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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001667-MR

BRIANNA ROBINSON — APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE JAMES T. JAMESON, JUDGE
ACTION NO. 13-CI-00519

MONROE GUARANTEE INSURANCE COMPANY

APPELLEE

AND

NO. 2016-CA-001668-MR

JOHN ABBINGTON THOMAS;
JOHN ABBINGTON THOMAS, D/B/A ROOM TO GROW PRESCHOOL; AND
ROOM TO GROW PRESCHOOL, LLC — APPELLANTS

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MONROE GUARANTEE INSURANCE
COMPANY

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND J. LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: By separate appeals which the Court has consolidated, Brianna Robinson along with John Abbington Thomas, John Abbington Thomas d/b/a Room To Grow Preschool, and Room To Grow Preschool, LLC appeal the Calloway Circuit Court's October 16, 2016 order granting declaratory and summary judgment in favor of Monroe Guaranty Insurance Company. Robinson brought suit against Thomas and Room to Grow raising several claims of negligence in connection with an assault she suffered allegedly while attending the preschool. The issue before us is whether the circuit court erred in finding no coverage for her claims exists under the insurance contract issued by Monroe to Thomas. We find no error and affirm.

FACTS AND PROCEDURE

Nearly two decades ago, in late May 2000, two-year-old Brianna Robinson began attending Room to Grow Preschool in Murray, Kentucky. John "Bing" Thomas owned and operated the preschool. Monroe had issued a

Commercial General Liability Insurance Policy to "Room to Grow Preschool John A. Thomas DBA," effective July 29, 1999 through July 29, 2000 (Monroe Policy).

Within a few days Brianna displayed resistance to attending Room to Grow. Her parents attributed her reluctance to a child's typical separation anxiety and nervousness in a new environment. At bedtime on May 31, 2000, Brianna told her mother, Lisa Robinson, that Madison, another child at Room to Grow, touched my "moo moo"[1] and that "they" pushed "like that." Lisa was unsure how to respond to Brianna's claims. Lisa informed Brianna it was "night night" time and Brianna again said that "her moo moo hurt." (R. 329).

The next day, June 1, 2000, Brianna's father, Dr. Thomas Robinson, picked Brianna up from Room to Grow. Shortly thereafter, Brianna told her father that "it hurts to go potty." Dr. Robinson discovered Brianna's vagina was red and raw. He called Lisa and they agreed they should take Brianna to their family physician, Dr. Richard Crouch.

Dr. Crouch saw Brianna that day. After a brief examination, he instructed Brianna's parents to immediately take her to a gynecologist. Dr. Crouch informed them that either a serious fall caused the injury, or someone had caused the irritation intentionally.

[1] Brianna referred to her vagina as her "moo moo."

Gynecologist Dawn Deeter examined Brianna under anesthesia on June 2, 2000. Dr. Deeter's written report of Brianna's history says:

> This 2 ½ yo complained to her mom "my moo-moo hurts" on 5/31. (Moo-moo is the patient's term for vulva vagina). The patient told the mom that "Madison touched my moo-moo."' She said either she "kept pushing them and pushing them away" or "they kept pushing and pushing her." Mom notes Brianna has tried to put something into the vagina a couple of times this past week which is the first time this has happened. Mom and dad note one episode of [Brianna] awakening from a nap hysterical, taking 10 minutes to settle. The child also reports pain with urination. The child is at a new DayCare since late May. Madison is reportedly a five year old girl at the DayCare center. She attends Room to Grow DayCare.

(R. 696). Dr. Deeter found Brianna's hymen was stretched and she had labial and vulvar lacerations "consistent with at least attempted penetration of something blunt." Dr. Deeter stitched the lacerated area. Dr. Deeter and Brianna's parents reported the incident to the police and to the Cabinet for Health and Family Services. The police investigation was delayed until June 5 because initially the case had been reported as "child on child" abuse and social services workers advised Dr. Deeter there would be no investigation.

Officers spoke to Dr. Deeter regarding her findings. Dr. Deeter confirmed she observed four lacerations to Brianna's vaginal area, but that Brianna's hymen was intact. Dr. Deeter also stated she consulted with another physician, Dr. Brent Boles, who advised that, in his opinion, Brianna's injuries

were not caused by a child, but that the injuries indicated a penetration of some kind.

Officers then spoke to the Robinsons. Lisa Robinson informed police that Brianna had initially stated that "Madison touched my moo moo," but since then had also stated that Bing Thomas had rubbed her there. At some point Brianna also identified Bing's then thirteen-year-old son, Jacob Thomas, as a person who touched her, and when questioned subsequently about who was present when the abuse occurred, Brianna looked at Dr. Robinson and stated, "Somebody gonna get you."

Bing and Dr. Robinson both underwent polygraph and urine tests and gave DNA samples. The deputy conducting the tests reported that Bing "was truthful and that he was not involved in sexually molesting Brianna," but that Dr. Robinson had answered two questions differently than he had in the pre-test interview. The deputy labelled Dr. Robinson's test result inconclusive. Both Bing and Dr. Robinson's urine tests indicated no drugs in either subject's system.

Police interviewed Bing Thomas; his wife, Stephanie Thomas; and four daycare employees. All testified that the abuse did not occur at Room to Grow, that they recalled no injury to Brianna or complaint of pain by her, and stated that, due to the daycare's open setup, it was impossible to be alone with a child.

Officers collected some of Brianna's clothing and submitted it to the Madisonville Crime lab for testing. The lab discovered semen on several pairs of Brianna's underwear, including a pair her parents confirmed she did not wear to Room to Grow. DNA testing eliminated Bing Thomas but found the sperm sample was consistent with a mixture of DNA from Dr. Robinson and Brianna. Dr. Robinson denied mixing his clothing with Brianna's clothing.

Brianna identified four possible people as the perpetrator: Madison; Bing Thomas; Bing's thirteen-year-old son; and her father, Dr. Robinson. Dr. Robinson was ultimately indicted for sexual abuse. (R. 290). A jury fully acquitted him of that charge. (R. 243). No other criminal charges were brought against the remaining persons. At no time did Bing Thomas notify Monroe of the assault or the subsequent police investigation.

In 2013, Brianna's mother, Lisa, sued Bing Thomas and Room to Grow preschool on Brianna's behalf alleging negligence, negligent infliction of emotional distress, and negligent failure to rescue. After Brianna reached the age of majority, she was substituted as plaintiff. The complaint alleged Bing and Room to Grow Preschool were negligent in:

> a. permitting an employee or other person to be alone with a child on the premises of Room to Grow Pre-school during school hours during which time the employee was able to penetrate the vagina of [Brianna];

> b. failing to properly and adequately supervise and discipline its employees to prevent the injuries that occurred to [Brianna];
>
> c. failing to implement, enforce and/or follow adequate protective and supervisory measures, police and procedures for the protection of students at Room to Grow Pre-school, including [Brianna];
>
> d. failing to adopt, enforce and/or follow policies and procedures to protect minors against harmful influence and contact by its teachers and/or employees and/or other persons;
>
> e. failing to provide [Brianna] with any assistance in coping with the injuries sustained;
>
> f. failing to warn or otherwise make reasonably safe the property which Defendants possessed and/or controlled, leading to the harm to [Brianna];
>
> g. negligently managing and/or operating Room to Grow Pre-school;
>
> h. negligently hiring, training, and/or supervising employees of Room to Grow Pre-school; and
>
> i. failing to report suspected or known child abuse.

(R. 5).

Monroe filed an intervening complaint, seeking a declaration of rights regarding its obligation to defend and indemnify Bing and Room to Grow. The Monroe Policy included an endorsement for Day Care Professional Liability coverage, but that endorsement contained several exclusions. Monroe also moved for summary judgment, arguing: (1) sexual abuse is not an "occurrence" under the

general liability definition of occurrence; (2) all of the daycare endorsement's exclusions apply; and (3) Bing and Room to Grow failed to timely report the claims.

By order entered October 6, 2016, the circuit court granted Monroe's motions for declaratory and summary judgment. Relying on *K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 752 (Ky. App. 2005), the circuit court found no insurance coverage exists for Brianna's injuries, because those injuries arose from violations of multiple sections of KRS[2] Chapter 510. Violations of a statute or government rule, the circuit court reasoned, are specifically excluded from coverage under the daycare endorsement. It then concluded Monroe owed no duty to provide insurance coverage for Brianna's claim and, because there was no genuine issue of material fact as to the coverage under the Monroe Policy, Monroe was entitled to summary judgment. From this order, Brianna and Bing/Room to Grow appealed.

STANDARD OF REVIEW

"It is well settled that the proper interpretation of insurance contracts generally is a matter of law to be decided by a court; and, thus, an appellate court uses a de novo, not a deferential, standard of review." *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 73 (Ky. 2010). Likewise, when a declaratory judgment has been entered "and no bench trial held, the standard of

[2] Kentucky Revised Statutes.

review for summary judgments is utilized." *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010). Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). It involves only questions of law with the simple determination of whether a fact question exists. *Allstate Insurance Company v. Smith*, 487 S.W.3d 857, 860 (Ky. 2016). Our review is *de novo*. *Furlong Development Co., LLC v. Georgetown-Scott County Planning and Zoning Commission*, 504 S.W.3d 34, 37 (Ky. 2016).

ANALYSIS

When an insurance contract's terms are unambiguous and reasonable, they will be enforced. *Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 630 (Ky. 2005). We strictly construe policy exceptions and exclusions to make insurance effective. *Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164, 166 (Ky. 1992). "Any ambiguities in an insurance contract must be resolved in favor of the insured, but this rule of strict construction certainly does not mean that every doubt must be resolved against the insurer and does not interfere with the rule that the policy must receive a reasonable interpretation consistent with the plain meaning in the contract." *Tower Insurance Company of New York v. Horn*, 472 S.W.3d 172, 174 (Ky. 2015).

Before examining the parties' specific arguments, we first must identify the relevant portions of the insurance policy at issue. The Monroe Policy's General Liability Coverage provides that Monroe "will pay those sums that the Insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . caused by an 'occurrence.'" (R. 443). The policy's daycare endorsement "modifies [the] insurance provided" by providing coverage for "bodily injury" or "other 'injury' arising out of the rendering or failure to render professional services in connection with the operation of the Insured's business as a daycare." (Daycare Endorsement, A., R. 455). However, the daycare endorsement also contains three exclusions from coverage. Specifically, it excludes coverage for bodily or other injury "arising out of:"

> 1. The violation of any statute, or governmental rule or regulation.
>
> 2. Liability of an Insured, if an individual, for personal acts or omissions of a nature other than day care.
>
> 3. Dishonest, fraudulent, criminal, or malicious acts or omissions of the Insured, any partner or employee.

(Daycare Endorsement, C.1-3, R. 465).

The circuit court found the "violation of any statute" exclusion precluded coverage for Brianna's injuries caused by sexual molestation. It reasoned that Brianna's injuries arose from violations for multiple sections of KRS Chapter 510.

The appellants claim that the exclusion is inapplicable because the claims in Brianna's complaint do not arise from the "violation of any statute," but out of common law negligence. They rely on an unpublished opinion of this Court which addressed the applicability of an insurance policy exclusion to claims raised by a student who was sexually molested by a teacher and sued his local school board for negligence in failing to provide a safe school environment and for violating his substantive due process rights. *Kentucky School Boards Ins. Trust v. Board of Educ. of Woodford County*, 2002-CA-001748-MR, 2003 WL 22520018 (Ky. App. Nov. 7, 2003). The board's insurance policy contained an exclusion for claims "based upon or arising out of bodily injury, sickness, disease or death, mental or emotional injury or distress" and "based upon or arising out of false arrest, assault and battery, detention or imprisonment." *Id.* at *3. In a 2-1 decision, the Court held that the exclusions did not apply. It reasoned that the student's negligence claims did not "arise out of" the sexual assault because the assault was not directly caused by the school board. The Court concluded "that when negligence allows a crime to occur, the claim against the negligent party arises from the negligence rather than the criminality." *Id.* at *11.

In a more recent published opinion, however, this Court interpreted the phrase "arising out of" in a broader manner. *Hugenberg v. West American Ins. Company/Ohio Cas. Group*, 249 S.W.3d 174 (Ky. App. 2006). In *Hugenberg*, the

parents of a teenaged passenger injured in a car accident sued the parents of the teenaged driver for negligent supervision. The driver's parents' homeowner's insurance policy contained an exclusion for bodily injury arising out of the use of a motor vehicle by an insured. The appellants asserted that the exclusion did not apply because the negligent supervision claim against the parents did not "arise out of" their use of a motor vehicle. The Court disagreed, reasoning that the negligent supervision claim was based on the bodily injury suffered by the passenger. It explained that "no cause of action lies for negligence unless the plaintiff has suffered a legally-cognizable injury or damage." *Id*. at 187. If not for the driver's losing control of the car and injuring the passenger, there could be no claim of negligent supervision against the driver's parents because the passenger would have suffered no injury, an essential element of the tort. *Id*. Similarly, but for the physical and psychological injuries Brianna sustained as a result of the assault by the unknown assailant, she would have no negligence claims to assert against Thomas and Room to Grow. *Id*. "The allegations of the complaint cannot compel a defense if coverage does not exist. The obligation to defend arises out of the insurance contract, not from the allegations of the complaint against the insured." *Thompson v. West American Ins. Co.*, 839 S.W.2d 579, 581 (Ky. App. 1992) (quoting *Cincinnati Ins. Co. v. Vance*, 730 S.W.2d 521, 524 (Ky. 1987).

The appellants further argue that the trial court's grant of summary judgment was based on the erroneous assumption that the assault against Brianna violated Kentucky's Penal Code, specifically KRS Chapter 510, which codifies criminal sexual offenses. They contend that the adults who could have committed the assault have been ruled out (Bing was not charged by the police and Dr. Robinson was acquitted at trial), and there is no evidence the two remaining suspects, Madison (who was five years of age at the time) or Jacob (who was thirteen) had the mental capacity to commit a crime.

But there is no evidence in the record that Madison or Jacob committed the assault beyond Brianna's own statement, made at two years of age, implicating Madison. The only evidence regarding the age of the perpetrator came from Dr. Boles who opined that the injury was not caused by a child. This medical opinion led the police to investigate two adult suspects: Bing and Dr. Robinson.

