STATE OF MICHIGAN

COURT OF APPEALS

CINCINNATI INSURANCE COMPANY, Plaintiff-Appellant, v MYRON HALL, as guardian of KELLY FOSTER HALL, SOCIAL RESOURCES, INC., and MICHAEL W. DAVIS, Defendants-Appellees, and MACOMB COUNTY COMMUNITY MENTAL HEALTH, Defendant.	UNPUBLISHED June 14, 2011 No. 297600 Macomb Circuit Court LC No. 2009-001032-CZ

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff Cincinnati Insurance Company (Cincinnati) appeals as of right an order denying its motion for summary disposition and granting defendant Social Resources, Inc (SRI)'s motion for summary disposition. We reverse and remand for further proceedings.

The instant case arises out of an underlying action, which in turn arose out of a permanent eye injury sustained by Kelly Foster Hall (Kelly) while in SRI's care. SRI provides occupational and social training to developmentally disabled adults, its "consumers." Kelly and David Egbuche, two of SRI's customers, were in a van being operated by Michael Davis, an SRI employee, on their way to an SRI training facility. Egbuche became annoyed by Kelly rocking and making noises, and he complained to Davis, who allegedly told Egbuche to "handle it" or "take care of it." Egbuche then struck Kelly in the face, breaking Kelly's glasses and injuring his eye. Allegedly, Kelly received no treatment until he arrived home at the end of the day, when his guardian, defendant Myron Hall (Hall) took Kelly to the hospital. Kelly was rendered blind in his left eye. Davis eventually pleaded no contest to criminal charges. Two years later, Hall filed the underlying action, a personal injury suit against SRI on Kelly's behalf.

At the time of the incident, SRI was insured by Cincinnati. Representatives of Cincinnati and SRI signed a "non-waiver" agreement prior to Cincinnati undertaking SRI's defense. Cincinnati initially provided a formal coverage opinion. However, Cincinnati then filed the instant declaratory judgment action against SRI, contesting coverage under the policy. Discovery was only in early phases in the underlying action, and the parties agreed to rely on the discovery generated in the underlying claim as the factual basis for the instant action. Cincinnati filed its motion for summary disposition in this case while that discovery was still ongoing. The trial court concluded that Cincinnati was estopped from asserting any defenses under its policy because it failed to issue a written reservation of rights latter. It also held that an "abuse or molestation" exclusion in the policy was inapplicable. This appeal followed.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.

Cincinnati first argues that the trial court erred in holding that a formal reservation of rights letter is a technical prerequisite to an insurer raising policy defenses in a subsequent action. We agree.

When a complaint presents a case of potential coverage, the insurer must either defend under a reservation of rights or seek a declaratory judgment that there is no coverage; if the insurer fails to exercise one of these two options, it is estopped from raising policy defenses in a later action. See, e.g., *Meirthew v Last*, 376 Mich 33, 39; 135 NW2d 353 (1985). The insurer must provide timely and specific notice that it is providing a defense under a reservation of rights. *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 205; 702 NW2d 106 (2005). The insurer must explain the policy provisions upon which it bases its opinion that coverage may not be afforded. *Id*. An insurer does not provide adequate notice by telling its insured only that it reserves "any defense" or "waives none of its rights." *Meirthew*, 376 Mich at 38; *Marthison v North British and Mercantile Ins Co*, 64 Mich 372, 384; 31 NW 291 (1887); accord, *Transamerica Insurance Group v Beem*, 652 F 2d 663, 664, 667 (CA 6, 1981).

"'Where the insurer is doubtful about its liability and wishes to retain all its rights and at the same time protect itself against the claim that it has unjustifiably refused to defend a suit against the insured, it may give a so-called "nonwaiver" notice to the insured or attempt to enter into a "nonwaiver" agreement with the insured by which it reserves all its rights to assert later the policy noncoverage.'" *Riverside Insurance Company v Kolonich*, 122 Mich App 51, 58-59; 329 NW2d 528 (1982), quoting 44 Am Jur 2d, Insurance, § 1408, pp 348-349. The non-waiver agreement here stated as follows:

> IT IS HEREBY UNDERSTOOD AND AGREED by and between the parties . . . that any action taken by the hereinafter named Insurance Company or Companies *in investigating and ascertaining the amount of sound value, or the amount of loss and damage* which occurred on October 17, 2006, *shall not waive or invalidate*

> *any of the terms or conditions of any policy or policies, and shall not waive or invalidate any of the terms and conditions of the policy or policies, or any defense thereunder.*
>
> THE INTENT of this agreement is to preserve the rights of all parties hereto, and *to permit an investigation of the cause of loss, the investigation and ascertainment of the amount of sound value, or the amount of loss and damage*, or any of them without regard to the liability of the hereinafter named Insurance Company or Companies. [(emphases added)].

