

NOTICE
Decision filed 03/04/24. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2024 IL App (5th) 220287-U

NO. 5-22-0287

IN THE
APPELLATE COURT OF ILLINOIS

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

| | | |
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| COUNTRY MUTUAL INSURANCE COMPANY, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Champaign County. |
| |) | |
| v. |) | No. 20-MR-89 |
| |) | |
| GARY GANG XU, XINGJIAN SUN, XING ZHAO, |) | |
| and AO WANG, |) | |
| |) | |
| Defendants |) | Honorable |
| |) | Jason M. Bohm, |
| (Gary Gang Xu, Defendant-Appellant). |) | Judge, presiding. |

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Vaughan and Justice McHaney concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting summary judgment in favor of the insurer on its complaint for a declaratory judgment that it had no duty to defend or indemnify its insured because the acts alleged in the underlying complaint did not fall within or potentially within coverage or were subject to a policy exclusion, and the trial court’s judgment is affirmed.

¶ 2 The plaintiff, Country Mutual Insurance Company (Country Mutual), filed a complaint seeking a declaratory judgment that it had no duty to defend or indemnify the defendant, Gary Gang Xu (Xu), against an underlying tort action under a homeowners insurance policy and a personal umbrella liability policy issued to Xu by Country Mutual. The trial court denied Xu’s motion for judgment on the pleadings and subsequently granted summary judgment in favor of Country Mutual. The court found that Country Mutual had no duty to defend Xu because the

factual allegations in the underlying complaint did not fall within or potentially within the coverage of either policy or were excluded from coverage. On appeal, Xu contends that the trial court erred in finding that Country Mutual had no duty to defend him where one count of the underlying complaint alleged acts of negligence that fell within or potentially within the coverage of the personal umbrella liability policy. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4

The Underlying Action

¶ 5 On September 10, 2019, Xingjian Sun, Xing Zhao, and Ao Wang (collectively, the plaintiffs) filed a 10-count complaint against Xu in the United States District Court for the Central District of Illinois. The 87-page complaint contained a detailed recitation of the factual allegations and theories of liability against Xu. According to the general allegations of the complaint, Xu was a tenured associate professor at the University of Illinois at Urbana-Champaign (University) from 2006 through 2018. Sun attended the University from 2012 through 2016. She was a student of Xu during that time. Zhao attended the University from 2013 through 2015. She was a graduate student and advisee of Xu. According to the complaint, Xu used his power and authority as a university professor to sexually harass, sexually assault, and exploit female students and colleagues.

¶ 6

The complaint included specific allegations as to Sun. In the fall of 2013, Sun, then 19 years old, entered into a sexual relationship with Xu, who was 45 years old and Sun's professor. The plaintiffs alleged that during the two-year period from 2013-2015, Xu physically assaulted and raped Sun, forced her to get an abortion after she became pregnant with his child, and attempted to hit her with his car. The plaintiffs also alleged that Xu allegedly tried "to pimp" Sun out to Chinese artists for financial gain.

¶ 7 The complaint also included specific allegations as to Zhao. According to those allegations, Xu made sexual overtures toward Zhao while he was her academic advisor. When Zhao rejected those advances, Xu belittled and sexually harassed her. The plaintiffs further alleged that Xu required Zhao to engage in countless hours of work, completing projects involving translation and graphic design, without any compensation, while Xu received credit and financial profit for Zhao's work.

¶ 8 The plaintiffs claimed that Xu violated federal laws prohibiting sex trafficking (count I), forced labor (count II), forced sexual labor (count III), and forced trafficking into servitude (count IV),¹ and Illinois laws prohibiting acts of gender violence (count V), involuntary servitude (counts VI & VII), and trafficking in persons (count VIII). They claimed that Sun and Zhao were entitled to civil damages for Xu's wrongful conduct under the federal Trafficking Victims Protection Act of 2017 (18 U.S.C. § 1595 (2018)), the Illinois Gender Violence Act (740 ILCS 82/10, 15 (West 2018)), and the Illinois Trafficking Victims Protection Act (740 ILCS 128/15, 20 (West 2018)).

¶ 9 The final two counts of the complaint were brought on behalf of Ao Wang. Wang was not affiliated with the University. He was an associate professor at Wesleyan University in Middletown, Connecticut. The counts on behalf of Wang were based upon theories of intentional infliction of emotional distress (count IX) and negligent infliction of emotional distress (count X). The plaintiffs alleged that Wang only knew Xu casually, and that Wang learned about Xu's abusive relationships with female students through Wang's friend, whom Xu had also attempted to rape. Wang received further confirmation of Xu's behavior through other colleagues and social media posts. Wang became concerned that Xu would continue to harm students. In March 2018, Wang

¹The plaintiffs alleged violations of several provisions of the federal Trafficking Victims Protection Act of 2017 (18 U.S.C. §§ 1589, 1590, 1591 (2018)), the Illinois Gender Violence Act (740 ILCS 82/5 (West 2018)), and the Illinois Trafficking Victims Protection Act (740 ILCS 128/1 *et seq.* (West 2018)).

posted an online article about Xu's history of sexually harassing and abusing female students and colleagues. The plaintiffs alleged that Xu was infuriated by Wang's post and began to retaliate. Xu allegedly engaged in threats of violence and bullying to coerce Wang's silence.

¶ 10 In the claim for intentional infliction of emotional distress (count IX), the plaintiffs alleged in part:

“253. Xu engaged in extreme and outrageous conduct toward Wang with his systematic campaign of threatening and bullying [Wang] to force into dropping his truthful claims against Xu. He, individually and through his agents, issued a death threat against Wang. Wang, well aware of Xu's violent tendencies, was terrified for the safety of his family. Xu tarnished Wang's reputation by undermining his academic accomplishments and harassing his colleagues and contemporaries. He attempted to bribe [Wang] into dropping his allegations in exchange for lucrative compensation at an upcoming art festival. When Wang still refused, [Xu] instituted a baseless and extended lawsuit against [Wang], at great personal and emotional cost to Wang and his family.

254. Xu engaged in this behavior knowingly, with the clear intent of causing Wang great emotional distress so that he would retract his true claims regarding Xu's sexual assaults of young women.”

The plaintiffs further alleged that as a direct and proximate result of Xu's conduct, Wang endured severe emotional distress, including anxiety and physical symptoms of chest pain that required hospital care.

¶ 11 In the claim for negligent infliction of emotional distress (count X), the plaintiffs realleged and incorporated all of the preceding allegations of the complaint “as though fully stated herein.”

The plaintiffs also alleged that Xu owed Wang a duty of ordinary care “to guard against injuries which flow as a reasonably probable and foreseeable consequence of an act,” and that,

“260. Xu breached this duty with his extreme and outrageous behavior as outlined above, including by issuing death threats, attempting to bribe [Wang], bringing a baseless lawsuit, and threatening [Wang’s] reputation and standing in the community.”

Wang claimed he suffered “physical and emotional harm, medical bills, and reputational harm” as a result of the breach.

¶ 12 The Declaratory Judgment Action

¶ 13 When the underlying lawsuit was filed in September 2019, Xu had a homeowners insurance policy and a personal umbrella liability policy with Country Mutual. Xu tendered his defense of that lawsuit to Country Mutual.

¶ 14 On January 29, 2020, Country Mutual filed a complaint against Xu,² seeking a declaratory judgment that it had no duty to defend or indemnify Xu in the underlying tort action under either the homeowners policy or the personal umbrella policy. Country Mutual claimed that the underlying complaint alleged only intentional and outrageous conduct by Xu, and that such conduct was not covered under either policy. In addition, Country Mutual alleged that each policy excluded coverage for the following types of claims: bodily injury that was “expected or intended” by an insured, bodily injury and personal injury arising from sexual abuse and mental abuse, and bodily injury and personal injury arising out of business pursuits. The underlying complaint and the applicable insurance policies were appended to the complaint. In this appeal, Xu only claims coverage under the personal umbrella liability policy, and so the factual summary is focused on the applicable provisions of the umbrella policy.

²Sun, Zhao, and Wang were named as codefendants in Country Mutual’s complaint.

¶ 15 The Country Mutual Personal Umbrella Liability Insurance Policy contained provisions setting forth the terms of coverage in section I, and the exclusions from coverage in section II.

