

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

WEST BEND MUTUAL INSURANCE  
COMPANY,

Plaintiff,

vs.

IMPACT DYNAMIC TRAINING, LLC;  
and REY CASTILLO

Defendants.

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Case No. 13-03345-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING PLAINTIFF WEST BEND MUTUAL  
INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION

In this declaratory-judgment action, Plaintiff West Bend Mutual Insurance Company (“West Bend”) has asked the Court to absolve it of any duty to defend or indemnify the defendants – Impact Dynamic Training, LLC (“Impact”) and Rey Castillo – in connection with an underlying civil action arising from the criminal sexual assault upon Kaylee Tonneberger by an Impact employee, Florencio Castillo. Specifically, although West Bend concedes that it furnished insurance coverage to Impact and Rey Castillo, West Bend contends that policy exclusions render the underlying litigation beyond the scope of the coverage West Bend contractually agreed to provide. Indeed, West Bend has moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that the defendants have no basis for demanding either a defense from West Bend in the underlying lawsuit or indemnification for any damages awarded in that underlying case. Because the Court concludes that two specific exclusions – the “abuse or molestation exclusion” and “employment-related practices exclusion” – bar coverage, the Court must grant summary disposition to West Bend.

## I. Factual Background

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” Maiden v Rozwood, 461 Mich 109, 120 (1999). In evaluating such a motion, the Court must consider the “affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion.” Id. Thus, the Court may look beyond the pleadings in order to set the factual background of this dispute. But because Plaintiff West Bend has sought a declaratory judgment addressing insurance coverage for potential liability arising from an underlying civil suit, the Court must focus in the first instance upon the allegations in that action to resolve the coverage dispute presented in the instant case. See Fitch v State Farm Fire and Casualty Co, 211 Mich App 468, 471 (1995).

Plaintiff West Bend provided insurance coverage to the defendants under a written insurance policy. See Amended Complaint for Declaratory Relief, Exhibit 1. Beginning in November 2011, Kaylee Tonneberger trained at Defendant Impact as a student volleyball player.<sup>1</sup> See Tonneberger v Castillo, 17th Circuit Ct No 13-00868-NO (Complaint, ¶ 7). In addition, Impact employed Ms. Tonneberger as a student referee for volleyball tournaments beginning in December of 2011. See id. (Complaint, ¶ 10). Defendant Rey Castillo, who owned Impact, employed his brother, Florencio Castillo, as a trainer at Impact. See id. (Complaint, ¶¶ 8-9, 12). On April 15, 2012, Ms. Tonneberger was sexually assaulted by Florencio Castillo, id. (Complaint, ¶¶ 13, 15), who perpetrated the crime

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<sup>1</sup> The facts presented by the Court are drawn primarily from the complaint in Tonneberger v Castillo, 17th Circuit Ct No 13-00868-NO. Plaintiff West Bend attached a copy of that complaint as Exhibit 2 to its Amended Complaint for Declaratory Relief in the instant case. Additionally, the Court has consulted the file in the underlying case and learned that the underlying case was “settled at case evaluation.” See Tonneberger v Castillo, 17th Circuit Ct No 13-00868-NO (Mediation Status Report filed February 19, 2014). Consequently, the original complaint almost certainly will not be amended in the underlying case.

under the guise of a massage while Ms. Tonneberger was working for Impact at a volleyball event. See id. (Complaint, ¶¶ 13, 15). Florencio Castillo ultimately was charged with committing criminal sexual conduct against Ms. Tonneberger and several other victims. He pleaded guilty and received a sentence of two to 15 years in prison. See People v Castillo, 17th Circuit Ct No 12-04637-FH.

On January 28, 2013, Ms. Tonneberger filed suit against Florencio Castillo, Defendant Rey Castillo, and Defendant Impact. The seven-count complaint included claims against Rey Castillo and Impact for sexual harassment, negligent hiring, and negligent infliction of emotional distress. See Tonneberger v Castillo, 17th Circuit Ct No 13-00868-NO (Complaint, ¶¶ 17-35, 42-55). Then, on April 12, 2013, Plaintiff West Bend filed a Complaint for Declaratory Relief in the instant case, disclaiming a duty to defend and indemnify Rey Castillo and Impact in the underlying action. After West Bend filed an amended complaint seeking declaratory relief, West Bend moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that exclusions in the insurance policy written for Rey Castillo and Impact necessarily defeated coverage for all of the claims in the underlying suit brought by Ms. Tonneberger. Accordingly, the Court must determine whether West Bend has a duty to defend and indemnify Rey Castillo and Impact in the underlying action.