This agreement only reserves "any" defenses. The trial court therefore correctly held that the non-waiver agreement was insufficient to reserve Cincinnati's right to raise any defenses under the policy.

However, an insurer doubtful about liability and desirous of retaining its rights may also determine its liability by commencing a timely declaratory judgment to settle whether it has a duty to defend. *Riverside Insurance Company v Kolonich*, 122 Mich App 51, 59; 329 NW2d 528 (1982). Defendants argue that a formal reservation of rights letter is required, relying on *Kirschner v Process Design Assoc, Inc*, 459 Mich 587; 592 NW2d 707 (1999). However, nowhere in *Kirschner* did our Supreme Court make such a pronouncement. Rather, our Supreme Court emphasized that the insurer was required to give fair or reasonable *notice* to its insured that the insurer was proceeding under a reservation of rights. *Id*., 593-595. The fact that the insurer in *Kirschner* fulfilled its obligation with a formal reservation of rights letter does not mean a reservation of rights letter is the only possible way to do so. A reservation of rights letter is unnecessary when an insurance carrier filed a timely declaratory judgment action. *Security Ins Co of Hartford v Daniels*, 70 Mich App 100, 116; 245 NW2d 418 (1976). The purpose of the declaratory judgment action in that case had been to resolve "issues prior to trial and, consequently, avoid prejudicing the rights of any injured party." *Id*.

The only question is whether the declaratory judgment action brought by Cincinnati here was timely. In *Meirthew*, the Court held that the insurance company did not give "reasonable" notice and so was estopped because it waited until *after* the judgment was obtained in the underlying case to assert a policy exclusion. *Meirthew*, 376 Mich at 37-38. In *Multi-States Transport, Inc v Michigan Mutual Ins Co*, 154 Mich App 549, 557, 398 NW2d 462 (1986), this Court held that a two-year delay between the initiation of the underlying action and the notice, a reservation of rights letter, was too long. In *Fire Ins Exch v Fox*, 167 Mich App 710; 423 NW2d 325 (1988), this Court affirmed the trial court's determination that an insurance carrier was not estopped from asserting defenses under the policy because of a four-month delay between undertaking the defense and issuing a reservation of rights letter.

We are unprepared to hold as a matter of law that the five-month delay here was timely. Although it is only a month longer than the delay found timely as a matter of law in *Fire Ins Exch*, and it was commenced prior to any dispositive judgments in the underlying action, holding it to be timely as a matter of law leads to a potential "slippery slope." Furthermore, it sidesteps any principled basis for truly determining timeliness. We conclude that whether the instant declaratory judgment action was "timely" for the purposes of giving notice to SRI of Cincinnati's reservation of rights turns on whether SRI was actually prejudiced by the delay. For

example, whether SRI in any way relied on Cincinnati initially appearing to provide a defense and coverage. The trial court erred relying strictly on Cincinnati's failure to issue a reservation of rights letter, but the matter must be remanded for a factual determination before it can be determined whether Cincinnati is estopped from raising any policy defenses.

Cincinnati next argues that the trial court erred in concluding that the "abuse or molestation" exclusion in the insurance policy was inapplicable to the injury here. We agree that the plain meaning of "abuse or molestation" is not restricted to sexual acts or behaviors, but we remand for a determination of whether the policy is therefore rendered ambiguous.

In interpreting insurance policies, clear and specific exclusionary clauses must be given effect, but are strictly construed in favor of the insured. *McKusick v Traverse Indemnity Corp*, 246 Mich App 329, 333; 632 NW2d 525 (2001). Unambiguous provisions of an insurance contract will be enforced as written. *Allstate Ins Co v Freeman*, 432 Mich 656, 665, 710; 443 NW2d 734 (1989). If any exclusion within the policy applies to an insured's particular claims, that coverage under the policy is lost. *Fresard v Michigan Millers Mutual Ins Co*, 414 Mich 686, 695, 327 NW2d 286 (1982). In addition, an insurer is not required to defend claims specifically excluded from policy coverage. *Meridian Mutual Ins Co v Hunt*, 168 Mich App 672, 677, 425 NW2d 111 (1988). Terms in an insurance policy must be given their plain meaning and the court cannot generate an ambiguity where one does not exist. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995).