Rather than speculating about the identity of the perpetrator, we focus on the language of the exclusion which refers to the "violation of any statute." It is unthinkable that the penetration of the vagina of a two-year-old child, resulting in four lacerations, is not violative of our statutes, regardless of the identity of the perpetrator and regardless whether a conviction could be obtained. The language of the exclusion does not specify that the statutory violation must result in a conviction. "[T]he customary meaning of violation tends toward the broad (any

failure to conform to a legal standard) rather than the narrow (a criminal conviction)." *Prewett v. Weems*, 749 F.3d 454, 458 (6th Cir. 2014). "A violation of law is not synonymous with conviction, nor does it necessarily mandate conviction." *Commonwealth v. Gerald*, 47 A.3d 858, 861 (Pa. Super. Ct. 2012). The plain language of the policy exclusion does not require a conviction for a criminal offense nor does it require identification of the perpetrator. "[I]t is inappropriate to find coverage in a policy that is meant to cover professional errors or mistakes, when the claims made arise from deliberate and systematic wrongful acts." *Employers Ins. of Wausau v. Martinez*, 54 S.W.3d 142, 144 (Ky. 2001). The nature and severity of Brianna's injuries leaves no doubt that the act violated a statute, whether the perpetrator could be identified and convicted or not.

The appellants contend that the exclusion renders the policy illusory as virtually any claim against Room to Grow would fall within its parameters. Any negligent conduct on the part of the day care, they contend, would fall afoul of some statute or regulation because day care is such a heavily regulated industry.

"The doctrine of illusory coverage . . . operates to qualify the general rule that courts will enforce an insurance contract as written." *Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 128 (Ky. App. 2012). The doctrine applies when the language of the policy, "if interpreted as proffered by the insurer, essentially denies the insured most if not all of a promised benefit." *Id*. (citations

omitted). Illusory coverage is coverage "that is at least implicitly *given* under its provisions and then *taken away*, whether by virtue of a prohibition or exclusion contained in the same policy, or by virtue of a strict legal definition[.]" *Id.* at 129.

The main body of the Monroe policy provides coverage for "bodily injury" and "property damage" only if it is "caused by an "occurrence" that takes place in the "coverage territory." An "occurrence" is defined in the definitions section of the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The definition of occurrence is amended in the day care endorsement section to include "any act or omission arising out of the rendering of or failure to render professional services as a day care." The illusory coverage doctrine is "is best applied . . . where part of the premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent." *Id.* (quoting *Jostens v. Northfield Energy Co.*, 527 N.W.2d 116, 119 (Minn. Ct. App. 1995)) The exclusion does not render the coverage illusory because injuries arising from occurrences or professional errors or mistakes which do not arise from statutory or regulatory violations are covered. The argument that there is practically no injury at a day care which would not violate a statute or regulation is hypothetical and does not render the coverage illusory. This would not defeat the reasonable

expectation that the insurance would cover the day care for accidents and occurrences, but not those arising from criminal acts or regulatory violations.

The appellants argue that the exclusion also violates the doctrine of reasonable expectations, which provides that "the insured is entitled to all the coverage he may reasonably expect to be provided under the policy." *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Papa John's Int'l, Inc.*, 29 F. Supp. 3d 961, 970 (W.D. Ky. 2014) (quoting *Simon v. Continental Ins. Co.*, 724 S.W.2d 210, 212 (Ky. 1986)). They argue that Room to Grow would have purchased the policy with the reasonable expectation of insurance coverage for negligence claims and would have read the "violation of any statute" exclusion as precluding coverage only for regulatory or administrative actions against the day care. "Reasonable expectations are not ascertained from the subjective belief, however genuine, of the insurance applicant." *Id*. at 971 (quoting *Sparks*, 389 S.W.3d at 128). Rather, "the test in determining reasonable expectations is based on construing the policy language as a layman would understand it, rather than considering the policyholder's subjective thought process regarding his policy." *Id.* (quoting *Sparks, supra*). "Only actual ambiguities in the policy language will trigger the doctrine of reasonable expectations." *Id*. (quoting *Sparks, supra*). Our review of the policy exclusions reveals no ambiguities that would trigger the doctrine of reasonable expectations. The exclusion is unambiguous and

the appellants' own arguments have focused on what they see as its excessive breadth, rather than its purported ambiguity. Thus, the doctrine of reasonable expectations is not applicable.

CONCLUSION

For the foregoing reasons, we affirm the Calloway Circuit Court's October 6, 2016 order granting declaratory and summary judgment to Monroe Guaranty Insurance Company.

LAMBERT, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent.

We will likely never know what happened to Brianna when she was two years old, whether she experienced a "serious fall" as Dr. Crouch first said was a possibility, or whether it resulted from an intentional act by another child or an adult, neither of which Dr. Deeter could rule out. (R. 690 (intake record from CHFS stating "Dr. Deeter s[ai]d she could not rule in or out if trauma was done by adult or child")). Dr. Boles agreed with Dr. Deeter that Brianna's injuries were caused when "someone tried to penetrate her w/ a blunt object." (*Id.*) Brianna's own reply brief says, "[T]he earliest evidence pointed to the five-year old [Madison], as the first person named as the perpetrator." (Brianna reply brief, p. 5.) The proof is that, after interacting with Madison, "Brianna has tried to put

something into the vagina a couple of times this past week which is the first time this has happened." (R. 696.)