“SECTION I – INSURING AGREEMENTS

A. Coverage

We will pay on behalf of an **insured**, for **ultimate net loss**, in excess of the **retained limit** (or **self insured amount**, whichever applies), which an **insured** is legally obligated to pay, because of **bodily injury, personal injury or property damage**. The harm or damage must be caused by an **occurrence**, happening anywhere in the world, during the policy period. ***.

* * *

SECTION II - EXCLUSIONS

This policy does not apply to:

* * *

B. Bodily injury or property damage expected or intended by an **insured**. This exclusion does not apply to **bodily injury** resulting from the use of reasonable force to protect persons or property;

* * *

E. Bodily injury, personal injury or property damage arising out of a:

1. **Business** pursuit of an **insured**; or
2. **Business property** owned by, rented to, or controlled by an **insured**, except **bodily injury, personal injury or property damage** to which **underlying insurance** applies.”

In an Illinois Amendatory Endorsement, the sexual misconduct exclusion was deleted from the original policy and replaced by the following:

“M. An **insured** who inflicts, or directs another person to inflict, upon any persons, **sexual misconduct, sexual molestation**, corporal punishment or physical or mental abuse that results in **bodily injury, personal injury, or property damage.**”

¶ 16 The policy provided specific definitions for words and phrases appearing in boldface type, including the following:

“Bodily injury: physical harm to a person, including sickness or disease, and any required care, loss of services, or death resulting from the physical harm.

* * *

Occurrence: an accident, including continued exposure to conditions that result in **bodily injury** or **property damage**. **Occurrence** also means an act that results in one of the offenses listed in the definition of **personal injury**. All exposure to the same general conditions existing at or starting from one source will be deemed one **occurrence**.

Personal injury:

- a. False arrest, false imprisonment, wrongful eviction, wrongful detention, or malicious prosecution; and
- b. Libel, slander, defamation of character or invasion of rights of privacy.”

¶ 17 On November 5, 2020, Xu filed a motion for judgment on the pleadings. Xu claimed that Country Mutual had a duty to defend him in the underlying suit because count X of the underlying complaint alleged negligent infliction of emotional distress and was, therefore, a claim within or potentially within the coverage of his homeowners policy and his umbrella policy.

¶ 18 Country Mutual filed a response in opposition to Xu’s motion for judgment on the pleadings. Country Mutual initially noted that Xu did not dispute Country Mutual’s claim that it owed no duty to defend Xu against the allegations of sexual abuse and other intentional conduct made by Sun and Zhao. Country Mutual challenged Xu’s claim that it had a duty to defend based solely on the claim for negligent infliction of emotional distress in count X of the underlying complaint. Country Mutual argued that count X did not allege an occurrence as defined in its policies. Instead, count X alleged that Xu breached his duty to Wang by engaging in “extreme and outrageous” behaviors, including death threats, attempted bribes, a baseless lawsuit, and threats to

Wang's reputation and standing in the community. Country Mutual also argued that the intentional acts alleged in the underlying complaint were subject to several policy exclusions.

¶ 19 Xu's motion for judgment on the pleadings was called for hearing on January 14, 2021. After considering the pleadings and arguments of counsel, the trial court denied Xu's motion, concluding that it could not find as a matter of law that the allegations in the underlying complaint fell within the coverage of either policy.

¶ 20 On November 19, 2021, Country Mutual filed two separate motions for summary judgment. In one motion, Country Mutual argued that the claims made on behalf of Sun and Zhao in the underlying complaint alleged intentional violations of criminal statutes and extreme, outrageous, and intentional conduct, and that such conduct was not covered under its homeowners and umbrella policies or was subject to policy exclusions.

¶ 21 In the other motion for summary judgment, Country Mutual claimed that Wang's claims for intentional infliction of emotional distress (count IX) and for negligent infliction of emotional distress (count X) were legally and factually indistinguishable; that each count alleged extreme, outrageous, or intentional conduct; and that such conduct was not covered under its homeowners and umbrella policies. Country Mutual also argued that there were no allegations that Xu had any physical contact with Wang or that Xu inflicted any physical injury on Wang, and so there were no allegations of "bodily injury" caused by an occurrence. Finally, Country Mutual argued that its policies excluded coverage for bodily injury expected or intended by the insured, bodily injury or personal injury arising out of the physical and mental abuse inflicted by the insured, and bodily injury or personal injury arising out of the insured's employment or business pursuits.

