STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 227-4-12 Wrcv

ProSelect Insurance Co.
Plaintiff

v.

Springfield Hospital,
The Windham Center for Mental Health Services,
and Mary Moe
Defendants

Decision on Cross-Motions for Summary Judgment

Mary Moe was a patient at the Windham Center for Mental Health Services when she was sexually assaulted by another patient. She reported to hospital employees and police officers that the perpetrator had kissed her on the lips, touched her breasts, digitally penetrated her, and exposed his genitals to her, all without her consent.

The hospital reported the incident to its insurer. At the time, the hospital was covered by three separate liability policies, but each of the policies contained an exclusion for claims arising out of sexual abuse or molestation, as the hospital had declined the insurer's offer to purchase coverage for such claims. Ms. Moe's attorney later confirmed with the hospital that his client's claim was that she had been sexually assaulted.

Ms. Moe eventually filed a civil lawsuit against the hospital. In the spirit of notice pleading, she alleged only that she had been "assaulted" while a patient at the hospital. She did not allege anything about whether or not the assault had been sexual in nature. Her complaint against the hospital took the form that the hospital had negligently failed to keep her safe from the assault, and had breached certain representations it had made about the safety of patients attending the facility.

The hospital thereafter submitted the complaint to the insurer. The insurer responded by sending a reservation of rights letter stating that the claims would not be covered by the policy because they appeared to arise out of an allegation of sexual assault. The insurer acknowledged that the complaint referred only to an "assault," but noted that prior correspondence with the victim's attorney had confirmed the assault to have been sexual in nature. The insurer nevertheless offered to provide a defense subject to a reservation of its rights, including the right to withdraw from the defense at a later date.

During discovery in the underlying lawsuit, the insurer propounded interrogatories. Ms. Moe responded to the interrogatories by confirming that her allegation was that she had been sexually assaulted.

The insurer now seeks a declaration that it owes no duties of defense or indemnification in the underlying lawsuit. *Cooperative Fire Ins. Ass'n of Vermont v. Bizon*, 166 Vt. 326, 331–32 (1997). The insurer argues that applicable policies contain an exclusion for claims arising out of sexual abuse, and that the exclusion applies here because the uncontested evidence demonstrates that the "assault" referenced in the complaint was actually a sexual assault for which there is no coverage. The insurer has filed a separate statement of material facts identifying the uncontested evidence as Ms. Moe's report to the hospital employees and police officers, Ms. Moe's attorney's correspondence with the hospital about the nature of his client's claim, and Ms. Moe's sworn interrogatory answers.

In response, the hospital concedes that it has no coverage for claims of sexual abuse. However, the hospital contends that it is still entitled to a defense in the underlying action because the underlying complaint does not include an allegation of sexual abuse. The hospital argues that insurers cannot use extrinsic evidence beyond the "eight corners" of the insurance policy and the underlying complaint to determine the scope of their defense obligations except when the extrinsic evidence sheds light upon a coverage issue unrelated to the claims made against the insured. See *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006) (explaining that courts have drawn a "very narrow exception" that permits insurers to refer to extrinsic evidence "only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim").

At issue is whether an insurer may use extrinsic evidence to demonstrate that an "assault" alleged in a complaint was actually a sexual assault for which there is no possibility of coverage, and thus no duty to defend.

In general, an insurer must defend its insured whenever "the claim against the insured might be of the type covered by the policy." *Garneau v. Curtis & Bedell, Inc.*, 158 Vt. 363, 366 (1992). The presence of a duty to defend is ordinarily determined by "comparing the coverage provisions of the policy with the allegations in the complaint." *Blake v. Nationwide Ins. Co.*, 2006 VT 48, ¶ 13, 180 Vt. 14; *Cooperative Ins. Cos. v. Woodward*, 2012 VT 22, ¶ 10, 191 Vt. 348; *Garneau*, 158 Vt. at 366. However, there is a well-recognized exception that permits insurers to make an independent examination of the facts to determine whether a policy exclusion applies when the determination of that issue involves factual questions not covered by the complaint. *Blake*, 2006 VT 48, ¶ 13, *Garneau*, 158 Vt. at 366. As formulated by a leading treatise, the exception is that "an insurer should not have a duty to defend an insured when the facts alleged in the complaint ostensibly bring the case within the policy's coverage, but other facts that are not reflected in the complaint and are unrelated to the merits of the plaintiff's action plainly take the case outside the policy coverage." 1 Windt, Insurance Claims & Disputes § 4:4 (6th ed. WL updated Apr. 2013).

Both parties agree that extrinsic evidence can be used for this purpose. At the heart of the parties' disagreement is whether the coverage issue in this case is sufficiently independent from the merits of the complaint to permit application of the exception allowing the insurer to use extrinsic evidence to determine the existence of its duty to defend.

As a starting point, it is clear that extrinsic evidence cannot be used to contradict the factual allegations made in the complaint. A coverage issue is *not* independent from the merits of the complaint when the issue is whether or not the allegations in the complaint are true. Hence, for example, an insurer cannot use extrinsic evidence to demonstrate that the allegations in the

underlying complaint are false. The principle is that an insurer cannot use extrinsic evidence in a coverage action to litigate the merits of the underlying lawsuit. *Northern Ins. Co. of New York v. Baltimore Business Communications, Inc.*, 68 Fed.Appx. 414, 418 (4th Cir. 2003); see also *American Motorists Ins. Co. v. Trane Co.*, 544 F.Supp. 669, 679 W.D. Wis. 1982) (explaining that an insurer "may not use outside facts to show that the allegations are false or groundless in order to avoid its duty to defend").