Our natural compassion makes it easy to get caught up in identifying the direct "cause" of Brianna's injury rather than the real issue, whether there is coverage for claims against the day care business for negligence in taking care of Brianna. On that issue, the record on appeal is quite clear. It supports the legal conclusion that Monroe had an obligation to cover the claim against Mr. Thomas for negligence in operating the day care pre-school Brianna attended.

To start, and as the majority notes, the Endorsement for Day Care Professional Liability insurance appended to the base contract expanded Mr. Thomas's insurance coverage. In addition to Monroe's agreement in the base policy to be legally obligated to pay damages "caused by an occurrence[,]" (R. 443), the Endorsement says:

> BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages) also applies to 'bodily injury', 'property damage' or other 'injury' arising out of the rendering of or failure to render professional services in connection with the operation of the Insured's business as a day care.

(R. 465.) This can only be understood as insuring against negligent acts or omissions in operating a day care business – the essence of Brianna's claims.

Whether this additional coverage is qualified by the "occurrence" language of the base policy is a matter of contract interpretation. Did the parties to

the Endorsement intend to append the additional coverage language to the end of the Coverage section in the base policy as a new Section I.A.1.d.? If so, the "occurrence" condition in Section I.A.1.b. would not affect it. That section's reference to "This insurance" would obviously be conditioning only the previous insurance coverage language of Section I.A.1.a. Because this additional coverage provision reasonably could be interpreted either way, its ambiguity must be decided in favor of coverage – just as the majority previously indicated by citing *Tower Ins. Co. of New York v. Horn*, 472 S.W.3d 172, 174 (Ky. 2015).

Even if the "occurrence" limitation applies, Brianna's claim is still covered. Her claim against Mr. Thomas asserts nine kinds of negligent "rendering of or failure to render professional services in connection with the operation of the Insured's business as a day care[,]" but there is no assertion of an intentional act. A plain reading of the policy's definition of "occurrence" reveals this is precisely the kind of non-intentional conduct Monroe intended to insure. It says:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(R. 451.) Monroe defines "occurrence" with the somewhat synonymous word, "accident." Black's Law Dictionary defines "accident," in part, as "An unintended and unforeseen injurious occurrence . . . ." *Accident*, BLACK'S LAW DICTIONARY

(11th ed. 2019). From Mr. Thomas's vantage, what happened to Brianna was both unintended and unforeseen. Furthermore:

> Our Supreme Court has pronounced that "occurrence" is to be given broad and liberal construction in favor of extending coverage. If the injury was not actually and *subjectively* intended, the coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable. *Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Company*, Ky., 814 S.W.2d 273 (1991).

Thompson v. West American Ins. Co., 839 S.W.2d 579, 580 (Ky. App. 1992) (emphasis added). Brianna's injury fits that definition. Brianna's claims were covered by this policy of insurance.

Not only is there coverage, there is no exclusion that eliminates Monroe's contractual obligation to defend Mr. Thomas and to pay any damages award attributable to his negligently rendering or failing to render professional services in operating his day care. As part of the base policy, the first exclusion found in Section I.A.2.a. says: "This Insurance does not apply to: a. Expected or intended injury[;] 'Bodily injury' or 'property damage' expected or intended from the standpoint of the Insured." (R. 443.) Neither the circuit court nor the majority find that this exclusion applies. But if the reason for excluding the claim against Mr. Thomas is he (or one of his employees[3]) was the perpetrator of the assault,

[3] The base policy defined Mr. Thomas and his spouse as Insureds. The Endorsement expanded the definition of "Insureds" to include his employees.

why not rely on this exclusion? The answer is that the record does not support a finding that Mr. Thomas or his employees assaulted Brianna. Therefore, we must look to the Endorsement, as the circuit court and the majority did, where we will find the additional exclusions.

The Endorsement added three potentially relevant exclusions.[4] The majority fails to note something significant about them. They apply only to the expanded coverage provision set out in the endorsement for damages "arising out of the rendering of or failure to render professional services in connection with the operation of the Insured's business as a day care." (R. 465.) Specifically, the Endorsement says, "Only with respect to *coverage provided by this endorsement*, the following exclusions are added to paragraph [Section I.A.]2." of the base policy. (*Id.* (emphasis added)). This makes a difference in analyzing the exclusion the majority identifies as precluding coverage. That exclusion is "[t]he violation of any statute, or governmental rule or regulation." (*Id.*)

However, before considering that exclusion, one must ask why the others did not apply.

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[4] A fourth irrelevant exclusion excluded coverage when the Insured performed specific services other than operation of a day care business, namely: (1) medical, dental, surgical and similar services; (2) skin enhancement, hair removal, replacement or grooming services; and (3) any health or therapeutic service or treatment. (R. 465.)

The second of the three additional exclusions says Monroe will not cover any "[l]iability of an Insured, if an individual, for personal acts or omissions of a nature other than day care." (*Id.*) Clearly, sexually assaulting a two-year-old child is conduct "of a nature other than day care." But this exclusion cannot apply because there is no substantial evidence, practically no evidence at all, that Mr. Thomas or his employees sexually assaulted Brianna.

