

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1761

September Term, 1996

GLORIA PETTIT, INDIVIDUALLY, etc.

v.

ERIE INSURANCE EXCHANGE

Wenner,
Eyler,
Sonner,

JJ.

Dissenting Opinion by Wenner, J.

Filed: September 5, 1997

Because I do not agree with my colleagues that, as a matter of law, James Kowalski, an acknowledged pedophile, intended to injure the Pettit children, I respectfully dissent.

Facts

The genesis of this appeal is a complaint filed by Ms. Pettit, individually and on behalf of her children, seeking damages from James Kowalski for having molested her two minor children, Randall and Roger Duprey. In 1992, the Roman Catholic Church carried out the dying request of the children's father, Roger Duprey, and named Kowalski the children's godfather. Kowalski developed a close relationship with the Pettit children.

From 1 April 1991 until 25 May 1993, Kowalski voluntarily and gratuitously cared for and supervised the Pettit children at his homes in Hyattsville, Maryland and Winchester, Virginia. Unknown to the Pettits, Kowalski was suffering from pedophilia, a recognized mental disorder. As I understand it, a pedophile believes her\his relationship with male children is normal.

Consequently, Kowalski views his care, love, affection, and support of the Pettit children as a mutual and consensual expression of love, similar to that in an adult relationship. While Kowalski was aware of his pedophilia, he failed to inform the Pettits of his condition. Nevertheless, there is nothing to indicate that Kowalski either intended or expected to injure the

Pettit children.¹ Rather, Kowalski loved and expressed his love for them in an affectionate and caring manner ordinarily reserved for an adult relationship. In sum, Kowalski was neither violent, nor did he threaten the Pettit children with violence.

During this period, Erie had provided Kowalski with four separate homeowner's and personal catastrophic liability insurance policies covering both his Maryland and Virginia homes.²

¹ Kowalski's acknowledged love for the Pettit children is evidenced by his having routinely helped them with their school work, taken them on camping and field trips and to sporting events, shopping, swimming, picnics, and other outings. In addition, Kowalski purchased clothing and other necessary staples for the children, and named them in his will as beneficiaries.

²The policies issued to Kowalski by Erie provide, in pertinent part:

- (1) Ultrasure Package Policy for Landlords - covers "personal injury . . . which occurs during the policy period . . . [and is] caused by an occurrence which takes place in the covered territory."
excludes - "injury expected or intended from the standpoint of anyone we protect."
- (2) Homeprotector 2003 Extra Cover Edition - covers "all sums which anyone we protect becomes legally obligated to pay as damages because of bodily injury . . . covered by this policy."
excludes - "bodily injury or property damage expected or intended by anyone we protect."
- (3) Homeprotector 2003 Extra Cover Edition - covers "all sums which anyone we protect becomes legally obligated to pay as damages because of bodily injury . . . covered by this policy."
excludes - "bodily injury or property damage expected or intended by anyone we protect."
- (4) Homeprotector 2004 Tenant Cover Edition (effective 1 May 1993 - 1 May 1994) - covers "all sums . . . which anyone we protect becomes legally obligated to pay as damages because of bodily injury or property damage, resulting from an occurrence during the policy period."
excludes - "bodily injury or property damage expected or intended by anyone we protect;"
excludes - "bodily injury or property damage which arises out of the sexual molestation, corporal punishment or physical or mental abuse by anyone we
(continued...)

As I have said, Ms. Pettit filed a complaint in the Circuit Court for Prince George's County charging Kowalski with negligence, and seeking damages from Kowalski for having sexually abused the children. Kowalski then sought from Erie coverage and a defense. Erie declined to provide either, and filed a Bill for Declaratory Relief, claiming it owed Kowalski neither coverage nor a defense. By stipulation, the underlying negligence tort action was stayed pending resolution of Erie's Bill for Declaratory Relief. Subsequently, the parties filed cross-claims for summary judgment. Following a hearing, Erie's motion for summary judgment was granted on the grounds that, as a matter of law, the policies provided no coverage, and thus, Erie had no duty to provide Kowalski with coverage or a defense. Of course, Kowalski's motion for summary judgment was denied. This appeal followed.

