employees;
>
> b. Patrons of any insured's business;
>
> c. Agents of any insured;
>
> d. "Volunteer workers"

[1] Since this appeal was filed, one of the underlying lawsuits was dismissed, and Richard A. and Richard M. were dismissed from the other lawsuit without liability, so the only issue pertaining to them on appeal is whether plaintiff had a duty to pay for their defense. Matthew likewise continues to argue that plaintiff was required to pay for his defense for the underlying lawsuits. But Matthew also entered into a stipulated judgment in one of the underlying lawsuits, and in so doing assigned his interest in any indemnity claim against plaintiff to the plaintiffs in that other suit. Thus, whether plaintiff was required to indemnify Matthew in the underlying lawsuit is still at issue. This is all to say that, while there have been developments since this appeal was filed, the issues remain whether plaintiff had a duty to indemnify and defend in the underlying lawsuits based on the relevant insurance policy.

[2] The plaintiffs in these suits constitute the many defendants in the action below.

e. Subcontractor or employee of any subcontractor;

f. "Independent contractor" or employee of any "independent contractor";

g. "leased worker"; or

h. Any other person.

Pursuant to a "Liability Coverage Form," the insurance policy also included "Sexual and/or Physical Abuse" liability coverage (SPAL). Under the SPAL, the parties agreed plaintiff would insure Katalyst for the following:

> We will pay on your behalf all sums which you shall become legally obligated to pay as DAMAGES because of injury to any person arising out of SEXUAL AND/ OR PHYSICAL ABUSE, caused by one or your EMPLOYEES, or arising out or your failure to properly supervise. We shall have the right and duty to defend any suit against you seeking such DAMAGES, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and such settlement of any claim or suit as we deem expedient, but we shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of our liability has been exhausted.

"Sexual and/or physical abuse" was defined under the SPAL as "sexual or physical injury or abuse, including assault and battery, negligent or deliberate touching." Coverage under the SPAL was limited, however. As relevant to this appeal, it excluded "persons insured," which the SPAL defined as "the organization . . . and any executive officer, director or stockholder thereof while acting within the scope of his duties as such."

Plaintiff moved for summary disposition, arguing that the acts at issue were excluded from coverage under the "physical-sexual abuse" exclusion and did not otherwise fall under the SPAL. The trial court agreed and granted summary disposition to plaintiff, reasoning that (1) Matthew's conduct was clearly excluded from coverage under the "physical-sexual abuse" exclusion and (2) Matthew's conduct did not fall within the definition of "sexual and/or physical abuse" under the SPAL, and, at any rate, Matthew was a person excluded from coverage under the SPAL. The trial court thereafter entered a declaratory judgment that plaintiff had no liability arising from the Marine or Condon Complaints. This appeal followed.

II. STANDARD OF REVIEW

The central issue in this case is whether the trial court properly interpreted the parties' insurance policy. An insurance policy is a contract, and the proper interpretation of a contract is a question of law reviewed de novo. *Morley v Auto Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). The brunt of the arguments on appeal concern whether the insurance policy's terms were ambiguous, and "the existence of an ambiguity in an insurance policy is a question of law" reviewed de novo. *Farm Bureau Mut Ins Co v Buckallew*, 246 Mich App 607, 612; 633 NW2d 473 (2001).

III. ANALYSIS

"In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). If the meaning of a contract is unambiguous, it must be enforced as written. *Id*. at 468.

Before interpreting the parties' contract, it is necessary to address the Krakowski defendants' contention that plaintiff is bound by its supposed interpretation of the SPAL stated in its letter denying coverage, and that this Court is limited to determining whether that interpretation is correct. In support of this assertion, the Krakowski defendants rely on *Mich Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 436; 592 NW2d 760 (1999), *Meirthew v Last*, 376 Mich 33, 38; 135 NW2d 353 (1965), and *Bartlett Investments, Inc v Certain Underwriters at Lloyd's London*, 319 Mich App 54, 59; 899 NW2d 761 (2017). Yet those cases do not support the Krakowski defendants' assertion. Those cases state that an insurer is estopped from raising new defenses to coverage after it states a reason for denial. See, e.g., *Mich Twp Participating Plan*, 233 Mich App at 435-436 ("Generally, once an insurance company has denied coverage to its insured and stated its defenses, the insurer has waived or is estopped from raising new defenses."). Applying that principle here, when plaintiff denied coverage, it stated that the at-issue conduct was excluded by the terms of the policy and did not otherwise fall within the SPAL. That was the defense to coverage that plaintiff asserted in the trial court and is the defense to coverage it maintains on appeal. Accordingly, the Krakowski defendants' contention that this Court is limited to determining whether plaintiff correctly interpreted the SPAL in its letter denying coverage has no support in this state's jurisprudence.