If there were such evidence, the third exclusion would also apply. That exclusion precludes coverage for "criminal . . . acts . . . of the Insured, any partner or employee." (*Id.*) But the third exclusion does not apply for the same reason the second exclusion does not apply – there is not enough evidence to support it. That leaves only the first exclusion.

The majority affirmed the circuit court by agreeing that the first additional exclusion fit the evidence about which there was no genuine dispute. To reach that conclusion, the circuit court necessarily presumed certain facts that have never been established.

First, the circuit court had to presume that Brianna's injury was sustained at the day care, despite contrary evidence sufficient to indict her father who, obviously, would not have committed the crime at the day care.

Second, the circuit court had to presume the actor who caused Brianna's injury was capable of criminal intent, despite evidence it could have

been five-year-old Madison or Mr. Thomas's thirteen-year-old son – *i.e.*, persons legally incapable of violating a criminal statute. "At common law a child under the age of seven years is conclusively presumed to be incapable of committing a crime. The common law rule raises a [rebuttable] presumption of incapacity of an infant between the ages of seven and fourteen . . . ." *Spurlock v. Commonwealth*, 311 Ky. 238, 242, 223 S.W.2d 910, 912 (1949). It is not a practical impossibility that Brianna's injuries were inflicted by someone legally incapable of violating a statute, notwithstanding the majority's contrary assessment of the evidence.[5] Such a practical evidentiary possibility is enough to prevent a summary judgment.

These presumptions might fairly be called mere inferences reasonably drawn from undisputed facts. Although the circuit court cannot resolve factual disputes on a motion for summary judgment, it is certainly permitted – in fact, it is required – to draw such reasonable inferences. But the court erred by drawing these inferences in favor of the wrong party – the summary judgment movant, Monroe. Such a ruling directly contravenes our well-entrenched rule requiring all inferences to be drawn in a light most favorable to the non-moving party, and all

[5] The majority says the only evidence regarding the age of the perpetrator was Dr. Boles's opinion that the injury was not caused by a child. Contrary to prohibitions against a reviewing court's weighing of evidence, the majority ascribed no weight to two-year-old Brianna's identification of non-adults as her perpetrator. Furthermore, there was medical opinion, from both Dr. Boles and Dr. Deeter, that the injury was caused by the insertion of a blunt object in Brianna's vagina – something not beyond the ability of a non-adult. Brianna herself was seen engaging in this very behavior after she had accused Madison of the same thing.

factual and inferential doubts to be resolved in that party's favor. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

After erroneously drawing these inferences in favor of Monroe, the circuit court – and now the majority – tailored, even tortured, our case law to suit the first additional exclusion. Both courts begin by misapplying *K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751 (Ky. App. 2005).

The insurance in *K.M.R.* was a homeowner's policy; Tommy and Elizabeth Conrad were the policyholders. *Id.* at 752. When twelve-year-old K.M.R. visited, Tommy sexually assaulted her; "Tommy pled guilty to two counts of sexual abuse in the first degree." *Id.* When K.M.R. and her mother brought civil suit, Tommy claimed coverage under the homeowner's policy. The insurer refused to entertain K.M.R.'s claim because an "exclusion denie[d] coverage to each of its insureds for damages intentionally caused by any one of them. Within the context of liability insurance, Tommy's acts of sexual molestation were intentional as a matter of law." *Id.* at 755.

This Court in *K.M.R.* found controlling a coverage exclusion nearly identical to that in the subject base policy (R. 443; Section I.A.2.a.) and other exclusions in the Endorsement that, though not identical, were similar in substance (R. 465; Endorsement C.2, C.3). As noted above, those exclusions were not found controlling here because, as explained earlier, the facts cannot support the finding.

Instead, the majority affirmed the circuit court by accepting its analysis that "the 'violation of any statute' exclusion precluded coverage . . . ." As a reminder, that language did not exclude coverage provided by the base policy; that exclusion was "[o]nly [applicable] with respect to coverage provided by this endorsement[.]" The coverage provided by the Endorsement was against claims "arising out of the rendering of or failure to render professional services in connection with the operation of the Insured's business as a day care." To give meaning to the restriction of *this* exclusion to *this* coverage, the contract must be interpreted as referencing the violation of laws regulating Mr. Thomas's "business as a day care." *K.M.R.* so dramatically differs from the case under review that it does nothing to inform the analysis. Other cases relied upon by the majority are similarly inapposite.

The majority cites *Hugenberg v. West American Ins. Company/Ohio Cas. Group*, 249 S.W.3d 174 (Ky. App. 2006) and focuses on its interpretation of the phrase "arising out of" to explain that the violation-of-laws *exclusion* is broader than simply applying to violations of day care regulations committed by Mr. Thomas. But the majority misinterprets *Hugenberg*.