Defendants argue that the policy exclusion does not apply because nothing of any even arguably sexual nature occurred. We disagree. The policy does not define "abuse," "molestation," or "abuse or molestation." Therefore, it is appropriate for this Court to refer to a dictionary. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010). Furthermore, there is no Michigan case law interpreting the phrase "abuse or molestation" in an insurance policy exclusion.

Both "abuse" and "molestation" have multiple possible definitions that include, but are not limited to, those which involve a sexual connotation. The Random House Webster's College Dictionary defines the verb "abuse" as "to use wrongly or improperly," "to treat in a harmful or injurious way," "to speak insultingly or harshly to or about," and "to commit sexual assault on." *Random House Webster's College Dictionary* (2001). This demonstrates that abuse need not be "sexual." The same dictionary defines "molest" as "to bother, interfere with, or annoy," "to make indecent sexual advances to," and "to assault sexually." *Id*. This likewise demonstrates that molestation need not be sexual. Therefore, according to dictionary definitions of the terms; Egbuche's actions toward Hall could be considered "treatment in an injurious way," constituting "abuse;" and "bothering, interfering with, or annoying," constituting "molestation."

Defendants rely on several other jurisdictions' interpretation of similar policy exclusions. None of the cited cases hold that "abuse" or "molestation" *must* be sexual. The Louisiana Court of Appeals held that a policy exclusion for injury resulting from "actual or threatened abuse or molestation" applied to the sexual assault of a five-year-old student by an older student. *Jones v Doe*, 673 So2d 1163, 1164-1166 (1996). The Supreme Court of New York, Appellate Division held that a policy exclusion for abuse or molestation applied to a case where a four-year-old girl was allegedly "assaulted, battered, and sexually molested" by a five-year-old boy. *New World*

Frontier Inc v Mt Vernon Fire Insurance Co, 253 AD2d 455, 455-456; 677 NYS2d 648 (1998). The Supreme Court of Connecticut held that the non-consensual grabbing and fondling of a young girl fell within the plain meaning of the words "abuse" and "molestation" in the policy exclusion. *Community Action for Greater Middlesex County, Inc v American Alliance Insurance Co*, 254 Conn 387, 403; 757 A2d 1074 (2000). The United States Court of Appeal for the Eighth Circuit held that a policy exclusion for "actual or threatened abuse or molestation" applied to a claim based on an inappropriate sexual relationship between a parishioner and a priest. *McAuliffe v Northern Insurance Company of New York*, 69 F3d 277, 279 (CA 8, 1995).

Although these jurisdictions all interpreted "abuse or molestation" as *including* unwanted or inappropriate sexual behavior, none of them held that sexual behavior was *required*. These cases merely dealt with allegations that were of a sexual nature and found those allegations to fall within the range of possible actions that would constitute "abuse or molestation." Further, these cases explained that words are not ambiguous simply because they might have several possible definitions, the Supreme Court of Connecticut explicitly stating that "[w]hatever other conduct that broad language may include within its purview, it certainly includes unwanted contact of a sexual nature." *Community Action*, 254 Conn at 401. Again, there is no reason why "abuse" or "molestation" *must* be sexual in nature. The actions alleged in the instant case clearly fall into the definitions of "abuse" and "molestation." Therefore, the policy explicitly excluded from its coverage the conduct alleged in Hall's complaint, and the defendant had no duty to defend the plaintiff.

As *Community Action* explained, unwanted sexual contact might be what "abuse or molestation" is most commonly used to describe. However, the plain meanings of the words encompass a broader range of possible acts and behaviors, and we find no authority requiring their use in an insurance policy to be artificially restricted to only sexual acts or behaviors.

We are nonetheless troubled by this outcome, because this plain reading of the "abuse or molestation" exclusion seems to suggest that the policy may well exclude everything. We agree with Hall's general assertion that insurance policies must insure against *something*. It defies all sense to conclude that an insured would pay for an insurance policy that turns out to be an empty work of fiction, and indeed, such a policy might even be considered fraudulent. If the literal application of the plain meaning of the "abuse or molestation" exclusion operates to totally eviscerate the policy, then the policy *must* be ambiguous, and the trial court may then engage in interpreting it to address that ambiguity. However, that evaluation should be undertaken by the trial court.

We therefore reverse and remand for further proceedings not inconsistent with this opinion, as the trial court deems necessary and appropriate. We do not retain jurisdiction.

/s/ Karen Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause