FILED
United States Court of Appeals
Tenth Circuit

October 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Plaintiff Counter Defendant – Appellee,

v.

MICHAEL WILLIAM LYONS,

Defendant Counter Plaintiff – Appellant,

and

LINDSAY LYONS,

Defendant.

No. 20-2152
(D.C. No. 1:19-CV-01053-JAP-SCY)
(D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge, and **MATHESON**, Circuit Judge.

Liberty Mutual Fire Insurance Company filed a declaratory judgment action seeking a declaration as to whether it owed a duty to defend or indemnify Michael Lyons in a New Mexico state court lawsuit involving allegations of

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

sexual molestation. The district court granted summary judgment to Liberty Mutual because Michael's insurance policy excluded coverage for claims based on bodily injury arising out of sexual molestation. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

In early 2019, Lindsay Lyons sued her father, Michael Lyons, in New Mexico state court. Lindsay alleged that her father sexually abused her over a period of eight years at his primary residence in Albuquerque, New Mexico, and his vacation home in Pagosa Springs, Colorado. The complaint included allegations that Michael breached his duty as a homeowner and parent to keep his premises safe for Lindsay.

Several months later, Lindsay amended her complaint. The amended complaint presented the same claim and sexual molestation allegations as the original complaint, but with one significant difference—the complaint no longer contained allegations that it was Michael who committed the sexual abuse. Lindsay still alleged that she was molested at Michael's residences and that Michael breached his duty as a homeowner and parent, but she did not identify him as the perpetrator.

At the time of the alleged acts, Michael's Albuquerque residence was insured by Liberty Mutual under a LibertyGuard Deluxe Homeowners Policy. After Lindsay filed her initial complaint, Michael's attorney contacted Liberty Mutual to request that Liberty Mutual defend Michael in the lawsuit.

Liberty Mutual denied Michael's request and filed suit in federal court seeking a declaratory judgment that it has no duty to defend or indemnify Michael against Lindsay's suit.[1] Liberty Mutual argued that Lindsay's alleged injuries were not caused by an "occurrence" as defined in Michael's policy and several policy exclusions precluded coverage for Lindsay's claim—particularly Exclusion 1.k, which excludes coverage for bodily injury arising out of sexual molestation. Michael filed several counterclaims and both parties moved for summary judgment on the question of whether Liberty Mutual had a duty to defend or indemnify.

The district court granted summary judgment for Liberty Mutual. The court concluded that Lindsay's allegations constituted an "occurrence" under Michael's policy, but that the sexual molestation exclusion precluded coverage for Lindsay's claim.

II. Discussion

We review a grant of summary judgment de novo, applying the same standard as the district court. *Sabourin v. Univ. of Utah*, 676 F.3d 950, 957 (10th Cir. 2012).

New Mexico substantive law applies in this diversity case. To determine whether an insurer has a duty to defend under New Mexico law, we compare the allegations in the complaint with the terms of the insurance policy. *Carolina*

[1] Shortly after Liberty Mutual filed its complaint, Michael and Lindsay settled the underlying state court case during a court-ordered mediation.

Cas. Ins. Co. v. Burlington Ins. Co., 951 F.3d 1199, 1209 (10th Cir. 2020) (citing *Lopez v. N.M. Pub. Schs. Ins. Auth.*, 870 P.2d 745, 747 (N.M. 1994)). An insurer has a duty to defend if the complaint contains allegations of an occurrence that potentially falls within the scope of the policy's coverage. *See Miller v. Triad Adoption & Counseling Servs., Inc.*, 65 P.3d 1099, 1103 (N.M. Ct. App. 2003). But an insurer has no duty to defend when a policy exclusion clearly applies. *W. Heritage Ins. Co. v. Chava Trucking, Inc.*, 991 F.2d 651, 656 (10th Cir. 1993) (citing *Ins. Co. of N. Am. v. Wylie Corp.*, 733 P.2d 854, 857 (N.M. 1987)).

In her amended complaint, Lindsay alleges the following facts to support her claim that Michael breached his duty to keep his premises safe:

- "During Plaintiff's childhood, beginning at a young age, Plaintiff was repeatedly sexually molested at Defendant's home in Albuquerque, New Mexico and at Defendant's vacation home in Pagosa Springs, Colorado";
- "Plaintiff recalls these incidents of sexual molestation occurring over a period of approximately eight years, from the time Plaintiff was five years-old until she was twelve or thirteen years-old, approximately between the years 2002 and 2010";
- "Plaintiff was sexually molested at Defendant's Albuquerque home approximately two times per year, for eight years";
- "Plaintiff was sexually molested at Defendant's Colorado home once, around 2009"; and
- "During each of these incidents Plaintiff was a child, and never did Plaintiff initiate, invite or acquiesce to the sexual molestation."

App., Vol. I at 204. The remaining paragraphs of the complaint do not contain any factual allegations.

Michael's insurance policy with Liberty Mutual provides personal liability coverage for certain claims based on bodily injury or property damage caused by an "occurrence."[2] *Id.* at 27. Relevant here, Exclusion 1.k of the policy excludes coverage for bodily injury or property damage "[a]rising out of sexual molestation, corporal punishment or physical or mental abuse[.]" *Id.* at 28.

Michael encourages us to read the amended complaint as alleging a stand-alone negligence claim unconnected to the sexual molestation allegations. If the complaint can be read as alleging a separate negligence claim, then Exclusion 1.k would not preclude coverage because not all of Lindsay's claims would arise out of sexual molestation.

We decline to read the amended complaint this way. The only factual allegations supporting Lindsay's claim against Michael are those concerning sexual molestation. Removing those allegations would leave us with only a bare recitation of the elements of negligence, which is not enough to state a claim, even under New Mexico's generous notice pleading standards.

Because the only injuries described in the amended complaint are those arising out of sexual molestation, Lindsay's suit fits squarely within Exclusion 1.k of Michael's insurance policy. Liberty Mutual therefore has no duty to defend or indemnify Michael.

[2] We assume without deciding that Lindsay's alleged injuries were caused by an "occurrence" as defined in Michael's policy.

Michael also contends that it was improper for the district court to hear this case because the determination of whether an insurer has a duty to defend must be made in the primary lawsuit and not in a collateral action, citing *Lopez*, 870 P.2d at 746, as support. Michael's reliance on *Lopez* is misplaced. In that case, the New Mexico Supreme Court concluded the insurer had a duty to defend because the court "cannot say as a matter of law that all of the personal injury claims in the federal lawsuit arose from an act of sexual molestation that was excluded from coverage." *Id.*

The situation is different here. Lindsay's only claim against Michael arises from acts of sexual molestation. Thus, unlike the *Lopez* court, we can say as a matter of law that all claims in the underlying lawsuit are excluded from coverage.

III. Conclusion

We affirm the district court's judgment.

Entered for the Court

Timothy M. Tymkovich
Chief Judge