The "arising out of" language in *Hugenberg* is actually found in the exclusion provision of the Hugenbergs' homeowner's policy; the "arising out of"

language in the policy before us is found in the coverage provision. It is hard to overstate the significance of that distinction. *Hugenberg* says:

> "the motor vehicle *exclusion*" in the policy . . . states, in relevant part, that the policy's coverage provisions for personal liability and medical payment to others "do not apply to 'bodily injury' . . . *[a]rising out of* . . . [t]he ownership, maintenance, use, loading or unloading of motor vehicles . . . owned or operated by or rented or loaned to an 'insured.'"

Id. at 185 (emphasis added). Significantly, the Court went on to say, "This phrase has been construed expansively" and quoted a federal case that said: "The words 'arising out of[']. . . are broad, general and comprehensive terms meaning 'originating from,' or 'having its origin in,' 'growing out of' or 'flowing from' . . . ." *Id.* at 186 (quoting *Insurance Co. of North America v. Royal Indemnity Co.*, 429 F.2d 1014, 1017-18 (6th Cir. 1970)).

If this phrase – "arising out of" – requires an expansive interpretation when actually written into an insurance policy *exclusion*, certainly it is no less expansive when it is actually written into a *coverage* provision as in this case.

The policy coverage in the Endorsement is for claims of bodily injury "*arising out of* the rendering of or failure to render professional services in connection with the operation of the Insured's business as a day care." If the circuit court and the majority had faithfully followed *Hugenberg*, they would have

read the coverage as expansive and found coverage for Brianna's claims of Mr. Thomas's negligent operation of a day care.

The majority's reliance on *Thompson v. West American Ins. Co*. is also misplaced. The case involves another homeowner's policy. The issue was "whether [the insurer] has a duty to defend or indemnify Thompson in an underlying civil action filed against him for his alleged acts of sexual molestation." 839 S.W.2d at 580. Differing dramatically from Brianna's allegations, the complainant's allegations in *Thompson* were that the policyholder, "Thompson[,] repeatedly performed unlawful sexual acts on him at Thompson's residence in Jefferson County . . . ." *Id.* The issue then before this Court was not the scope of the exclusions; the issue was the scope of the coverage.

Like the base policy in the case under review, coverage for Thompson was only available if the "claim is made or suit is brought against an insured for damages to cover bodily injury or property damage caused by an occurrence to which this coverage applies . . . ." *Id.* After explaining "that 'occurrence' is to be given broad and liberal construction in favor of extending coverage[,]" this Court rejected Thompson's "utterly absurd" argument that because the complaint also included a single count of negligence amongst the claims of sexual assault and other intentional torts, the harm the claimants suffered at his hands was not intentional for purposes of insurance coverage. *Id.* at 580-81.

Quoting *Thompson* out of context, the majority here says "allegations of the complaint cannot compel a defense if coverage does not exist. The obligation to defend arises out of the insurance contract, not from the allegations of the complaint . . . ." *Id.* at 581. A more complete quote shows how starkly *Thompson* differs from this case:

> In a final attempt to save this case from the defeat of summary judgment, Thompson points out that the complaint alleges negligence, thus, West American has a duty to defend and indemnify on that claim. The allegations of the complaint cannot compel a defense if coverage does not exist. The obligation to defend arises out of the insurance contract, not from the allegations of the complaint against the insured. *Cincinnati Ins. Co. v. Vance*, Ky., 730 S.W.2d 521 (1987). Here, the acts alleged against Thompson are that he sexually molested Sachse and Meyer. The intentional act of sexual molestation is the equivalent of an intent to harm. "There is no such thing as negligent or reckless sexual molestation." *J.C. Penny Casualty Ins. Co. v. M.K.*, 52 Cal.3d 1009, 278 Cal.Rptr. 64, 804 P.2d 689 (Cal. 1991).

Id. Brianna does not accuse Mr. Thomas of sexually assaulting her. As she notes in her reply brief, "the allegations in this case are not that a Defendant (John Abington Thomas, or any employee of Room To Grow Pre-school) committed an act of abuse." (Brianna reply brief, p. 1.) Rather, she accuses Mr. Thomas of negligently rendering or failing to render professional services in connection with the operation of his business as a day care. *Thompson* tells us nothing useful to our review of this case or to our interpretation of the insurance policy.

Next, the majority returns to the language of the Endorsement's additional coverage exclusion for the "violation of any statute." No one disputes that if a sexual perpetrator is responsible for the injury Brianna suffered, that person broke a law. However, there is no proof that Mr. Thomas violated any law. The criminal investigation – including Mr. Thomas's polygraph and comparative DNA analysis – led the police to drop Mr. Thomas even as a suspect. And as Brianna herself says, her complaint "does not allege any statutory violation . . . [nor] even mention any statute or regulation." (Brianna appellant brief, p. 9).

As already noted above, the "violation-of-any-statute" exclusion applies only to the additional coverage described in the Endorsement relating to the operation of a day care business. That limits the applicable violable laws to those regulating day care businesses. Although appellees reference KRS 199.898 and 922 KAR[6] 2:090, *et seq*., governing day care businesses, there is nothing in the record suggesting the Cabinet for Health Services' (now Cabinet for Health and Family Services) Division of Licensed Child Care investigated the incident. The first of the additional exclusions simply does not apply.

