STATE OF MICHIGAN

COURT OF APPEALS

JAN MARIE MEIERS POST,

Plaintiff-Appellee,

v

ROBERT SCHAFER,

Defendant,

and

AETNA CASUALTY,

Garnishee Defendant-Appellant.

UNPUBLISHED
August 20, 1996

No. 173320
LC No. 86-5365-GC

Before: White, P.J., and Fitzgerald and E.M. Thomas,* JJ.

PER CURIAM.

Garnishee-defendant Aetna Casualty (Aetna) appeals the circuit court's grant of plaintiff's motion for summary disposition in this garnishment proceeding in which plaintiff seeks to recover under defendant Robert Schafer's homeowner's insurance policy damages awarded to her in an underlying civil action against Schafer. We reverse.

Plaintiff brought the underlying civil suit in 1986, alleging that from September 1970 through May 1974 she was a student, and defendant was a teacher, at Owosso High School and that defendant made sexual advances on plaintiff which eventually led to sexual intercourse. Plaintiff's complaint alleged that defendant's conduct toward her was "without her consent (although with her acquiescence, which was obtained through defendant's exercise of his authority as a teacher over his student)," that defendant's conduct constituted a "willful and deliberate breach of his professional responsibility toward

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* Circuit judge, sitting on the Court of Appeals by assignment.

a student of such tender years and innocent nature," and that as a result plaintiff was caused intense suffering, humiliation and damage, including psychiatric therapy.

The circuit court in the underlying action granted defendant's motion for summary disposition on statute of limitations grounds. This Court reversed, holding that the period of limitations is tolled where a child victim of an illicit sexual relationship psychologically represses the memory of the events and where, after the memory is revived, there is corroboration that the alleged events actually occurred. *Meiers-Post v Schafer*, 170 Mich App 174, 176; 427 NW2d 606 (1988).

Aetna refused to defend defendant in the underlying action. The case was tried to a jury in December 1991, and plaintiff was awarded $50,000.

Trial testimony established that plaintiff met defendant during the 1970-1971 school year, when she was fourteen[1] and a freshman at Owosso High School. Defendant's then-wife, who also taught at the high school, invited a number of students home to help correct papers, including plaintiff. Sexual contacts began then; defendant had plaintiff put her head in his lap. During plaintiff's sophomore year (1971-1972), when she was fifteen, defendant was her geometry teacher. During this time, defendant digitally penetrated plaintiff a number of times while they were in his house, his truck, and at school, and repeatedly touched both her upper and lower body under her clothes when they drove together. That summer, before plaintiff turned sixteen, defendant and plaintiff first had sexual intercourse. Plaintiff testified she was a virgin at the time. She also testified that defendant made statements to her such as "Don't tell anybody because I'll never admit to it and you're jail bait because you're under sixteen."

The homeowner's insurance policy at issue was in effect from November 11, 1972, to November 11, 1975. Plaintiff was sixteen when the policy took effect, having turned sixteen on August 8, 1972.

At trial, defendant admitted engaging in sexual acts with plaintiff, including intercourse, in her high school years, but denied intending to harm plaintiff. During questioning by plaintiff's counsel in plaintiff's case, defendant testified that he "knew" his conduct was wrong at the time. When asked if he knew it was wrong because he was in a trusted position of authority over a student, he answered "I guess so." When asked "Do you realize that she was a victim?" he answered, "Because of her age, yes." On further cross-examination, defendant testified that he agreed that a teacher is in a position of responsibility, that one of those responsibilities is to protect the morals of his students "to the extent he can," and that to violate the student-teacher trust can do a great deal of harm to a child.[2].