Standard of Review

"The standard for appellate review of a trial court's grant of a motion for summary judgment is simply whether the trial court was legally correct." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737, 625 A.2d 1005 (1993). Maryland Rule 2-501(e) provides:

The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

(...continued)

protect."

"In opposing a motion for summary judgment, a party is entitled not only to have the facts viewed in the light most favorable to it but also to all reasonable inferences which may be drawn from these facts." *Clea v. City of Baltimore*, 312 Md. 662, 678, 541 A.2d 1303 (1988) (quoting *Tyler v. Vickery*, 517 F.2d 1089, 1094 (5th Cir.1975), *cert. denied*, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976)).

I agree with Ms. Pettit that, as she had charged Kowalski with having negligently injured her children and Erie's policies covered such claims, Erie was obligated to provide Kowalski with both coverage and a defense. Moreover, I agree with Ms. Pettit that in making such a determination the trial court should have considered the terms of the insurance policies, the claims in the underlying tort action, and any extrinsic evidence provided by the insured. It is, of course, this last element that Ms. Pettit claims the trial court should have, but failed to consider before granting Erie's motion for summary judgment.

To the contrary, Erie does not believe that the charges in Ms. Pettit's underlying negligence tort action support a claim of negligence, asserting that, although citing no authority, Kowalski's acts were, as a matter of law, intended to injure the Pettit children. Consequently, as the policies exclude coverage for "bodily injury expected or intended by anyone we protect," Erie believes potential coverage does not exist. I do not agree.

An insurer's obligation to defend its insured ". . . is determined by the allegations in the tort action . . . [E]ven if a tort plaintiff does not allege facts that clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a potentiality that the claim could be covered by the policy." *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975) In *St. Paul Fire & Marine Ins. Co. v. Prysieski*, 292 Md. 187, 438 A.2d 282 (1981), the Court of Appeals established a two-step approach for determining whether a potentiality of coverage exists:

In determining whether a liability insurer has a duty to provide its insured with a defense in a tort suit, two types of questions ordinarily must be answered: (1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? (2) do the allegations in the tort action potentially bring the tort claim within the coverage? The first question focuses upon the language and requirements of the policy, and the second question focuses upon the allegations of the tort suit.

292 Md. at 193.

In addition, in *Aetna Casualty & Surety Co. v. Cochran*, 337 Md. 98, 108, 651 A.2d 859 (1995), the Court of Appeals said that "the insurance policy along with the allegations in the complaint are not the sole means of establishing a potentiality of coverage," noting:

Allowing an insured the opportunity to establish a defense to tort allegations which may provide a potentiality of coverage under an insurance policy prior to the insured incurring expenses associated with maintaining a defense in that tort action is precisely what the insured bargained for under the

insurance contract. Thus, permitting an insured to establish a potentiality of coverage by reference to sources **other than the policy and the complaint** addresses this policy concern.

Id. at 110-111 (emphasis added). Moreover, "even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer must still defend if there is a *potentiality* that the claim could be covered by the policy." *Brohawn*, 276 Md. at 408.

Accordingly, it is necessary first to ascertain the scope and limitations of the policy's coverage, and then determine whether potential coverage exists. Since Ms. Pettit's underlying negligence tort action charges that Kowalski is a pedophile, the trial court should have considered such evidence before determining whether a potentiality of coverage existed.

I point out that Ms. Pettit's underlying negligence tort action charges Kowalski with three counts of negligently injuring her children. Erie declined Kowalski's coverage and a defense, claiming the allegations in Ms. Pettit's underlying negligence tort action do not support claims of negligence. On the other hand, Erie concedes that potential coverage would exist "if it is possible for the trier of fact to find that one of Mr. Kowalski's alleged actions was negligent."

Traditionally, negligence consists of:

- (1) A duty, or obligation, recognized by the law, requiring the person to conform to a

certain standard of conduct, for the protection of others against unreasonable risks.

(2) A failure on the person's part to conform to the standard required: a breach of the duty. . . .

(3) A reasonably close causal connection between the conduct and the resulting injury. . . .

(4) Actual loss or damage resulting to the interests of another. . . .

B.N. v. K.K., 312 Md. 135, 141, 538 A.2d 1175 (1988). Hence, as "the presence of an intent to do an act does not preclude negligence," *Ghassemieh v. Schafer*, 52 Md. App. 31, 40, 447 A.2d 84, *cert. denied*, 294 Md. 543 (1982), I believe Ms. Pettit's underlying negligence tort action contained allegations of negligence.

The underlying negligence tort action charges that Kowalski knew, or should have known, that his being a pedophile constituted an unreasonable risk for the Pettit children, and that he had a duty to refrain from such conduct with the Pettit children. Moreover, Ms. Pettit alleged that, as a homeowner, it was Kowalski's duty to provide safe homes for the Pettit children and to protect them from injury because of a dangerous condition in his homes. As Kowalski frequently and gratuitously cared for and supervised the Pettit children in his homes, it was his duty to ensure their safety when entrusted to his care.

According to Ms. Pettit's underlying negligence tort action, Kowalski breached his duty by, (1) failing to restrain his

pedophilic conduct when entrusted with the Pettit children; (2) failing to inform their parents that he was a pedophile and an unreasonable risk to the children; and (3) failing reasonably to protect the Pettit children from being injured by his pedophilic activities. The underlying tort action went on to claim that Kowalski's breach of duty injured the Pettit children, and sought damages for those injuries.

Erie's policies provide: "We will pay all sums which anyone we protect becomes legally obligated to pay as damages because of bodily injury or property damage covered by this policy."³ Three of Erie's policies also provide: "If anyone we protect is sued for damages because of bodily injury or property damage covered by this policy, we will provide a defense with a lawyer we choose, even if the allegations are not true."

In view of this language, and that the underlying tort action charged Kowalski with negligence, I believe Erie was obliged to provide Kowalski with coverage and a defense. According to Erie, the "intentional injury" exclusion relieves it of its duty to provide Kowalski either with coverage or with a defense. The intentional injury exclusion upon which Erie relies provides: "WHAT WE DO NOT COVER (1) Bodily injury or property damage expected or intended by anyone we protect."

³The language of two of the policies vary slightly. These variations, however, are not material to the issue being considered.

Thus, in determining whether potential coverage exists, it must be determined whether Kowalski's pedophillic acts constitute "bodily injury expected or intended by anyone we protect." The trial court believed this exclusion clause excluded Ms. Pettit's claims from potential coverage. I disagree. While Erie urges that Kowalski's pedophillic acts, as a matter of law, constitute intentional injuries, I find no Maryland precedent supporting Erie's position.

No doubt relying on society's visceral reaction to pedophiles, with which I certainly agree, Erie urges us to create an exception to the long established and familiar framework of negligence. That is that, in a situation such as the one now before us, Kowalski intended to injure the Pettit children. While I agree that Kowalski's actions are not only egregious, but well beyond the moral views of our society, the long established framework of negligence as it has evolved over these many years must be considered.

Maryland has long applied a subjective standard in cases involving intentional torts. That is, not only must the intent of the individual who committed the intentional act be considered, but also the intent to cause the injury suffered from the intentional act. For example, in *Allstate Ins. Co. v. Sparks*, 63 Md. App. 738, 493 A.2d 1110 (1985), we held that, although the insured's son intended to syphon gasoline from a truck parked near a mill, he did not intend

to cause the fire that destroyed the mill. Consequently, we concluded that the policy's intentional injury exclusion did not apply.

In *Allstate*, in construing the language of the exclusion that "damage which is either expected or intended from the standpoint of the insured," we opined that "[f]irst, there is the question of whether the **results** or the **means** must have been intended. The Allstate policy indicates, in our view, that the insured must have intended the results ("damages"), not simply the causing act, for coverage not to apply." *Id.* at 742 (emphasis in original).

As I believe the language of the exclusion clause in the policies in question is similar to that in *Allstate Ins. Co.*, I would here apply the same standard.

In *Ghassemieh*, 52 Md. App. 31, we distinguished between intended acts and intended harm. There, we said, "While it is true . . . that the absence of intent to harm is essential to the legal conception of negligence, . . . the presence of an intent to do an act does not preclude negligence." *Id.* at 40 (quoting *Adams v. Carey*, 172 Md. 173, 186, 190 A. 815 (1937)).

Consequently, in order for Erie's intentional injury exclusion to apply, I believe it must be shown that Kowalski intended to injure the Pettit children, rather than merely to express his love for them in such an unfortunate manner.

The intentional injury exclusion here at issue is similar to that which recently confronted the Court of Appeals in *Bailer v. Erie Ins. Exchange*, 344 Md. 515, 687 A.2d 1375 (1997).⁴ Notably, in *Bailer* Erie conceded in its brief that the intentional injury exclusion did not preclude coverage for a tort that "produces an unintended result, even if the means were intended." *Id.* at 528. Not surprisingly, here Erie makes no such concession. Instead, Erie attempts to distinguish *Bailer* because the *Bailer* policy was an excess coverage policy, while that in the case at hand is a basic liability policy. As I see it, this distinction is of no avail to Erie.

The approach we adopted in *Allstate* and *Ghassemieh* is supported by 7A Appleman, INSURANCE LAW AND PRACTICE, § 4492.02 (1979):

The rebuttable presumption that a person intends the ordinary consequences of his voluntary act that is used in determining responsibility for the consequences of a voluntary act has no application to the interpretation of terms used in insurance contracts. The word "intent" for purposes of tort law and for purposes of exclusionary clauses in insurance policies denotes that the actor desires to cause the consequences of his act or believes that consequences are substantially certain to result from it.

Id. at 29 (footnote omitted).

We held in *Harpy v. Nationwide Mut. Fire Ins. Co.*, 76 Md. App. 474, 545 A.2d 718 (1988), a case somewhat similar to the instant case, that,

⁴I find it interesting that, until being questioned at oral argument, Erie failed to acknowledge *Bailer*, even though it had been discussed in both appellant's initial and reply brief, and Erie had been a party in *Bailer*.

under the facts there presented, the insured was not entitled to coverage for having sexually abused his daughter. The *Harpy* facts, however, differ in three important respects from those in the case at hand.

First, the insured in *Harpy* was not a pedophile, and suffered no mental disorder precluding him from forming the required intent to injure. Thus, Erie concedes that this issue was neither raised in nor addressed in *Harpy*.

Second, we emphasized in *Harpy* that Harpy had submitted an affidavit that he did not intend or expect "that [the child] would suffer **the type of injuries** that she has alleged in her complaint against me." While we pointed out that such a self-serving affidavit was of no avail to Harpy, I believe it is instructive to observe the language chosen by Harpy, that he neither intended nor expected that the child would suffer "the type of injuries that she has alleged in her complaint" rather than that he neither intended nor expected that she would suffer any injury. Here, however, Kowalski is a pedophile. While he may have intended his pedophillic acts, he may not have intended to injure the Pettit children. I believe this is a question for the fact finder.

Moreover, *Harpy* involved rape, while in the case at hand there is no evidence of violence or of rape. Although in occasionally encouraging his pedophile friends to participate, Kowalski may have

intended to injure the Pettit children, I believe this is likewise a question for the fact finder.

In conclusion, I believe that in cases such as the one at hand, a pedophile's intent to injure the child involved should be submitted to the fact finder, not determined as a matter of law. I believe submitting such evidence to the fact finder, comports with the familiar and long established framework of negligence tort law. Consequently, I believe that the trial court erred in granting Erie's motion for summary judgment.