STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0784

North Star Mutual Insurance Company,
Respondent,

vs.

Christopher Erickson, et al.,
Appellants.

Filed January 9, 2023
Affirmed
Smith, Tracy M., Judge

Wadena County District Court
File No. 80-CV-19-1044

Paul A. Rajkowski, Paul E. Storm, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for respondent)

Jason D. Pederson, Bemidji, Minnesota; and

Jenneane Jansen, Jansen & Palmer, LLC, Minneapolis, Minnesota (for appellants)

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Respondent-insurer brought a declaratory-judgment action to determine coverage under appellants' insurance policies, and, following cross-motions for summary judgment, the district court granted summary judgment in favor of respondent-insurer. Appellants argue that the district court erred by determining that the policies' definition of "bodily injury" precluded coverage for their negligence-related claims and that the policies' intentional-acts exclusion precluded coverage for their defamation claim. We affirm.

FACTS

Appellant Laicy Erickson ran a daycare at the home she shared with her husband, appellant Christopher Erickson. The Ericksons were insured by respondent North Star Mutual Insurance Company. Appellants Samantha and Trent Walter's children attended the daycare. The Walters sued the Ericksons based on conduct allegedly committed by the Ericksons' minor son, C.E., against the Walters' minor daughter, R.W., at the daycare. At the time, C.E. was approximately seven years old and R.W. was approximately five years old. The Walters' complaint alleged that, over several months, C.E. pinned R.W. down, asked her to take her clothes off so he could spray her with a hose, kissed her and stated that he intended to marry her, tried to touch her "privates," "rubb[ed]" and "touch[ed] [her] vagina," and, on multiple occasions, tried to put his penis in her mouth.

The complaint also alleged that Laicy failed to supervise C.E. and R.W., that Laicy knew of certain incidents but did not report them to the Walters, and that, after the Walters reported the incidents to authorities, Laicy failed to disclose information to the police. The

Walters' complaint asserted twelve claims: (I) physical assault, (II) sexual assault, (III) battery, (IV) negligent infliction of emotional distress, (V) intentional infliction of emotional distress, (VI) defamation, (VII) negligence, (VIII) vicarious liability, (IX) negligent supervision of a minor, (X) failure to report sexual abuse, (XI) giving false or misleading information to authorities, and (XII) invasion of privacy.

At the time of the alleged conduct, the Ericksons had combination-package policies from North Star that provided coverage for their home and their in-home daycare.[1] The policies provided coverage as follows:

> **Coverage L - Personal Liability** – "We" pay, up to "our" "limit", all sums for which an "insured" is liable by law because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies. "We" will defend a suit seeking damages if the suit resulted from "bodily injury" or "property damage" not excluded under this coverage.

The policies defined "bodily injury" as "bodily harm to a person and includes sickness, disease, or death." The definition of "bodily injury" also specified certain types of injuries that did not qualify as "bodily injury" under the policies. The definition of "bodily injury" stated that the term "does not mean bodily harm, sickness, disease, or death that arises out of . . . any actual, alleged or threatened sexual misconduct" (sexual-misconduct provision).

[1] The Ericksons had a 2014-2015 policy and a 2015-2016 policy, and the alleged conduct spanned both time periods.

In addition, the policies contained an exclusion from coverage for bodily injury "expected or intended" by an insured (intentional-acts exclusion).[2]

The Ericksons tendered the Walters' complaint to North Star, and North Star accepted the tender under a reservation of rights. North Star then commenced a declaratory-judgment action—the action before us now—against the Ericksons and the Walters to establish that North Star had no duty to defend or indemnify because the policies did not provide coverage for the claims against the Ericksons.