A. THE "PHYSICAL-SEXUAL ABUSE" EXCLUSION

Turning to the policy at-issue, we first address the "physical-sexual abuse" exclusion, which provides that the policy "does not apply to any 'occurence,' [sic] suit, liability, claim, demand or causes of action arising out of or that in any way involves the physical abuse, sexual abuse or licentious, or immoral or sexual behavior[.]" Allegations that Matthew installed hidden surveillance cameras in restrooms and changing facilities in Katalyst's gym to record its patrons in various states of undress without their knowledge or consent is plainly "licentious, or immoral or sexual behavior," and therefore falls under the "physical-sexual abuse" exclusion of the policy.

In arguing that Matthew's conduct does not fall under this exclusion, the Krakowski defendants contend that the exclusion is ambiguous when read in conjunction with the next provision. The "physical-sexual abuse" exclusion states, "This insurance does not apply" to certain conduct, and the next provision states, "In addition, it is understood this insurance does not apply to 'bodily injury;' 'property damage' or 'personal and advertising injury' arising out of" more specific conduct. Reviewing these provisions, the Krakowski defendants point out, "Unlike the second provision, the first provision does not state the types of injuries to which it applies," and contend, "If 'this insurance' necessarily includes all three types of injury, then the recitation of those types of damages in the second provision is surplusage." We disagree.

Both provisions use "this insurance" to refer to the coverage provided under the policy. While the second provision specifies that "this insurance" does not apply to certain types of

damages arising out of certain conduct, this specificity does not render the first provision ambiguous. The second provision states that the policy does not cover three types of damages arising out of specified conduct, while the first provision states that the policy does not cover certain conduct, regardless of the resulting damages. That the second provision specifies the damages to which it does not apply does not render the first provision ambiguous.

The Krakowski defendants also argue that the "physical-sexual abuse" exclusion's use of "licentious, or immoral or sexual behavior" "creates practical ambiguities" because "coverage would depend not on the act, but on the *mens rea* of the person engaged in the act and/or happenstance." As an example, the Krakowski defendants contend that the act of installing a camera in a bedroom to eavesdrop on someone would not be excluded by this provision, but the same act would be excluded if, while attempting to eavesdrop, the camera recorded someone in a state of undress. Even with this example, it is unclear what the Krakowski defendants believe is ambiguous about the exclusion. A contract term is ambiguous "if its language is reasonably susceptible to more than one interpretation." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). Neither the Krakowski defendants' argument nor their example suggests that the term at issue is reasonably susceptible to more than one interpretation. Thus, the Krakowski defendants have not demonstrated how the "physical-sexual abuse" exclusion is ambiguous.

In sum, because installing cameras in a bathroom to record patrons in various states of undress is clearly "licentious, or immoral or sexual behavior," and because the Krakowski defendants' arguments that the "physical-sexual abuse" exclusion is ambiguous are without merit, the Krakowski defendants were excluded from coverage under the "physical-sexual abuse" exclusion of the policy.

B. THE SPAL

The question now becomes whether the Krakowski defendants were covered under the SPAL. The SPAL provides that plaintiff will cover damages "because of injury to any person arising out of SEXUAL AND/OR PHYSICAL ABUSE," and defines "sexual and/or physical abuse" as "sexual or physical injury or abuse, including assault and battery, negligent or deliberate touching."

The Krakowski defendants do not argue that Matthew's conduct of secretly recording patrons in various states of undress in restrooms and changing facilities involved physical injury or abuse,[3] nor do they contend that it involved sexual abuse. They only contend that it involved

[3] At one point on appeal, the Krakowski defendants briefly state that they should be indemnified in the underlying lawsuits because one of those lawsuits alleged physical injury resulting from the psychological trauma caused by Matthew's conduct, and the other lawsuit did not foreclose such a possibility. Assuming without deciding that this brief and undeveloped mention was sufficient to present the argument on appeal, it misconstrues the SPAL. Under the SPAL, plaintiff agreed to cover damages for "injury arising out of SEXUAL AND/OR PHYSICAL ABUSE." The physical injury that the Krakowski defendants point to in the underlying lawsuits is the damages that

sexual injury. Matthew's conduct was clearly sexual in nature. But the relevant inquiry is broader than whether the conduct was sexual—this Court is asked to determine whether Matthew's conduct involved sexual injury. Dictionaries generally agree on a basic understanding of an "injury"—*Merriam-Webster Collegiate Dictionary* (11th ed) defines "injury" as "an act that damages or hurts," and *Random House Webster's Collegiate Dictionary* (2nd ed) defines "injury" as "harm or damage done or sustained, esp. bodily harm."

