

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MELANIE HOLLAND,

Plaintiff-Appellee/Cross-Appellant,

and

HON CHAN, D.O. and HON CHAN, D.O., P.C. ,

Plaintiffs-Appellees,

v

PRONATIONAL INSURANCE COMPANY,

Defendant-Appellant/Cross-  
Appellee.

UNPUBLISHED

October 6, 2005

No. 254975

Ingham Circuit Court

LC No. 02-000920-CZ

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Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant ProNational Insurance Company appeals as of right from a declaratory judgment requiring it to defend plaintiffs Hon Chan, D.O. (Chan) and Hon Chan, D.O., P.C. (Chan, P.C.) in a medical malpractice action for all relevant claims unrelated to sexual assault. Plaintiffs Melanie Holland, Dr. Chan, and Chan, P.C. appeal as of right from the same judgment. This case stems from an insurance coverage dispute arising out of a medical malpractice suit filed by Holland against Chan as her psychiatrist and his professional corporation, Chan, P.C. We affirm.

**I. FACTS**

Chan diagnosed Holland with depression and saw her for supportive therapy and medication management on a monthly basis over the course of approximately six months. Holland filed a medical malpractice action against Chan and his professional corporation. Holland alleged that Chan failed to maintain therapeutic boundaries by hugging her during therapy sessions and indicating that he wished to hire her to work for him. Holland alleged that Chan called her to come to his office for an additional after hours therapy session during which he sexually assaulted her. Chan maintains that the incident was a job interview and denies sexually assaulting Holland. Holland alleged that after the sexual assault, Chan appeared uninvited at her house and inappropriately telephoned her. According to Chan, he went to

Holland's apartment and called her at her request to complete the job interview. Finally, Holland claimed that after she went to the police, she was contacted by another doctor who offered her a monetary settlement to resolve the matter. Chan denies any involvement with this phone call and claims that he did not learn of it until several weeks after it occurred.

Defendant, the malpractice insurer for Chan and his professional corporation, notified Chan that it would not indemnify him because his acts were excluded from coverage by the sexual misconduct and criminal acts exclusion clauses contained in the policy. Holland's original malpractice action was dismissed without prejudice until the coverage dispute between Chan and defendant was resolved. Thereafter, Holland, Chan, and his professional corporation filed a declaratory judgment action seeking a declaration that defendant had the duty to defend and indemnify Chan and Chan, P.C. Defendant and plaintiffs filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court concluded that defendant "has no obligation to defend [Chan] against any claims related to the sexual assault alleged . . . and . . . has no obligation to indemnify . . . for claims related to sexual assault. As to the allegations of malpractice . . . unrelated to the sexual assault and that are supported by expert testimony in the record below, Defendant ProNational has a duty to indemnify Defendants to the extent that a final judgment is entered awarding damages specifically and only referable to those claims."

Defendant argues on appeal that it has no duty to defend Chan because the allegations of sexual misconduct cannot be separated from the other allegations of misconduct and the other allegations of misconduct are also excluded under its policy. Further, on cross-appeal, plaintiff contends that defendant has an obligation to defend and to indemnify plaintiffs Chan and Chan, P.C. in spite of the sexual misconduct exclusion clause.

## II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Whether an insurer is contractually obligated by an insurance policy to defend its insured is a question of law requiring interpretation of an insurance contract. *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004). The construction and interpretation of insurance contracts is a question of law that this Court reviews de novo. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636, 687 NW2d 300 (2004).

## III. ANALYSIS

### A. Insurance Contract

Defendant argues on appeal that it has no duty to defend Chan because the allegations of sexual misconduct cannot be separated from the other allegations of misconduct and the other allegations of misconduct are also excluded under its policy. We disagree.

“It is well settled that if 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) (citations omitted). “Further, an insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy.” *Id.* However, an insurer’s duty to defend is not defined solely by the terminology of a plaintiff’s pleadings. *Michigan Ed Employees Mut Ins Co v Karr*, 228 Mich App 111, 113; 576 NW2d 728 (1998). Rather, it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists. *Id.* Accordingly, allegations must be examined to determine the substance, as opposed to the mere form, of the complaint. *Id.* “In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured’s favor.” *Radenbaugh, supra* at 138.