Similarly, extrinsic evidence cannot be used when it relates both to the coverage issue and to the merits of the underlying case. Again, the policy here is that the coverage action cannot be used to decide factual questions that will undermine the insured's ability to defend itself in the underlying litigation. Hence, when a plaintiff sues a church on a claim that she was sexually abused by its minister, the question of whether the minister was employed by the church at the time of the abuse cannot be answered with reference to extrinsic evidence in the coverage action because it goes both to the coverage issue (whether the abuse occurred during the policy period) and to the merits issue (whether the church may be held vicariously liable for the acts of its minister). In that context, extrinsic evidence relating to the dates of the minister's employment may not be used to determine whether the insurer owes a duty to defend. *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 307–11 (Tex. 2006).

Extrinsic evidence can be used only when the coverage issue "will not be resolved by the trial of the third party's suit against the insured." *Polarome Intern., Inc. v. Greenwich Ins. Co.*, 961 A.2d 29, 47–49 (N.J. Super. App. Div. 2008) (citation omitted); *Dairy Road Partners v. Island Ins. Co., Ltd.*, 992 P.2d 93, 113 (Haw. 2000). Hence, an automobile insurer may use extrinsic evidence in a coverage action to demonstrate that a farm worker was injured in a work-related truck accident when the issue in the underlying action is merely whether the driver of the truck was negligent. *Blake v. Nationwide Ins. Co.*, 2006 VT 48, ¶¶ 13–17, 180 Vt. 14. In that circumstance, extrinsic evidence is permitted in the coverage action because the coverage issue (whether the claim was work-related) would not be determined by a jury deciding the merits issue (whether the driver was negligent).

Here, the underlying merits issues are whether a sexual assault occurred at all (or whether the sexual contact was instead consensual) and, if so, whether the hospital negligently failed to keep its patients safe and whether the hospital breached the representations it made about patient safety. The coverage issue is whether the plaintiff's injuries arise from an assault of a sexual nature. Although the coverage issue may seem at first blush to be related to the merits of the underlying case, it actually is not. The liability trial will determine whether or not a sexual assault occurred, but it will not differentiate between a sexual assault and a physical assault. A jury deciding the issues of liability and damages would have no reason to make that distinction unless the insurer requested a special interrogatory for the purpose of determining the extent of its coverage obligation. It is therefore appropriate for the insurer to seek an answer to the coverage issue now, in this declaratory action, using the uncontested evidence available at this time. *Dairy Road Partners*, 992 P.2d at 116.

The hospital has argued that there is a potential that the jury might award damages based upon a finding that an assault occurred that was not sexual in nature. However, the basis for this assertion is neither identified by the hospital nor supported by the record. All of the evidence presented to the court establishes that the underlying issue is that the plaintiff was either sexually assaulted or she was not assaulted at all; there is no middle ground. Moreover, all of the plaintiff's

damages, no matter the iteration of the claim, flow from the allegation of a sexual assault. It is not possible to imagine a potential for liability in this case that is disconnected from the overarching context of a sexual assault.

The hospital has also argued that summary judgment is inappropriate because the evidence in the underlying trial is disputed, including issues about the credibility of the victim's allegations and the question of whether or not the alleged sexual activity was consensual. But neither of these disputes are material to the coverage action, in which both the court and the insurer assume that the substantive allegations of the complaint are true. The material fact for purposes of the coverage action is whether the assault, if it occurred, was sexual in nature. The summary-judgment record in this action shows that fact to be undisputed. For these reasons, the insurer has established that there is no potential for coverage in this case.

Finally, it is clear that insurers who assume a defense under a reservation of rights may later withdraw from that defense if the insurer discovers evidence unrelated to the merits of the plaintiff's action that "confines the claim" in such a way that the insurer and the court can "eliminate the possibility that the insured's conduct falls within the coverage of the policy." *Stein v. Northern Assurance Co. of America*, 495 Fed. Appx. 108, 111 (2d Cir. 2012) (quoting *IBM Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 148 (2d Cir. 2004)); *Maryland Cas. Co. v. Pearson*, 194 F.2d 284, 287 (2d Cir. 1952); *Gardner v. State Farm Fire and Cas. Co.*, 544 F.3d 553, 560–61 (3d Cir. 2008). In other words, an insurer is permitted to withdraw from a case once it is able to demonstrate undisputed extrinsic evidence unrelated to the merits of the case which conclusively establishes that there is no potential for coverage. 14 Couch on Insurance § 200:47 (3d ed. WL Updated Dec. 2012).

Here, as noted above, the insurer has adduced undisputed evidence demonstrating that the underlying plaintiff's claims all arise out of an allegation that she was *sexually* assaulted. As such, the insurer has confined the underlying claims to one seeking damages that are not covered by the applicable insurance policies. The insurer is therefore permitted to withdraw from the defense. See *Lee v. Aetna Cas. & Sur. Co.*, 178 F.2d 750, 752 (2d Cir. 1949) (Hand, J.) ("In most cases . . . it will not be difficult for the insurer to compel the injured party to disclose whether the injury is within the policy; and, if it transpires that it is not, the insurer need go on no longer.").

**ORDER**

Plaintiff ProSelect Insurance Company's Motion for Summary Judgment (MPR #1), filed Aug. 31, 2012, is ***granted***. Defendant Springfield Hospital's Cross-Motion for Summary Judgment (MPR #3), filed Oct. 10, 2012, is ***denied***. Plaintiff's attorney to prepare a form of judgment for the court's approval under Vermont Civil Procedure Rule 58.

Dated at Woodstock, Vermont this 14 day of May, 2013.

Harold E. Eaton, Jr.
Superior Court Judge

FILED
MAY 16 2013
VERMONT SUPERIOR COURT
WINDSOR UNIT