2012 IL App (1st) 103828-U

FIRST DIVISION
February 6, 2012

No. 1-10-3828

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PENNSYLVANIA GENERAL INSURANCE COMPANY, Plaintiff-Appellee, v. CHICAGO PROVINCE OF THE SOCIETY OF JESUS, Defendant-Appellant, and FATHER DONALD J. MCGUIRE, JOHN DOES 117, 119, 119, 129 and 130, Defendants.	)	Appeal from the Trial court of Cook County No. 08 CH 15031 Honorable Martin S. Agran, Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ *1* *HELD:* Reversed in part, affirmed in part and remanded. Trial court erred in granting summary judgment to insurer in its declaratory judgment action against its insured. It correctly denied summary judgment to the insured. Insurer's

failure to submit complete copies of the insurance policies at issue created a question of fact foreclosing summary judgment to either party.

¶ 2 Defendant the Chicago Province of the Society of Jesus (the Society) appeals from orders of the trial court denying its motion for summary judgment and granting summary judgment to plaintiff Pennsylvania General Insurance Company (Pennsylvania General) in Pennsylvania General's declaratory judgment action against the Society. The court held Pennsylvania General did not have a duty to defend the Society under assorted insurance policies Pennsylvania General had issued to the Society. The Society argues the court erred in denying its motion for summary judgment and granting summary judgment to Pennsylvania General because (1) a question of fact existed regarding what the insurance polices actually provided; (2) the "expected or intended injury" exclusion did not foreclose coverage for "bodily injury" and, in deciding that the exclusion did apply, the court improperly ruled on an ultimate factual question in the underlying actions; and (3) the pastoral counseling professional liability coverage endorsement in the policies covered the claims. We reverse in part, affirm in part and remand.

¶ 3 Background

¶ 4 In 2008, John Does 117,118 and 119 filed amended complaints against the Society. They asserted they had been sexually abused, battered and exploited as minors by Father Donald J. McGuire, a priest ordained and employed by the Society, while McGuire was a priest and they had suffered physical and psychological damage

as a result. They charged the Society with negligence, intentional infliction of emotional distress and fraud.[1] In 2009, John Does 129 and 130 filed similar individual complaints against the Society, alleging they had been sexually abused as minors by McGuire while he was a priest and charging the Society with negligence, intentional infliction of emotional distress and fraud.

¶ 5 The John Doe complaints alleged that the Society was aware of the incidents of sexual abuse of minors by McGuire by 1969 and well before he started abusing the John Does. They alleged administrators, officers, priests or teachers were aware or should have been aware that, while McGuire was teaching at Loyola Academy, a high school operated by the Society, he was sexually abusing minor boys, including forcing them to sleep in his room overnight. They asserted that, in 1969, one of the abuse victims, John Doe 84 told Father Schlax, a Chicago Archdiocese priest, that McGuire was sexually abusing him. Father Schlax reported the abuse to the Society and Loyola Academy officials. John Does 117, 118 and 119 specifically alleged that John Doe 84, his father and Father Schlax immediately met with representatives of the Society and Loyola Academy, after which McGuire was removed from Loyola Academy. The John

[1] The suits filed by John Does 117, 118 and 119 included McGuire as a defendant. Pennsylvania General's subsequent declaratory judgment action also included McGuire as a defendant. However, the charges against McGuire are not at issue here. The trial court granted summary judgment to Pennsylvania General in its action against McGuire, finding Pennsylvania General had no duty to defend or indemnify McGuire. That decision has not been challenged and is, therefore, not before us. Accordingly, we will not recite any history pertaining to the actions against McGuire.

Does alleged that, after 1969, the Society received more reports regarding McGuire engaging in improper activities with minor boys and resolved other allegations of abuse by settlement agreements requiring strict confidentiality. They asserted that, despite the Society's knowledge of McGuire's propensities to engage in sexual abuse of children, the Society consistently transferred McGuire, allowed him to remain in ministry and travel around the world for 30 years where he could have access to and abuse children, all in an effort to avoid scandal and hide the abuse.

¶ 6 The Society notified Pennsylvania General, its insurance carrier, of the suits and sought defense and indemnification. Pennsylvania General had issued general liability insurance policies to the Society covering the period between November 30, 1990, and November 30, 1998. Pennsylvania General refused to defend.