Here, Holland’s complaint alleged facts related to a job offer and Chan’s behavior subsequent to the assault. A psychiatric expert testified that this behavior was malpractice regardless of the alleged sexual assault. Accordingly, the sexual misconduct exclusion clause does not preclude indemnification for claims unrelated to the sexual assault. Citing *Govar v Chicago Ins, Co*, 879 F2d 1581 (CA 8, 1989), defendant argues on appeal that it should not be required to defend Chan for any of the alleged instances of malpractice because all of Holland’s claims are centered on the sexual misconduct which cannot be separated from the other allegations of malpractice. However, defendant’s reliance on *Govar* is misplaced. In *Govar*, the court determined that a consensual sexual relationship between a psychologist and his patient, *Govar*, was too intertwined with the alleged malpractice to be separated and concluded that the insurance company was not required to indemnify the psychologist. *Id.*, 1583. Unlike the plaintiff in *Govar*, Holland has not eliminated sexual misconduct allegations from a complaint to merely replace them with a general allegation of malpractice. *Id.*, 1582. Rather, the complaint in this case alleged separate instances of conduct including a job offer and behavior subsequent to the alleged assault. The alleged job offer, in particular, is not intertwined with the sexual misconduct. Moreover, the alleged assault was a single incident that Holland rebuffed, unlike in *Govar*, where the parties were engaged in a consensual ongoing sexual relationship over a period of months and during the course of treatment. *Id.*, 1582. In circumstances such those in *Govar*, any alleged conduct occurring during sessions would necessarily be difficult to separate from the contemporaneous sexual relationship. Here, by both Chan’s and Holland’s account, the discussion of employment took place during an office session prior to the alleged assault. Finally, the insurance policy in *Govar* included a clause that precluded indemnification if the sexual misconduct was established as an “essential element” of the claim. Defendant’s policy includes no such provision. We conclude that the sexual misconduct exclusion clause does not preclude indemnification for the claims unrelated to the sexual assault.

#### B. Offer of Employment

Defendant also argues it should not be required to defend or indemnify for malpractice related to the alleged offer of employment. We disagree. Defendant contends that the relevant

psychiatric expert's opinion that the job offer constituted professional malpractice is built on the mistaken belief that Chan told Holland that if she accepted it he could no longer be her therapist. This claim is without merit. Chan affirmatively testified that he told Holland that if he hired her she would need to find a new therapist. Defendant also argues that the expert testimony is based on the mistaken belief that Chan actually offered Holland a job. This claim is also without merit. The expert testified that Chan violated the standard of care by simply suggesting that the therapist-patient relationship should change to an employer-employee relationship and that this was harmful because Chan placed his need for a temporary office assistant above Holland's needs as a patient. He testified that this was particularly harmful to Holland because it replicated a dysfunctional family situation that required her to set aside her own needs to take care of her father. Defendant also makes much out of the fact that Holland testified that there was no real job offer and only the possibility of filling in for a few days. However, the expert testified that the temporary nature of the possible position actually made Chan's actions more egregious because, by Chan's own testimony, he was considering asking Holland to take time off of her own job and get a new therapist in order to fill in for a few days for him. Finally, defendant argues that the malpractice claim based on the offer of employment is insincere because Holland did not feel aggrieved by the alleged job offer and the resulting damages were de minimus and inseparable from the injury sustained as a result of the sexual misconduct. However, the expert specifically testified that at least part of Holland's injuries are "traceable to the specific stressor of the abandonment of her treatment by Dr. Chan, the proposal that she suddenly take on a new role with him, all sort of interlaced with the terror situation that occurred in the office on Saturday, the 27th of November, '99, and the subsequent stalking of her." Moreover, when asked how he would explain Holland's injuries if no sexual assault had occurred, he responded:

Just the way I have. The terribly negligent termination and abandonment of treatment, mismanagement of the transference and counter-transference, exploiting her by soliciting her to work for him, even worse if she expressed any interest in it.

Holland's allegations and the expert testimony support the proposition that Chan committed professional negligence by suggesting that Holland work for him. Ultimately, the question of the apportionment of damages in the underlying malpractice case is a question for the jury. Accordingly, defendant is required to defend and indemnify Chan for damages related to this issue.