¶ 22 In response, Xu argued that the complaint contained a count alleging negligent infliction of emotional distress, and that those allegations were sufficient to show that Country Mutual had

a duty to defend him on the entire action. In reply, Country Mutual argued that Xu had essentially conceded that there was no coverage for the intentional acts alleged in counts I through IX of the underlying complaint. Country Mutual also argued that while count X was labeled “negligent infliction of emotional distress,” it alleged only intentional conduct that was not covered under either policy.

¶ 23 Following a hearing on April 21, 2022, the trial court granted Country Mutual’s motions for summary judgment. In its oral ruling, the court initially found, consistent with the parties’ arguments, that there was no basis to find that the claims alleged in counts I through IX of the underlying complaint fell or potentially fell within the coverage of the homeowners policy or the umbrella policy. The court next found that the allegations in count X alleged extremely outrageous, intentional conduct by Xu, and that when those allegations were considered in context and liberally construed, there was no credible basis to conclude that the alleged conduct was negligent, accidental, and not intended. The court concluded that Country Mutual had no duty to defend Xu in the underlying tort action under either policy. This appeal followed.

¶ 24

II. ANALYSIS

¶ 25 On appeal, Xu contends that the trial court erred when it denied his motion for judgment on the pleadings and when it granted summary judgment in favor of Country Mutual. Xu claims that Country Mutual has a duty to defend him in the underlying tort action because Wang’s claim for negligent infliction of emotional distress fell within the coverage of the personal umbrella policy issued by Country Mutual.

¶ 26 Summary judgment is appropriate when the pleadings, together with the affidavits, depositions, and admissions on file, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c)

(West 2020). A circuit court's ruling on summary judgment is reviewed *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). A motion for judgment on the pleadings, like a motion for summary judgment, is limited to the pleadings. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). A judgment on the pleadings is properly granted if the pleadings disclose that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Wilson*, 237 Ill. 2d at 455. A court's decision to grant or deny a motion for judgment on the pleadings is reviewed *de novo*. *Wilson*, 237 Ill. 2d at 455.

¶ 27 When interpreting an insurance policy, the court's primary objective is to ascertain and enforce the intentions of the parties as expressed in the agreement. *Outboard Marine*, 154 Ill. 2d at 108. The parties' intent is ascertained by construing the policy as a whole, considering the type of insurance and the risks undertaken, the subject matter that is insured, and the purposes of the entire contract. *Outboard Marine*, 154 Ill. 2d at 108. The interpretation of the provisions in an insurance policy presents a question of law that is reviewed *de novo*. *Outboard Marine*, 154 Ill. 2d at 108.

¶ 28 To determine whether an insurer has a duty to defend its insured in a lawsuit, a court ordinarily considers the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy. *Wilson*, 237 Ill. 2d at 455; *Outboard Marine*, 154 Ill. 2d at 107-08. If the underlying complaint alleges facts within or potentially within the coverage of the policy, the insurer is obliged to defend. *Wilson*, 237 Ill. 2d at 455. Conversely, if the underlying complaint alleges facts that, if true, would not be covered under the policy, the insurer has no duty to defend. *Pekin Insurance Co. v. Dial*, 355 Ill. App. 3d 516, 520 (2005). If several theories of recovery are alleged in the underlying complaint against the insured, the insurer's duty to defend arises even if only one of several theories of recovery is potentially within the coverage.

Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 194 (1976). The factual allegations of the complaint, rather than the legal theory or label under which the claim is brought, determine whether there is a duty to defend. See *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755-56 (2005) (citing *Lexmark International, Inc. v. Transportation Insurance Co.*, 357 Ill. App. 3d 128, 136-37 (2001)).

¶ 29 The insured has the initial burden to demonstrate that a claim is within the coverage of a policy. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). If the insured demonstrates that there is coverage, the burden shifts to the insurer to prove that a limitation or exception applies. *Fay*, 232 Ill. 2d 453-54.

¶ 30 On appeal, Xu relies solely on the “negligence allegations” in count X of the underlying complaint to establish coverage under his personal umbrella policy. In count X, Wang realleged and incorporated all of the preceding allegations in the complaint “as though fully stated herein.” In the underlying complaint, the plaintiffs alleged that Xu sexually assaulted and harassed his female students, exploited their labor, and committed acts of gender violence in violation of federal laws and Illinois laws. In the claim for intentional infliction of emotional distress (count IX), the plaintiffs alleged that Xu engaged in with a systematic campaign of threats and bullying to force Wang to retract his truthful claims against Xu and that Xu engaged in this behavior “knowingly” and “with the clear intent to cause Wang great emotional distress.” The plaintiffs further alleged that Wang endured severe emotional distress, including anxiety and physical symptoms of chest pain that required hospital care, as a direct and proximate result of Xu’s conduct. In count X, the plaintiffs alleged that Xu breached his duty of ordinary care to Wang “with his extreme and outrageous behavior as outlined above, including by issuing death threats, attempting to bribe

[Wang], bringing a baseless lawsuit, and threatening [Wang's] reputation and standing in the community.”

¶ 31 After reviewing the complaint, we find no significant distinction between the conduct alleged in count IX and the conduct alleged in count X. Although count X is couched in terms associated with negligence, it is based on intentional conduct, rather than negligent, accidental, or unintended conduct. The emotional distress arose out of intentional acts allegedly committed by Xu. To determine whether the complaint alleged an accident, a court looks to the factual allegations rather than the legal theory asserted. See, e.g., *State Farm Fire & Casualty Co. v. Young*, 2012 IL App (1st) 103736, ¶ 31; *Dial*, 355 Ill. App. 3d at 522; *State Farm Fire & Casualty Co. v. Watters*, 268 Ill. App. 3d 501, 510 (1994). The underlying allegations describe intentional retaliation and threats to physically harm Wang and to harm his reputation, and those allegations control over the labeled theory of liability. Therefore, we do not find that the allegations in the count for negligent infliction of emotional harm triggered coverage under the personal umbrella policy.

¶ 32 The personal umbrella policy at issue insured against losses caused by an “occurrence.” The policy defined “occurrence” as “an accident, including continued exposure to conditions that result in bodily injury or property damage.” The term “accident” was not defined in the policy, but Illinois courts have noted that an accident is “ ‘an unforeseen occurrence, usually *** an undesigned sudden or unexpected event of an inflictive or unfortunate character’ ” (*Young*, 2012 IL App (1st) 103736, ¶¶ 25-26 (quoting *Aetna Casualty & Surety Co. v. Freyer*, 89 Ill. App. 3d 617, 619 (1980))). Count X of the underlying complaint alleged that Xu’s acts were willful, intentional, and retaliatory, and done with the “clear intent to cause Wang great emotional distress.” This type of conduct cannot be considered to be accidental. In addition, the plaintiffs did not allege that Xu physically inflicted a “bodily injury” on Wang as defined in the policy. Even if

the allegations of severe emotional distress potentially fit within the definition of “bodily injury,” the policy excludes coverage for bodily injury “expected or intended” by the insured. Here, the complaint alleges that Xu engaged in intentional conduct with the intent to cause emotional distress. Thus, the “injury” to Wang would have been reasonably expected or intended, and therefore, excluded from coverage.

¶ 33 The policy also defines “occurrence” as “an act that results in one of the offenses listed in the definition of personal injury.” The offenses listed in the definition of “personal injury” include libel, slander, and defamation of character. Xu contends that the allegation that he threatened to harm Wang’s reputation was sufficient to establish coverage under the second definition of occurrence, but he cites no case law to support his argument. Nor has he identified factual allegations in count X that would establish the elements of defamation. Thus, Xu failed to meet his burden to demonstrate that the underlying complaint alleged facts that would constitute an occurrence as defined in the policy.

¶ 34 Count X of the underlying complaint alleged that Xu’s acts were willful, intentional, and retaliatory, and done with a purposeful intent to inflict emotional distress on Wang and to coerce his silence. After examining the underlying complaint along with the provisions in the umbrella policy, we conclude, as did the trial court, that the conduct alleged in count X did not potentially fall within the coverage of the personal umbrella liability policy or was excluded from coverage. Country Mutual did not have a duty to defend or indemnify Xu in the underlying federal action.

¶ 35 **III. CONCLUSION**

¶ 36 Accordingly, the trial court did not err in denying Xu’s motion for judgment on the pleadings and the court properly entered summary judgment in favor of Country Mutual. The judgment is affirmed.

¶ 37 Affirmed.