¶ 7 Pennsylvania General filed a declaratory judgment action against the Society, seeking a declaration that it owed them no duty to defend or indemnify. It attached assorted provisions it asserted were in the policies and "relevant" to its action. The Society moved to dismiss Pennsylvania General's amended complaint, arguing that the court could not construe the policies as a whole in determining duty to defend without the entire policies. Pennsylvania General informed the court that it did not have full copies of the policies, only additional forms that were not relevant to the coverage issues. The court denied the Society's motion.

¶ 8 The Society renewed the motion, arguing that Pennsylvania General had access to additional policy forms and documents. It attached documents and forms relevant to

the policies that it had obtained from Pennsylvania General's parent company. The court then ordered Pennsylvania General to file a second amended complaint attaching all forms relevant to the policies. Pennsylvania General filed a second amended complaint, attaching reams of documents and forms it had that related to the policies, but not copies of the actual policies. Its subsequent third and fourth amended complaints attached the same "relevant" portions of the policies as well as the remaining "irrelevant" forms and documents it had been ordered to produce by the court, but not the entire policies.

¶ 9 In Pennsylvania General's fourth amended complaint, the complaint at issue here, it requested a declaration that it owed no insurance coverage obligations to the Society in connection with the John Doe lawsuits. It asserted that, as shown by the policy provisions it attached to the complaint, the policies included coverage for "bodily injury" and "property damage" and additional coverage via an endorsement for "pastoral counseling professional liability." The insurance coverage would not apply to " 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured." The pastoral counseling professional liability coverage would apply to "damages because of acts, errors, or omissions of the insured arising out of pastoral counseling activities of the insured." It would not apply to damages arising out of "the willful violation of a penal statute or ordinance committed by or with the consent of the insured"; "an actual or alleged conduct of a sexual nature [although Pennsylvania General would defend the insured in any suit seeking damages from such conduct until

judgment was entered against the insured for such conduct]"; and "any dishonest, fraudulent or criminal acts or omissions of the insured."

¶ 10 Pennsylvania General filed a motion for summary judgment on its claims against the Society. It asserted it had no duty to defend or indemnify the Society because the John Doe complaints' allegations of knowledge by the Society of McGuire's predatory history showed the "expected or intended injury" exclusion to "bodily injury" coverage applied; there was no coverage for abuse that occurred outside the policy period, specifically referring to John Does 117 and 118; the John Doe complaints did not allege that the challenged acts, errors or omissions of the Society arose out of professional pastoral counseling activities such that the pastoral counseling professional liability endorsement applied; and the Society's dishonest and fraudulent acts in hiding McGuire's behavior and representing him as a priest in good standing foreclosed coverage under the pastoral counseling professional liability endorsement. Pennsylvania General's motion for summary judgment attached the "relevant" and "irrelevant" forms and documents but not copies of the entire polices.

¶ 11 The court granted Pennsylvania General's motion for summary judgment with regard to John Doe 118's suit against the Society because McGuire's abuse of John Doe 118 was alleged to have occurred in 2001 and 2002, beyond the coverage period of the insurance policies. That decision is not before us on appeal.

¶ 12 The court denied the rest of Pennsylvania General's motion for summary judgment. On the basis of the court's denial of Pennsylvania General's motion for

summary judgment, the Society moved for summary judgment on the question of Pennsylvania General's duty to defend the Society against the John Doe 117, 119, 129 and 130 suits. On December 3, 2010, the court denied the Society's motion, reversed its previous decision denying Pennsylvania General's motion for summary judgment and, instead, granted summary judgment to Pennsylvania General.

¶ 13 The court held Pennsylvania General had no duty to defend the Society under the bodily injury coverage provisions because the factual allegations in the John Doe complaints regarding the Society's knowledge of McGuire's behavior and proclivities were sufficient to trigger the "expected or intended exception" to that coverage. It also held that Pennsylvania General had no duty to defend the Society under the pastoral counseling professional liability coverage endorsement because the allegations in the John Doe complaints did not involve the types of services embodied in the pastoral counseling coverage.

¶ 14 The sum of the court's orders was that Pennsylvania General had no duty to defend the Society against any of the claims in the John Doe 117, 118, 119, 129 and 130 complaints. Having fully resolved all remaining issues before it on Pennsylvania General's motion for a declaratory judgment, the court's December 3, 2010, order was final and appealable. The Society timely appealed the court's decision on December 30, 2010.

¶ 15 Analysis

¶ 16 The Society argues the court erred in finding Pennsylvania General had no duty

to defend or indemnify the Society and in granting summary judgment to Pennsylvania General on that basis because (1) Pennsylvania General's "refusal" to produce the insurance agreements at issue created a question of fact regarding what Pennsylvania General's polices actually provide; (2) the "expected or intended injury" exclusion to "bodily injury" coverage did not apply and, in deciding that the exclusion did apply, the court improperly ruled on an ultimate factual question in the underlying actions; and (3) the John Doe suits assert claims against the Society that fall within the pastoral counseling professional liability coverage endorsement of the policies and exclusions to that coverage are inapplicable.

¶ 17 Standard of review

¶ 18 Summary judgment is proper where there are no disputed questions of fact and the moving party is entitled to judgment as a matter of law. *Kennedy v. Four Boys Labor Service*, 279 Ill. App. 3d 361, 365 (1996). We review the trial court's grant of summary judgment *de novo*. *Kennedy*, 279 Ill. App. 3d at 366. "Where only the construction of a contract is at issue, the legal effect and interpretation of the contract is a question of law, and summary judgment is proper." *Kennedy, Ryan, Monigal & Associates, Inc. v. Watkins*, 242 Ill. App. 3d 289, 295 (1993). An insurance policy is a contract and its construction is also reviewed *de novo* as a question of law. *State Farm Fire and Casualty Co. v. Martinez*, 384 Ill. App. 3d 494, 498 (2008).

¶ 19 Question of Fact regarding Policies

¶ 20 The Society argues questions of material fact exist regarding the content of the

general liability policies Pennsylvania General issued to the Society because Pennsylvania General, in support of its claims that it had no duty to defend or indemnify the Society and its subsequent motion for summary judgment addressed to those claims, relied on generic, preprinted policy forms as opposed to actual, complete copies of its insurance agreements with the Society. Although Pennsylvania General agreed that it had issued the policies to the Society, it did not attach complete copies of the policies to its complaint(s) or motion for summary judgment. Instead, it attached to its fourth amended complaint all forms and documents Pennsylvania General allegedly had relating to the policies, both those it considered "relevant" as well as the "irrelevant" ones that it had been previously ordered to submit by the court. It also attached a sworn affidavit from Tom Conlon, a Pennsylvania General "representative," averring that Pennsylvania General had "provided the portions of the policies issued to [the Society] that it currently has available to it. Pennsylvania General Insurance Company does not currently have access to the remaining portions of the policies issued to [the Society]." The Society asserted as an affirmative defense that Pennsylvania General was not entitled to relief because Pennsylvania General had not attached copies of the actual policies to its complaint.

¶ 21 Pennsylvania General then filed a motion for summary judgment and a supporting memorandum attaching the same forms and documents it considered "relevant" and "irrelevant." It also attached a sworn affidavit from Michael McCorry, a senior underwriter-assistant vice president for Pennsylvania General's parent company.

McCorry averred that he was familiar with Pennsylvania General's underwriting records. He swore that, based on an examination of Pennsylvania General's business records, including all the documents attached to the fourth amended complaint, the policy provisions attached to the motion for summary judgment "are operative parts of the policies issued to [the Society by Pennsylvania General] effective annually from November 30, 1990 through November 30, 1998."

¶ 22 In its response, the Society asserted as a basis for denial of Pennsylvania General's motion for summary judgment that a question of material fact existed concerning the contents of the Pennsylvania General policies because copies of those policies were not before the court. The court denied Pennsylvania General's motion for summary judgment. It then reversed itself and granted the motion. Neither the court's opinion denying Pennsylvania General's motion for summary judgment nor its opinion reversing the earlier opinion and granting summary judgment to Pennsylvania General addressed the Society's argument regarding the adequacy of the policy materials submitted by Pennsylvania General. The court quoted portions of the submitted documents that it considered "relevant" without comment.

¶ 23 An insurer’s duty to defend arises if the facts alleged in the underlying complaint fall within or potentially within an insurance policy’s coverage. *Allstate Insurance Co. v. Lane*, 345 Ill. App. 3d 547, 550 (2003). In deciding whether a duty to defend exists under an insurance policy, the court must compare the allegations of the underlying complaint(s) "to the relevant coverage provisions of the insurance policy." *Crum &*

Forster Managers Corp. v. Resolution Trust Corp., 156 Ill. 2d 384, 393 (1993). However, in order to interpret those provisions, a court must construe them in the context of the insurance policy as a whole. *Crum & Forster Managers Corp.,* 156 Ill. 2d at 391. Pennsylvania General, as the party pursuing the declaratory judgment action regarding its duty to defend under the policies at issue here, had the burden of proving the existence of the policies and that the provisions therein did not provide insurance coverage for the Society in the underlying John Doe suits. *Fidelity and Casualty Insurance Co. of New York v. Wil-Freds, Inc.*, 145 Ill. App. 3d 1085, 1091 (1986). The duty to defend is broader than the duty to indemnify so, if an insurer owes no duty to defend, it also owes no duty to indemnify. *Westfield Nat'l Insurance Co. v. Continental Community Bank and Trust Co.*, 346 Ill. App. 3d 113, 1124 (2003).

¶ 24 The Society argues that, because the actual, complete Pennsylvania General policies issued to the Society are apparently unavailable and incapable of being reconstructed, the exact scope of coverage afforded the Society is unclear and undeterminable. It asserts that, without a complete set of actual policies, "[f]or all this Court knows, other parts of the Pennsylvania General polices could grant new coverage or even negate the exclusions Pennsylvania General relied upon to deny coverage to [the Society]." It argues that, because the actual entire Pennsylvania General policies issued to the Society are not in the record, it is impossible to determine as a matter of law that those policies as a whole do not provide coverage to the Society for the underlying John Doe actions and the court erred in finding otherwise. Citing *Fidelity*

and Casualty Insurance Co. of New York v. Wil-Freds, Inc., 145 Ill. App. 3d 1085 (1986), the Society argues the missing content of the Pennsylvania General policies creates a question of material fact that renders granting of summary judgment in Pennsylvania General's favor wholly inappropriate. We agree.

¶ 25 In *Wil-Freds*, the insurer sought a declaration that it did not have a duty to defend or indemnify Wil-Freds, Inc. in an underlying action. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1086. In its amended complaint, the insurer asserted that it had issued a policy to Wil-Freds, pertinent portions of the policy were attached to the complaint and, under the terms and conditions of the policy, it was not obligated to defend or indemnify Wil-Freds. The insurer, however, did not attach copies of portions of the policy. Instead, it attached an affidavit from its commercial lines manager averring that she had been advised by the insurer's records department that neither that department nor the insurer's underwriting department had a file on the policy issued to Wil-Freds. She further attested that attached to her affidavit were copies of forms used by the insurer at the time the policy to Wil-Freds was issued and those forms would have been a part of any comprehensive general liability policy issued by the insurer to any insured during the relevant time period. She stated the remainder of the policy issued to Wil-Freds could not be produced because there was no underwriting file. The attached forms consisted of six printed pages appearing to be excerpts from an insurance policy. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1087.

¶ 26 Wil-Freds agreed it had been issued a policy by the insurer during the relevant

time period, denied that the policy did not provide it with coverage and raised the fact that the insurer had not attached a copy of the policy to its amended complaint and that Wil-Freds did not possess a copy of it. On cross motions for summary judgment, Wil-Freds alleged the missing policy contained a broad form property damage endorsement which was not among the forms attached to the insurer's motion for summary judgment. It attached a blank copy of the form with a supporting affidavit and a certificate of insurance referring to the endorsement. The court denied Wil-Freds' motion for summary judgment and granted the insurer's motion, finding that under the policy provisions submitted, the insurer did not have a duty to defend or indemnify Wil-Freds.

¶ 27 Wil-Freds appealed. On appeal, the parties submitted a stipulation that, although neither party had a copy of the policy, " 'at the very least' " the policy contained those form policy provisions, including the broad form property damage endorsement, attached to the motions for summary judgment. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1089. The appellate court reversed, concluding that, "in this state of the record," the trial court erred in granting of summary judgment to the insurer. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1090-91. The court found it apparent that there was a disputed question of fact as to the terms of the missing insurance policy and that the qualified and incomplete stipulation of the parties did not supply those terms. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1091. The court held "[s]ummary judgment is improper where the parties have not provided sufficient documentation to determine factual issues from the record." *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1091. The insurer, as the plaintiff, had the

burden of establishing that its insured's possible loss was excluded under the policy and it could not do so "solely on the strength of the qualified affidavit by its employee." *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1091.