After entry of judgment in plaintiff's favor, plaintiff filed a writ of garnishment against Aetna. Aetna filed an answer denying liability. The parties filed cross-motions for summary disposition. Aetna argued that the policy's intentional injury exclusion, fraud and concealment provisions, business pursuit exclusion and notice provision excluded coverage. The circuit court denied Aetna's motion, concluding that defendant admitted that he acted intentionally but that the court would not presume defendant intended to injure plaintiff as a matter of law.[3]

The circuit court granted plaintiff's motion, which argued in part that at trial it was established that defendant did not intend to inflict bodily injury or damage on plaintiff, and that defendant did not expect that plaintiff would suffer damage or bodily injury. This appeal ensued.

I

Aetna first argues that the court erred in denying its motion for summary disposition based on the policy exclusion for injury expected or intended by the insured because intent should be presumed where an adult teacher engages in sexual conduct with a minor student, even though the relationship extends beyond the age of consent.

The intentional injury exclusion in the homeowner's insurance policy states, in pertinent part:

This policy does not apply:

* * *

f. to bodily injury or property damage which is either expected or intended from the standpoint of the insured.

Identical exclusionary language has been held unambiguous and subject to a policy-blended subjective test, under which coverage is precluded if the insured intends some type of injury, albeit that the actual injury was of a different character or magnitude than that intended, and coverage is also precluded where the insured was aware that harm was likely to follow from the performance of his intentional act. *ACGIC v Marzonie*, 447 Mich 624, 641-642; 527 NW2d 760 (opinion of Riley, J.)(1994), citing *Metropolitan Property & Liability Ins Co v DiCicco,* 432 Mich 656; 443 NW2d 734 (1989) and *Frankenmuth Mutual Ins Co v Piccard*, 440 Mich 539, 550; 489 NW2d 422 (1992). In *Marzonie* it was observed that the words "intended" and "expected" were designed to expand the exclusion beyond mere intended injuries, and that the word "expected" denotes that the actor knew or should have known that there was a substantial probability that certain consequences would result from his actions, so that the injury can be declared the natural, foreseeable, expected, and anticipated result of an intentional act. *Marzonie*, 447 Mich at 641-642, 642, n 23.[4]

At deposition and at trial, defendant admitted committing intentional sexual acts with plaintiff throughout her high school years. The dispute below focused on whether defendant intended to injure plaintiff, Aetna arguing that intent is presumed as a matter of law where sexual conduct with a minor is involved, and plaintiff arguing that because the conduct at issue occurred after she reached the age of consent, and while defendant was no longer her classroom teacher, intent, which was not proven as a matter of fact, could not be presumed as a matter of law. We conclude that in the instant case, where the gravemen of the underlying complaint is that defendant abused his authority status in initiating and continuing a sexual relationship with a student, and it is undisputed that defendant had intentional sexual relations with plaintiff, the resulting emotional injury was expected or intended as a matter of law.

The trial testimony established that defendant was aware that harm was likely to follow from his intentional acts and thus "expected" injury to plaintiff within the meaning of the policy exclusion. We therefore reverse and order that summary disposition be granted in Aetna's favor.

/s/ Helene N. White
/s/ Edward M. Thomas

[1] Plaintiff was born on August 8, 1956.

[2] When asked "And you were aware that it hurt and that it damaged a child of that age?" defendant responded " I don't believe I was aware it was hurting her, no.

[3] The court rejected Aetna's argument regarding concealment of defendant's conduct, finding that Aetna failed to provide case law in support of its position and had presented no evidence that it asked or that defendant answered falsely any questions concerning the subject of the underlying suit. The court also rejected Aetna's business pursuit exclusion argument, noting that trial testimony indicated that the sexual liaison occurred at different locations, including defendant's home, and that these acts occurred after plaintiff's sophomore year, when defendant was her teacher.

[4] We recognize that none of the opinions cited were joined by a majority of the justices. It is clear, however, that a majority of the Court has agreed that the "expected or intended" language has been interpreted in this manner. Justices Mallett and Boyle concurred in Justice Riley's opinion in *Marzonie*, and Justices Brickley and Mallett concurred in Justice Riley's opinion in *Piccard*.