### C. Stalking and Sharing of Confidential Information

Next, defendant argues that the alleged stalking and sharing of confidential information did not occur while Chan was rendering professional services for Holland and that it therefore has no duty to defend Chan. We disagree. The policy provides coverage for damages that the insured becomes obligated to pay "because of a professional incident which results from your rendering of, or failure to render, professional services." The policy defines professional incident as "[a]n act (or omission or series of related acts or omissions) . . . in the furnishing of professional services to a patient, that may result in your liability for damages," and professional services as "[t]he delivery of medical or dental services to a patient as permitted by the Named Insured's license to practice allopathic, osteopathic or podiatric medicine or dentistry."

MCL 750.411h(2)(a)(2) prohibits stalking and provides that it is a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than \$1,000.00, or both. Stalking is defined as, “a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” MCL 750.411h(1)(d).<sup>1</sup>

According to Chan’s version of events, he has not committed stalking because his contact with Holland was not unconsented contact as defined by MCL 750.411h(1)(e). Chan admitted to parking his vehicle outside of Holland’s apartment complex and calling her several times on Saturday, November 27 and the following Monday. However, at all times Chan has denied the alleged sexual assault and maintained that the November 27 visit was a job interview. Importantly, Chan testified that Holland invited him to come to her apartment, gave him directions, and provided him with her cell phone number. Chan maintained that he went to Holland’s apartment to follow up on the job interview because the interview was cut short when Holland left to visit her grandmother at the hospital. Chan also testified that he called Holland again that night and two days later because he was concerned after Holland missed their 4:00

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<sup>1</sup> MCL 750.411h(1) further provides:

(a) “Course of conduct” means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.

(b) “Emotional distress” means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) “Harassment” means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

\* \* \*

(e) “Unconsented contact” means any contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at that individual’s workplace or residence.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

meeting on November 27. According to Holland's version of events, Chan sexually assaulted her, appeared at her apartment uninvited, and telephoned her repeatedly leaving several phone messages. Holland's complaint indicates that she felt threatened by the incident and called the police.

This incident can be considered a professional service and defendant has a duty to defend Chan against these allegations. The intentional/criminal acts exclusion clause does not relieve defendant from its duty to defend because Chan's actions are arguably not excluded. Here, Chan's denial leaves open the possibility that no criminal act occurred. Where the insured's testimony reflects that his conduct was not criminal, the insurance company should not be allowed to characterize the behavior as criminal to avoid its duty to defend. Importantly, this is not an instance where absent the alleged criminal act the malpractice claim would be non-existent. Here, the expert testified that outside contact such as this was malpractice regardless of whether it constituted criminal stalking. Accordingly, behavior that fell short of criminal stalking could constitute malpractice. Moreover, if Chan's version of events involving a job interview and follow up phone calls is true, the expert in this case clearly testified that such patient contact is a violation of the standard of care.

Defendant cites *Allstate Ins Co v Keillor (On Remand)*, 203 Mich App 36; 511 NW2d 702 (1993), aff'd on other grounds 450 Mich 412 (1995), for the proposition that an allegation of criminal conduct is sufficient to trigger the exclusion clause and relieve it from the duty to defend. Defendant's reliance is misplaced. The facts of *Keillor* were detailed by our Supreme Court in *Allstate Ins Co v Hayes*, 442 Mich 56, 59; 499 NW2d 743 (1993). The insured, Hayes, was sued for negligence, wrongful death, and violations of the dram shop act after he provided alcohol to a minor who was later involved in a car accident which killed Keillor. *Hayes, supra*, at 58. Hayes filed a complaint requesting a declaration that the policy did not provide liability coverage for Hayes' actions because coverage was precluded by the policy's criminal/intentional acts exclusion and automobile exclusion. *Id.* The complaint named Hayes and Keillor as defendants. *Id.* Hayes failed to respond to the complaint, and prior to the entry of a default judgment against Hayes, he signed a affidavit which stated that he had chosen not to contest the coverage question. *Id.* at 59. Our Supreme Court held the default judgment against Hayes did not bind Keillor and that the trial court had the power to declare the rights of the remaining parties. *Id.* at 57. On remand, this Court considered whether the exclusion clauses precluded coverage. *Keillor, supra* at 39. This Court held that the insurance company was not required to defend its insured because the homeowner's policy included a criminal acts exclusion and a motor vehicles exclusion. *Id.* at 40-41. This Court rejected the argument that the criminal exclusion was ambiguous and further concluded, "we find that the exclusion from criminal acts applies in this case in which Hayes served alcohol to a minor [because] [s]uch an act constitutes a criminal act causing this exclusion to apply." *Id.* at 40. Our Supreme Court affirmed *Keillor* in part concluding that the motor vehicle exclusion precluded coverage without reaching the criminal acts exclusion. *Allstate Ins Co v Keillor*, 450 Mich 412, 421; 537 NW2d 589 (1995). Contrary to defendant's suggestion, this Court did not specifically hold that allegations of criminal conduct were enough to trigger the exclusion clause. It is not clear what facts supported this Court's conclusion that "Hayes served alcohol to a minor." However, Hayes' refusal to contest the issue is instructive and seems to reflect that the court treated it as an undisputed fact. Here, Chan and Chan, P.C., are contesting the coverage issue.