While these definitions could support the Krakowski defendants' assertion that Matthew's conduct amounted to "sexual injury," we are persuaded by plaintiff's argument that, in context, the term "sexual injury" requires physical contact. Such a result is supported by application of "the doctrine of *noscitur a sociis*, i.e., that a word or phrase is given meaning by its context or setting." *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003) (quotation marks and citation omitted). "This principle states that when several words are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." *Atl Cas Ins Co v Gustafson*, 315 Mich App 533, 541; 891 NW2d 499 (2016) (quotation marks and citation omitted). Physical injury, physical abuse, and sexual abuse all involve physical contact. Similarly, assault, battery, and negligent or deliberate touching all involve physical contact or the imminent threat of physical contact.[4] Given this context, we agree with plaintiff and the trial court that "sexual or physical injury or abuse" all involve physical contact, so "sexual injury" as used in the SPAL would likewise involve physical contact. Unquestionably, Matthew's conduct did not involve physical contact or the imminent threat of physical contact, and was therefore not covered by the SPAL.[5]

The Krakowski defendants argue that this interpretation is incorrect because the SPAL is intended to be "reciprocal and dovetail" the "physical-sexual abuse" exclusion, meaning that the SPAL is intended to cover what is otherwise excluded by the "physical-sexual abuse" exclusion. Yet reading the "physical-sexual abuse" exclusion and the SPAL together does not support such a conclusion, and actually supports this opinion's conclusion. The "physical-sexual abuse"

---

plaintiff would be covering, whereas coverage itself depends on whether Matthew's conduct was "sexual and/or physical abuse" under the terms of the SPAL.

[4] While the use of "include" can be either "a term of enlargement" or "of limitation," *Surowitz v City of Pontiac*, 374 Mich 597, 606; 132 NW2d 628 (1965), the term is ordinarily used as a term of enlargement absent evidence of a contrary intent, *Skillman v Abruzzo*, 352 Mich 29, 34-35; 88 NW2d 420 (1958). Applying these principles here, the use of "including" in the SPAL's definition of "sexual and/or physical abuse" was meant as a term of enlargement. Nevertheless, it is significant that when specifying the non-exhaustive list of conduct covered by the term "sexual and/or physical abuse," the policy lists only instances that involve physical contact or the imminent threat of physical contact.

[5] We acknowledge that the trial court also held that coverage was not available under the SPAL because Matthew was a person excluded from coverage under the SPAL. In light of our conclusion above, however, we need not address this issue.

exclusion excludes from coverage "physical abuse, sexual abuse or licentious, or immoral or sexual behavior," while the SPAL covers damages for "injury to any person arising out of SEXUAL AND/OR PHYSICAL ABUSE." Thus, while physical and sexual abuse are normally excluded under the policy, the SPAL covers that conduct. But the "physical-sexual abuse" exclusion is broader than the SPAL coverage. The "physical-sexual abuse" exclusion also precludes coverage for "licentious, or immoral or sexual behavior," and the SPAL does not state that it provides coverage for such conduct. As previously explained, coverage for Matthew's conduct is precluded by the "physical-sexual abuse" exclusion because the conduct was "licentious, or immoral or sexual behavior." Thus, contrary to the Krakowski defendants' argument, reading the SPAL and the "physical-sexual abuse" exclusion together supports that Matthew's conduct was not covered by the SPAL.[6]

In sum, the trial court properly ruled that plaintiff was not required to indemnify the Krakowski defendants in the underlying lawsuit based on the terms of the parties' policy.[7]

C. DUTY TO DEFEND

"It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify." *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 451; 773 NW2d 29 (2009) (quotation marks and citation omitted). "[I]f the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137; 610 NW2d 272 (2000) (quotation marks and citation omitted).

The SPAL provides that plaintiff has "the right and duty to defend any suit against you seeking" damages "because of injury to any person arising out of SEXUAL AND/ OR PHYSICAL ABUSE." Despite this opinion's conclusion that plaintiff ultimately did not have a duty to indemnify the Krakowski defendants under the SPAL, the underlying allegations nevertheless *arguably* fell under the SPAL. Thus, while plaintiff did not have a duty to indemnify the Krakowski defendants, it did have a duty to defend the Krakowski defendants. Accordingly, we reverse that portion of the trial court's opinion and order concluding that plaintiff did not have a duty to defend the Krakowski defendants.

---

[6] Contrary to the Krakowski defendants' assertions, plaintiff never argued that Matthew's conduct was sexual abuse for purposes of the "physical-sexual abuse" exclusion and not sexual abuse for purposes of the SPAL. Rather, plaintiff argues that Matthew's conduct was "licentious, or immoral or sexual behavior" excluded from coverage by the "physical-sexual abuse" exclusion and not otherwise covered by the SPAL.

[7] Due to developments after this appeal was filed, the only issue now before this Court as it relates to indemnity is whether plaintiff had a duty to indemnify Matthew. As a result, this opinion does not address the Krakowski defendants' argument that each defendant was entitled to separate indemnification under a separation of insureds provision.

IV. CONCLUSION

Affirmed in part, reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Amy Ronayne Krause
/s/ Michael J. Riordan
/s/ Colleen A. O'Brien