The majority purports to find other support in our jurisprudence for excluding coverage. It first notes that the policy language does not require a conviction of the alleged violator of any law. Furthermore, notwithstanding the

[6] Kentucky Administrative Regulations.

absence of any authority for saying so, the majority also held that not even the identity of the law violator need be known.[7] Quoting *Employers Ins. of Wausau v. Martinez* for the straw-man analysis that a conviction is not necessary for the exclusion to apply, the majority says, "it is inappropriate to find coverage in a policy that is meant to cover professional errors or mistakes, when the claims made arise from [the insured's] deliberate and systematic wrongful acts." 54 S.W.3d 142, 144 (Ky. 2001). More specifically, the Supreme Court held that "exclusion of coverage . . . provisions of the insurance policy do not require that *the insured* be convicted of the offense." *Id.* at 143 (emphasis added). The insured, the policyholder in *Martinez*, was not convicted of a crime; neither was Mr. Thomas. That does not mean that *Martinez* is on point. It is not, not even close.

The claim in *Martinez* was for civil damages for the crime of cemetery mismanagement and misconduct by Wausau's policyholder, the Louisville Crematory and Cemeteries Company, Inc. *Id.* "Since the early 1900s, the cemetery [company] had interred bodies in already occupied graves . . . [and] 80,000 individuals had been buried in a cemetery designed to hold 15,000." *Id.* Facing criminal charges, "the cemetery's corporate personnel . . . agreed to

[7] However, it does require *corpus delicti*. *Corpus delicti* means the body of the crime and in battery cases, including cases of sexual battery, proof of the *corpus delicti* requires a showing of (1) injury and (2) that the injury resulted from the criminal agency of another. *See Dolan v. Commonwealth*, 468 S.W.2d 277, 282 (Ky. 1971). If Brianna's injuries were caused by someone psychologically or mentally incapable of forming criminal intent, there is no *corpus delicti*.

participate in a diversion program." *Id.* In the case before us, there is no evidence of Mr. Thomas's knowing violation of any penal or other statute.

Martinez is patently distinguishable. It does not, as the majority suggests, hold that knowing *who* violated a statute is unnecessary for the "violation-of-any-statute" exclusion to apply. It does indicate the opposite and obvious, however; – an insurer can deprive an insured of coverage when the insured himself violates a statute. In this way, Mr. Thomas's circumstances are entirely unlike those in *Martinez*. For that matter, this case is equally unlike *K.M.R.*, *Hugenberg*, and *Thompson*. In each case, not only was the violator of a law identified, the violator was the policyholder. That is why coverage was excluded. That simply is not so in the case before us and Brianna does not claim otherwise. There is no factual or legal reason for excluding coverage in this case.

Additionally, the majority finds significance in the fact that Mr. Thomas did not, to quote the majority, "notify Monroe of the assault or the subsequent police investigation." Why would he? Monroe has argued all along that Mr. Thomas's policy does not cover claims seeking damages for intentional criminal conduct. If he was the perpetrator, does it make sense for the law to expect him to make the kind of "utterly absurd" claim Thompson made in *Thompson v. West American Ins. Co.*? If he was not the perpetrator – and the

police investigation quickly so concluded – there was no claim of any kind about which to notify Monroe.

Monroe tries to avoid coverage by arguing it "never received any notice of this matter until more than a decade after the incident." (Monroe appellee brief, p. 2). This assertion approaches disingenuity. For eleven years there was no claim at all until Brianna's mother hired an attorney. On November 9, 2011, that attorney sent a demand letter addressed simply to Room To Grow Preschool. Monroe acknowledges receiving it from Mr. Thomas that same day. (*Id.*, citing R. 533). A little less than two years later, Brianna's mother sued Mr. Thomas and his day care business. For the first time, the allegations were of negligence and not allegations of a crime. So, Mr. Thomas claimed coverage, having sent notice of the claim to Monroe two years earlier.

Monroe complains that the delay in being notified of the claim prejudiced Mr. Thomas's defense. We should not be surprised that Mr. Thomas and the day care may not have preserved, for more than a decade, every record that would have helped defend it against this claim. Unfortunately, that is the nature of claims we would call stale except for statutes that preserve them while the plaintiff is under a disability.

In summary, the record does not support a finding either that Mr. Thomas intended Brianna's injury nor that he foresaw it. Thus, the record does not

support excluding Brianna's claims from coverage under this insurance policy. The risk of harm attributable to the negligent operation of a day care is the reason Mr. Thomas wanted insurance and the reason Monroe was willing to sell it to him – to underwrite the risks that Mr. Thomas neither intended nor could reasonably foresee. Mr. Thomas did not need to rely on the doctrines of illusory coverage or reasonable expectations. A proper interpretation of the insurance contract in the context of our basic jurisprudence regarding insurance contracts is sufficient.

For the foregoing reasons, I respectfully dissent.

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