Similarly, this Court has concluded that where the insured admitted the criminal act an intentional/criminal acts exclusion clause relieved the insurer from the duty to defend because the insured could not reasonably expect coverage. *Allstate Ins Co v Fick*, 226 Mich App 197, 204; 572 NW2d 265 (1997). Unlike the insureds in *Fick*, Chan has not admitted the conduct constituting the crime or refused to contest coverage.

Defendant also argues that it should not be required to defend Chan for the alleged disclosure of confidential information to Dr. Hughett because he was committing a crime which is excluded under its policy. We disagree. According to defendant, Chan was guilty of conspiracy to obstruct justice because he was attempting to convince a crime victim to refrain from reporting an offense to the authorities, and, defendant alleges, Chan violated the Health Insurance Portability and Accountability Act (HIPAA) by disclosing confidential information.

The criminal exclusion clause does not relieve defendant of the duty to defend on this issue because it is not clear that a criminal act actually occurred with regard to the relevant matter. Chan testified that he did not know of Dr. Hughett's call to Holland until at least a week after it was placed. Moreover, Holland merely testified that Hughett called her and encouraged her to reach a monetary settlement with Chan. MCL 750.483a(3)(a) makes it a misdemeanor for a person to "[g]ive, offer to give, or promise anything of value to any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime." No evidence suggests, and Holland does not allege, that Hughett was directing the settlement offer at a criminal investigation. Additionally, defendant has abandoned his argument that Chan violated HIPAA by failing to cite any supporting authority on appeal. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

#### D. Defendant's Duty to Defend

Plaintiffs cross-appeal and argue that defendant should be required to defend Chan despite the sexual misconduct exclusion clause. We disagree.

Plaintiffs conceded in their brief in support of summary disposition that "the claimed acts of sexual misconduct that occurred in Dr. Chan's office . . . (and identifiable damages flowing there from) are excluded from coverage under paragraph 4(l) of Dr. Chan's policy." Moreover, plaintiffs specifically requested the court to declare that defendant had a duty to defend Chan for "professional negligence involving non-sexual boundary line violations." A party cannot request a certain action of the trial court and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Thus, plaintiffs have waived their claim of error in this issue.

Regardless, defendant clearly had no obligation to provide coverage or a defense with regard to the alleged sexual assault. The relevant policy provides: "This policy does not apply to . . . [a]ny act of sexual misconduct, sexual molestation or physical or mental abuse, whether under the guise of treatment or otherwise, if **you** actively participate in, facilitate, or knowingly permit any such conduct" (Policy, § 4(j) attached to plaintiffs' brief in support of motion for

summary disposition (emphasis in original)). “An insurer is not required to defend its insured against claims specifically excluded from policy coverage.” *American Bumper, supra* at 375. Where policy language is clear, this Court is bound by the specific language set forth in the policy because an insurance company cannot be held liable for a risk it did not assume. *Id.* Accordingly, the trial court correctly held that defendant is not required to defend Chan or Chan, P.C. against Holland’s claim of sexual misconduct.

Affirmed.

/s/ Patrick M. Meter  
/s/ Christopher M. Murray  
/s/ Bill Schuette