Following discovery, North Star, the Ericksons, and the Walters each filed a motion for summary judgment. The district court granted North Star's motion for summary judgment and denied the Walters' and the Ericksons' motions, concluding that North Star had no duty to defend or indemnify the Ericksons against any of the Walters' claims. The district court determined that (1) the negligent-infliction-of-emotional-distress, negligence, vicarious liability, and negligent-supervision-of-a-minor claims did not allege covered bodily injury because they arose out of sexual misconduct; (2) the physical assault, sexual assault, battery, intentional-infliction-of-emotional-distress, defamation, and invasion-of-privacy claims were excluded by the intentional-acts exclusion; and (3) the failure-to-report and false-or-misleading-information claims were not cognizable causes of action.

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[2] The intentional-acts exclusions varied between the policies. The 2014-15 policy excluded bodily injury "which is expected or intended from the standpoint of an 'insured.'" The 2015-16 policy excluded bodily injury that is

1) expected by, directed by, or intended by an "insured";
2) the result of a criminal act of an "insured"; or
3) the result of an intentional and malicious act by or at the direction of an "insured".

The Walters and the Ericksons appeal.[3]

DECISION

On review of summary judgment, appellate courts analyze whether there are genuine disputes of material fact and whether the district court erred in its application of law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). The interpretation of an insurance policy and whether the policy affords coverage for a particular situation are questions of law reviewed de novo. *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018). When interpreting an insurance contract, appellate courts give words their natural and ordinary meaning and construe any ambiguity about coverage in favor of the insured. *Am. Fam. Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001).

On appeal, both appellants and North Star frame the issue in terms of North Star's duty to defend. An insurer's duty to defend is triggered if a claim is arguably within the policy's coverage, regardless of the merits of the claim. *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 416, 419 (Minn. 1997). Because the relevant facts are undisputed on appeal, the question for this court is whether the policies afford coverage for

[3] Although it is not reflected in the record before us, the parties agree that the Ericksons and the Walters filed a *Miller-Shugart* settlement agreement in the underlying action after the district court issued its order in the declaratory-judgment action. In a *Miller-Shugart* settlement, a defendant whose insurer is disputing coverage settles with the plaintiff and assigns the right to contest insurance coverage to the plaintiff. The plaintiff typically agrees to satisfy any judgment against the insurer and not the defendant in his or her personal capacity. *See Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982). The notice of appeal identifies the Walters and the Ericksons as appellants, but the Ericksons did not file a brief and are not listed on the Walters' brief.

the allegations in the complaint. *See Metro. Prop. & Cas. Ins. Co. & Affiliates v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999).

Appellants challenge the district court's coverage determination for four of the twelve claims. They contend that (1) the negligence, vicarious liability, and negligent-supervision-of-a-minor claims are not precluded from coverage by the policies' definition of bodily injury and (2) the defamation claim may be based on negligent, not intentional, conduct and thus is not excluded from coverage by the intentional-acts exclusion. We address each argument in turn.

I. Negligence, Vicarious Liability, and Negligent-Supervision-of-a-Minor Claims

Appellants make two arguments about the negligence, vicarious liability, and negligent-supervision-of-a-minor claims. First, appellants argue that the express omission of "sexual misconduct" from the policies' definition of bodily injury should not be interpreted to preclude coverage for C.E.'s conduct because, as a young child, C.E. lacked the necessary intent to engage in sexual misconduct. Second, in the alternative, appellants argue that, even if C.E.'s conduct was "sexual misconduct," the Ericksons' negligent conduct caused a separate harm such that coverage is still appropriate for the negligence and negligent-supervision claims.

A. Intent Under the Sexual-Misconduct Provision

We first address appellants' argument about the interpretation of "sexual misconduct" in the policies' bodily-injury definition. The crux of this dispute is whether the policies' plain language requires an intent to act sexually or engage in sexual misconduct. The policies provide:

> 'Bodily injury' does not mean bodily harm, sickness, disease, or death that arises out of: . . . any actual, alleged or threatened sexual misconduct. Sexual misconduct includes, but is not limited to, sexual molestation, sexual touching, sexual harassment, assault of a sexual nature, unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or any act, conduct or communication which is of a sexual or seductive nature.

Appellants contend that these examples require the subjective intent to act sexually and that C.E., because of his age, was incapable of such intent and thus could not commit sexual misconduct. Thus, they argue that the negligence, vicarious liability, and negligent-supervision claims are covered.

Appellants' argument relies on importing the subjective-intent analysis required for an intentional-acts exclusion into the sexual-misconduct provision here. Specifically, appellants argue that two supreme court cases interpreting intentional-acts exclusions—*State Farm Fire & Casualty Co. v. Wicka* and *B.M.B. v. State Farm Fire & Casualty Co.*—control our analysis of the sexual-misconduct provision. Under Minnesota law, "an intentional acts exclusion applies only where the insured acts with the *specific intent* to cause bodily injury." *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 329 (Minn. 1991) (emphasis added). Thus, in *Wicka*, the supreme court held that an insured's acts are "unintentional" for the purposes of the intentional-acts exclusion if the insured's mental illness or defect prevented the insured from "know[ing] the nature or wrongfulness of an act" or deprived the insured "of the ability to control his conduct." *Id.* at 331; *see also B.M.B. v. State Farm Fire & Cas. Co.*, 664 N.W.2d 817, 826 (Minn. 2003) (holding that a court may not infer an intent to injure from an insured's nonconsensual sexual contact if

there is a genuine dispute of material fact about whether an insured's acts are "unintentional" because of mental illness). However, appellants do not cite legal authority applying the intent requirement—or the related inquiry into whether the insured understood or could control his conduct—to policy provisions other than an intentional-acts exclusion.

Moreover, this court has declined to inquire into subjective intent when interpreting policy provisions that do not reference intent. *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 325 (Minn. App. 2008), *rev. denied* (Minn. Nov. 18, 2008). In *SECURA*, we interpreted a criminal-acts exclusion that excluded coverage for a "bodily injury" that "[r]esults from the criminal acts of any insured." *Id.* at 322. We "decline[d] to graft onto the clause's plain language an additional, separate inquiry regarding the intent of the tortfeasor in causing the injury." *Id.*

Here, we similarly conclude that this sexual-misconduct provision does not require an inquiry into the insured's subjective intent. We come to this conclusion for two reasons: the provision's plain language does not explicitly require intent, and the provision's examples of sexual misconduct do not create an implicit intent or motivation requirement.

First, the plain language of the sexual-misconduct provision lacks an explicit reference to intent. In that way, the language of the sexual-misconduct provision differs from the distinct—and narrower—language of the intentional-acts exclusions in *Wicka*, *B.M.B.*, and the policies here. The policies' bodily-injury definition omits injury that "arises of out . . . any actual, alleged, or threatened sexual misconduct." By contrast, the intentional-acts exclusions in the policies specify that the bodily injury be "expected or intended" by an insured, "expected by, directed by, or intended by" an insured, or "the

result of an intentional and malicious act." *Cf. Wicka*, 474 N.W.2d at 326 (excluding "bodily injury . . . which is expected or intended by the insured"); *B.M.B.*, 664 N.W.2d at 820 n.2 (excluding "personal injury or property damage: a. which is either expected or intended by [the insured]; or b. to any person or property which is the result of [the insured's] willful and malicious act, no matter at whom the act was directed"). Thus, unlike the intentional-acts exclusions, the sexual-misconduct provision does not contain words invoking intent, e.g., "expected," "intended," or "intentional and malicious." As a result, while intentional-act exclusions explicitly require that the person subjectively intended to cause injury, this sexual-misconduct provision does not explicitly require that the person intended to act sexually or engage in sexual misconduct.