¶ 28 The *Wil-Freds Inc.* court held it seemed apparent that "before declaratory relief can be considered in this case that the terms and conditions of the missing insurance policy will necessarily have to be determined in an evidentiary hearing" because, although the parties agreed a policy was issued, they disputed its terms and conditions. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1091. The court noted that, until the terms of the actual insurance contract were fixed, any decision regarding the rights of the parties under the blank policy forms could only be advisory. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1091. It reversed the grant of summary judgment to the insurer, affirmed the denial of summary judgment to Wil-Freds and remanded for further proceedings. *Wil-Freds, Inc.*, 145 Ill. App. 3d at 1091.

¶ 29 As did the insured in *Wil-Freds*, the Society consistently disputed the terms of the policies as submitted by Pennsylvania General. Granted, it did not make any claims as to what might be missing from the policies nor did it move to produce any missing provisions. However, it argued below, as it does here, that the policies might contain additional provisions that would provide it with coverage; there was no way to know whether many of the forms and documents Pennsylvania General attached were actually part of the policies because there were no markings on the documents; and, because there were no declarations pages for the policies, there was no way to rebuild

a specimen policy or verify which provisions belonged in the policies. It clearly raised a question of fact regarding the contents of the policies.

¶ 30 Pennsylvania General responds that section 2-606 of the Illinois Code of Civil Procedure (735 ILCS 5/2-606 (West 2010)) does not require it to attach complete copies of the policies but rather only "so much *** as is relevant." It argues that it did so, attaching the sections of the actual policies that were relevant in deciding the coverage action. Pursuant to section 2-606,

> "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her. In pleading any written instrument a copy thereof may be attached to the pleading as an exhibit. In either case the exhibit constitutes a part of the pleading for all purposes." 735 ILCS 5/2-606 (West 2010).

We are not dealing here with a claim or defense but rather with a motion for summary judgment, so section 2-606 does not apply.

¶ 31 More importantly, in deciding whether a duty to defend exists under an insurance policy, the court must compare the allegations of the underlying complaint to the relevant coverage provisions of the policy. *Crum & Forster Managers Corp.,* 156 Ill. 2d at 393. However, to interpret those provisions, a court must construe them in the context of the insurance policy as a whole. *Crum & Forster Managers Corp.,* 156 Ill. 2d

at 391. That is not possible here. The provisions provided by Pennsylvania General may be "operative parts" of the insurance policies as McCorry's affidavit stated and thus arguably relevant to the issue at hand. But, without copies of the entire policies, a court is not able to construe those provisions in context with the rest of the policies. The entire polices are, therefore, relevant in the determination of a duty to defend, whether in the context of Pennsylvania General's complaints under Rule 2-606 or in the context of the sufficiency of the proofs on Pennsylvania General's motion for summary judgment.

¶ 32 Pennsylvania General also responds that, if the Society believed additional provisions were needed or relevant, it was up to the Society to produce them or to counter McCorry's affidavit or to request additional discovery. Pennsylvania General asserts that the Society's failure to set forth additional policy provisions in support of its argument did not make the contents of the policies a question of material fact. But, both Pennsylvania General and the Society stated they did not have copies of the policies. The Society, therefore, would not be able to produce additional documentation regarding the policies no matter how much additional discovery it requested. Further, Pennsylvania General was the plaintiff here. It was, therefore, Pennsylvania General's burden to provide as much of the written document as was necessary to the determination at hand. As stated above, here that means the entire policies, not just portions thereof.

¶ 33 This is especially true because Pennsylvania General at no time explained in any

detail what happened to the policies, why they were unavailable, how hard it looked for the policies, why it considered the provisions it attached to its motion for summary judgment to be "operative parts" of the policies or whether those provisions were copies of actual policy provisions or recreations. Without proof by Pennsylvania General that the documents it attached to its motion for summary judgment were the only available and best evidence of the contents of the policies, those documents are insufficient substitutes for the complete policies Pennsylvania General had the burden to produce. See generally *Zurich Insurance Co. v. Northbrook Excess and Surplus Insurance Co.*, 145 Ill. App. 3d 175 (1986).

¶ 34 Pennsylvania General's failure to provide copies of the complete insurance policies created a question of fact regarding the contents of those policies, foreclosing a summary judgment determination regarding Pennsylvania General's duty to defend, whether in favor of Pennsylvania General or in favor of the Society. Accordingly, we reverse the trial court's grant of summary judgment to Pennsylvania General and affirm its denial of summary judgment to the Society. Given this, we need not address the remaining issues on appeal.

¶ 35 For the reasons stated above, we reverse in part, affirm in part and remand.

¶ 36 Reversed in part, affirmed in part, remanded.