## II. Legal Analysis

Michigan law recognizes a duty to defend and a duty to indemnify in the insurance context. Although “the duty to defend is broader than the duty to indemnify[,]” American Bumper and Mfg Co v Hartford Fire Ins Co, 452 Mich 440, 450 (1996), “[t]he duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy.” Id. Consequently, “[i]f the policy does not apply, there is no duty to defend,” id., and necessarily no duty to indemnify

either. Summary disposition on the duty to defend and the duty to indemnify “is not proper where the evidentiary record is not fully developed or where there is a genuine issue of material fact.” St Paul Fire & Marine Ins Co v Michigan Mutual Ins Co, 469 Mich 905, 905 (2003), citing Polkow v Citizens Ins Co of America, 438 Mich 174, 180-181 (1991). Conversely, summary disposition must be granted “under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact.” West v General Motors Corp, 469 Mich 177, 183 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” Id.

The dispute in this case turns upon the construction of an insurance policy written by Plaintiff West Bend for Defendants Impact and Rey Castillo. Our Supreme Court has ruled that an insurance policy is “subject to the same contract construction principles that apply to any other species of contract.” Rory v Continental Ins Co, 473 Mich 457, 461 (2005). As a result, an insurance policy “must be enforced in accordance with its terms.” Frankenmuth Mut Ins Co v Masters, 460 Mich 105, 111 (1999). “Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage.” Auto-Owners Ins Co v Harrington, 455 Mich 377, 382 (1997). But in any event, a court cannot “hold an insurance company liable for a risk it did not assume.” Frankenmuth Mut Ins, 460 Mich at 111. Applying all of these principles, the Court must determine whether West Bend is obligated to defend and indemnify the defendants.

The insurance policy at issue requires Plaintiff West Bend to indemnify Defendants Impact and Rey Castillo for liability to third parties for “‘bodily injury’ . . . to which this insurance applies” and “to defend the insured[s] against any ‘suit’ seeking those damages.” See Amended Complaint

for Declaratory Relief, Exhibit 1 (Commercial General Liability Coverage Form, Section I, ¶ 1(a)).

But the insurance policy contains exclusions that limit coverage in situations such as this. First, the policy includes an “abuse or molestation exclusion,” which states:

This insurance does not apply to “bodily injury” . . . arising out of (1) The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or (2) The negligent (a) Employment; (b) Investigation; (c) Supervision; (d) Reporting to the proper authorities, or failure to so report; or (e) Retention; of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph (1) above.

See Amended Complaint for Declaratory Relief, Exhibit 1. Second, the policy contains an exclusion for “employment-related practices,” which provides:

This insurance does not apply to: “[b]odily injury” to (1) [a] person arising out of any . . . [e]mployment-related practices, policies, acts or omissions, such as coercion [or] harassment[.]

See id. These two exclusions fit this situation like a glove. The “abuse or molestation exclusion” contemplates bodily injury arising from circumstances precisely like those that caused bodily injury to Ms. Tonneberger. Even if Ms. Tonneberger somehow fell outside “the care, custody, and control” of Defendants Impact and Rey Castillo when she was working as a student volleyball referee, there can be no doubt that Ms. Tonneberger’s “bodily injury” resulted from “coercion” or “harassment,” as contemplated by the “employment-related practices” exclusion.<sup>2</sup> Consequently, the Court cannot impose upon Plaintiff West Bend an obligation to defend and indemnify Impact and Rey Castillo for Ms. Tonneberger’s bodily-injury claims in the underlying lawsuit.

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<sup>2</sup> Another exclusion applicable to “massage activities” also seems to defeat coverage for the claims presented by Ms. Tonneberger. That exclusion provides that “[t]his insurance does not apply to ‘bodily injury’ . . . arising out of the activities of any masseur, masseuse or any person conducting massage-type activities.” See Amended Complaint for Declaratory Relief, Exhibit 1. To be sure, Defendant Impact employed Florencio Castillo as a trainer, as opposed to a masseur, but he engaged in “massage-type activities” when he sexually assaulted Ms. Tonneberger.

### III. Conclusion

In the final analysis, Plaintiff West Bend wrote an insurance policy for Defendants Impact and Rey Castillo that clearly and unambiguously excludes coverage for bodily injury resulting from the type of sexual assault committed by Florencio Castillo as an Impact employee. Accordingly, the Court must grant declaratory relief in the form of a conclusion that West Bend bears no obligation to defend or indemnify Impact and Rey Castillo in connection with the legal claims in Tonneberger v Castillo, 17th Circuit Ct No 13-00868-NO.<sup>3</sup> West Bend is invited to submit a proposed judgment memorializing that decision and closing the case.

IT IS SO ORDERED.

Dated: March 10, 2014



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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge

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<sup>3</sup> In arriving at this result, the Court recognizes that its decision works to the detriment of Ms. Tonneberger by leaving her to seek a remedy from Defendant Impact and Rey Castillo, rather than their insurance provider. In this respect, the Court finds its decision disheartening, but the language of the various exclusions leaves no room for any other outcome.