Second, the examples of sexual misconduct in the policies' sexual-misconduct provision do not create an implicit motivation or intent requirement. We are unconvinced by appellants' argument that modifying "misconduct" with the word "sexual" creates such a motivation or intent requirement. Definitions of "sexual" include "[r]elating to, involving, or characteristic of sex or sexuality, or the sex organs and their functions," *The American Heritage Dictionary of the English Language* 1606 (5th Ed. 2018), or "of, pertaining to, or for sex," *Random House Webster's Unabridged Dictionary* 1755 (2d Ed. 1998). Thus, the ordinary usage of "sexual" means that the behavior relates to sex or sexual organs, not that the behavior is sexually motivated or intended to culminate in sexual intercourse. *See Evanston Ins. Co. v. Johns*, 530 F.3d 710, 714 (8th Cir. 2008) (applying Minnesota law and holding that an exclusion for claims "arising out of the actual or alleged physical contact . . . of a sexual nature" does not require subjective intent). The inclusion

of both "sexually motivated physical contact" and "touching of a sexual nature" within the policies' scope of sexual misconduct underscores that sexual motivation is distinct from sexual conduct, and that sexual motivation is not required for conduct to qualify as sexual misconduct within these policies.

In sum, because the policies' sexual-misconduct provision does not impose an intent inquiry for "sexual misconduct," we do not consider C.E.'s subjective intent when evaluating whether his conduct constitutes sexual misconduct. We turn next to whether C.E.'s conduct as alleged by the Walters constitutes sexual misconduct, precluding coverage under the policies.

According to the Walters' complaint, C.E. pinned R.W. down and engaged in "dry humping," requested that R.W. get naked, kissed R.W., "rub[bed]/touch[ed] R.W.'s vagina," and, on multiple occasions, tried to put his penis in R.W.'s mouth. We conclude that these allegations—which involve C.E.'s attempts to stimulate his own genitals and the actual and attempted touching of another child's genitals—are consistent with sexual molestation and touching of a sexual nature, both of which are examples of "sexual misconduct" identified in the policies.[4] Moreover, the complaint actually alleged that

[4] This conclusion accords with the limited number of cases that our research has yielded from other jurisdictions involving the unfortunate circumstances here—conduct by a young child. For example, in *Cmty. Action for Greater Middlesex Cnty., Inc. v. Am. All. Ins. Co.*, the Connecticut Supreme Court held that the allegations that three preschool boys "grabbed and fondled" their classmate's "vagina" was "aptly characterized as sexual abuse and molestation" and rejected the argument that the boys must have "sexual intent or motivation" for the exclusion to apply. 757 A.2d 1074, 1076, 1083 (Conn. 2000). And in *Erie Ins. Exch. v. First United Methodist Church*, a North Carolina federal district court found that a four-year-old's "holding or rubbing of genitalia of another child, licking the genitalia of another child, pulling down clothing to expose the genitalia of another child

R.W.'s injuries included "physical and sexual assault." Thus, despite C.E.'s tender age and regardless of his subjective state of mind, his alleged conduct qualifies as sexual misconduct within the policies' definition. Thus, there is no coverage for the negligence, vicarious liability, and negligent-supervision-of-a-minor claims premised on C.E.'s alleged conduct.

B. "Arising Out of" Under the Sexual-Misconduct Provision

We turn next to appellants' alternative argument that Laicy Erickson's negligent operation of the daycare—which underlies the negligence and negligent-supervision claims—caused a separate harm from the harm caused by C.E.'s conduct. They argue that separate harm did not "arise out of" sexual misconduct within the meaning of that phrase in the sexual-misconduct provision.

Under Minnesota law, "arising out of" means "causally connected with and not proximately caused by." *Meadowbrook*, 559 N.W.2d at 419 (quotations omitted). The relevant inquiry when determining whether there is coverage for a claim is the direct cause of the injuries. *SECURA*, 755 N.W.2d at 322, 327.

Appellants assert that Laicy Erickson's negligence caused harm "wholly unrelated to C.E.'s conduct." But according to the complaint, the harms that form the basis of the negligence and negligent-supervision claims were the "physical and sexual assault" of R.W.; R.W.'s "substantial fright, fear of imminent harm, anxiety, humiliation and

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and kissing" was consistent with the plain and ordinary meaning of abuse and molestation under the policy's exclusion, regardless of the child's intent or motivation. 690 F. Supp. 2d 410, 413-15 (W.D.N.C. 2010).

indignity, culminating in severe emotional injury"; and the Walters' "anxiety, humiliation, and emotional injury." Appellants do not offer an alternative cause for R.W.'s physical assault, sexual assault, or other injuries besides C.E.'s conduct, nor do they cite authority for the proposition that a daycare owner's negligence or negligent supervision can cause an independent harm under these circumstances. Thus, because the injuries alleged in the negligence and negligent-supervision claims were directly caused by—and thus arose out of—C.E.'s alleged sexual misconduct, we conclude that the negligence and negligent-supervision claims are outside of the policies' coverage. *See id.* at 327.

This determination accords with our prior caselaw evaluating coverage for negligence and negligent-supervision claims against an insured for injuries caused by a third party when the insurance policy excludes coverage for injuries that arise out of certain types of conduct. We concluded that such claims are excluded from coverage when there is a causal connection between the excluded conduct and the injuries, even if negligence by the insured also contributed to the injuries. *Id.* at 322, 327 (excluding negligent-supervision and negligent-entrustment claims from coverage when injuries were "undeniably causally connected" to excluded conduct even though "negligence may have also contributed to the same injuries"); *Amos ex rel. Amos v. Campbell*, 593 N.W.2d 263, 267, 269 (Minn. App. 1999) (excluding negligent-hiring, negligent-supervision, and negligent-retention claims from coverage because of the "causal connection" between the injuries and excluded conduct). Similarly, here, appellants cannot obtain coverage by alleging that Laicy Erickson was negligent in operating the daycare.

We are also guided by the supreme court's decision in *Miller*. There, the supreme court held that there was no coverage for negligence claims premised on sexual assault where the policy's definition of bodily injury "does not include: . . . the actual, alleged, or threatened molestation of a person." *Miller*, 589 N.W.2d at 299. The sole issue was the insurer's duty to defend and indemnify an insured against negligence and negligent-infliction-of-emotional-distress claims premised on the insured's failure to prevent sexual abuse of a child committed by the insured's husband. The supreme court held that "[t]he plain language of the policies provides no coverage for injury in the form of sexual molestation regardless of whether the injury was caused by an insured or the injury could have been prevented by an insured." *Id.* at 300. Likewise, R.W.'s injuries are not covered even if the Ericksons' negligence allegedly contributed to those injuries.

In sum, we conclude that the district court properly determined that the negligence, vicarious liability, and negligent-supervision-of-a-minor claims are not covered by the Ericksons' policies because the sexual-misconduct provision does not require the subjective intent to act sexually and because C.E.'s conduct was the direct cause of the alleged harms.

II. Defamation Claim

Appellants also contend, for the first time on appeal, that there is coverage for the defamation claim based on a negligence theory. They argue that the intentional-acts exclusion does not bar coverage because the claim may be based on the Ericksons' negligent—rather than intentional—false statements.

The Walters' complaint did not specifically identify the allegedly defamatory statements, but the defamation claim appears to be based on denials by the Ericksons that C.E.'s conduct occurred. Appellants do not dispute that the Walters' complaint alleged only that the Ericksons intentionally made false statements. But appellants claim that a North Star investigatory report—in which Laicy Erickson denies that C.E. engaged in the alleged conduct—indicates that she may have believed at the time that her statements were truthful and thus may have made the false statements negligently.

We decline to reach the merits of this argument. Appellate courts generally do not consider an issue not raised before the district court, and a party may not "obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellants assert that they raised the negligent-defamation theory in the district court, but we did not find any reference to this theory in the record. Although appellants argued in the district court that the defamation claim did not arise out of intentional sexual misconduct, appellants did not argue that Laicy Erickson's alleged defamatory statements were made negligently rather than intentionally. Thus, because appellants did not advance a negligent-defamation theory before the district court, this argument is forfeited.

Affirmed.