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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

RYAN KANZAKI et al.,

Plaintiffs and Appellants,

v.

FIRE INSURANCE EXCHANGE,

Defendant and Respondent.

H038540

(Santa Clara County

Super. Ct. No. 1-11-CV200660)

This is an action to establish a duty under a policy of homeowners insurance of the insurer to defend certain claims arising from a college party gone wrong. The trial court granted summary judgment for the insurer, concluding that none of the claims could be attributed to an “occurrence” as required by the policy. This court has already affirmed a similar judgment in a materially identical case arising from the same events. That decision binds us here under basic principles of stare decisis. We will therefore affirm the judgment.

BACKGROUND

It is undisputed that plaintiff Ryan Kanzaki was an insured under a homeowners policy issued by defendant Fire Insurance Exchange (Exchange) to his parents, plaintiffs

Craig and Cheryl Kanzaki.¹ The policy provides coverage for “damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies.” It defines “personal injury” to include “[f]alse arrest [and] imprisonment” as well as “[l]ibel, slander, [and] defamation of character.” “[O]ccurrence” is defined as “an accident including exposure to conditions which results during the policy period in bodily injury or property damage.” The policy excludes coverage, as potentially relevant here, for (1) “personal injury caused by a violation of penal law . . . committed by or with the knowledge of an insured,” (2) injury “caused intentionally by or at the direction of an insured,” (3) injury “result[ing] from any occurrence caused by an intentional act of an insured where the results are reasonably foreseeable,” and (4) injury “caused by or arising out of the actual, alleged, or threatened molestation of a child by . . . any insured[,] . . . any employee of an insured[,] or . . . any . . . person who is acting or who appears to be acting on behalf of any insured.”

On March 3, 2008, a person identifying herself as Jane Doe filed a complaint against Ryan and 11 other persons alleging in essence that on March 3, 2007, while a minor, she had attended a party at which Ryan and nine other named defendants were present; that after plying with her with alcohol, and while she was in a semiconscious or unconscious state, some of the defendants took or led her into a room where they engaged in sexual acts with her while other defendants encouraged this conduct, took photographs and videos of it, and prevented entry into the room by would-be rescuers. Doe also alleged that during and after this event, the defendants committed slander per se in that they implied she had consented to the sexual interactions when in fact she had not done so, or was unable by virtue of inebriation to do so. Numerous legal theories were

¹ For ease of comprehension we will sometimes refer to plaintiffs by their first names.

pleaded, including negligence, false imprisonment, slander, battery, sexual battery, and violations of the Penal Code.

The Kanzakis tendered the defense of these claims, and of an associated cross-complaint, to Exchange. Exchange refused the tender on the grounds that (1) Jane Doe's claims all arose from sexual misconduct; (2) they were not the result of an accident and thus did not arise from an "occurrence" as required under the policy; (3) they included claims for punitive damages, coverage for which was expressly excluded by the policy; and (4) the claims all arose from willful acts, such that coverage was barred by the exclusion for intentional acts and by Insurance Code section 533.

It was undisputed for purposes of summary judgment that on the occasion giving rise to the claims, Ryan's conduct consisted of going "into a room where sexual acts occurred with a Jane Doe. Ryan was appalled and left. He did not have any contact, sexual or otherwise, with Jane Doe." Some time after the party, he had "made comments to a person not present on the night of the incident about the dubious character of Jane Doe and her being unchaste, based on Ryan's knowledge of Jane Doe before the acts that occurred the night of the party, and after." He ultimately secured a dismissal of the Doe complaint "for a mutual waiver of costs." The Kanzakis paid and incurred legal expenses of about \$144,000 in the action.

Exchange filed a motion for summary judgment. Plaintiffs filed a motion for summary judgment or summary adjudication. The trial court denied plaintiffs' motion and granted defendant's motion. Plaintiffs filed a timely appeal from the ensuing judgment.

DISCUSSION

We need not reiterate the basic principles governing an appeal of this kind, which are amply set forth in our recent decision in *Gonzalez v. Fire Insurance Exchange* (2015) 234 Cal.App.4th 1220, 1229-1231 (*Gonzalez*). That case involved policy provisions that

were materially identical to those at issue here, and arose from the same underlying lawsuit, i.e., the Doe complaint. There as here a central question was whether Jane Doe’s claims could be understood to arise from an “occurrence,” as required for coverage under the policy. We concluded that they could not, because all of the claims alleged against the defendant there—the same claims at issue here—rested on intentional acts, and the essence of an “occurrence” as defined in the policy is an *accident*. (See *id.* at p. 1231-1232, citing *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 887 [discussing identical policy language].)

Plaintiffs contend that the policy’s limitation to “occurrence[s]” applies only to claims for bodily injury and property damage, and not to claims for personal injury, which it expressly defines to include slander. We noted that “the exact same argument” had been rejected in *Lyons, supra*, 161 Cal.App.4th at pages 886-887. (*Gonzalez, supra*, 234 Cal.App.4th at pp. 1231-1232.) We rejected the insureds’ criticisms of that decision and instead found the reasoning in *Lyons* persuasive. (*Id.* at p. 1232.) We will adhere to that decision here.

Plaintiffs also contend that Doe’s complaint “included claims arising from accidental negligent conduct that was potentially covered by [Exchange’s] policy.” This too echoes a contention we rejected in *Gonzalez*. Here plaintiffs note Doe’s allegations that the attendee defendants, including Ryan, bore responsibility “for inviting her to the party, for giving her alcohol, and for failing to intervene or assist her when others were assaulting her.” But none of this conduct can be described as accidental, as that term was understood in *Gonzalez* and *Lyons*. Plaintiffs point to nothing in Doe’s complaint or in the actual circumstances of the party that would suggest her claims against Ryan rested in any sense on an “accident.”

Plaintiffs insist that Doe’s claims for slander warrant coverage. In the trial court plaintiffs mainly addressed themselves to defendant’s argument that the slander claims

were so closely intertwined with the sexual misconduct that coverage was barred by the child molestation exclusion. Plaintiffs are correct to say that the cited exclusion is at least potentially inapplicable because it bars only coverage for acts of child molestation by or on behalf of an insured. Conceivably the exclusion would have applied if the alleged sexual assault were found to be an act in furtherance of a *conspiracy*, and thus imputed to each of the conspirators. And such a conspiracy was alleged in Doe's complaint. But the complaint also asserted liability, as to Ryan and each of the other attendee-defendants, resting on neither the commission of, nor conspiring to commit, acts of child molestation. It therefore raised a distinct possibility of liability outside the cited exclusion. (See *Gonzalez, supra*, 234 Cal.App.4th at p. 1238 [reaching same conclusion under similar exclusion].)

This conclusion does not assist plaintiffs, however, for the question remains whether liability for slander, as alleged by Doe, could have arisen from an occurrence. In *Gonzalez, supra*, 234 Cal.App.4th 1220, we adopted the reasoning of *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, where the court found no duty by a liability insurer to defend claims of negligence and negligent infliction of emotional distress arising from the insured's alleged rape and assault of the claimant. The insured argued that he might be found to have mistakenly believed the claimant had consented to intercourse, in which case her injuries would arise from an "accident." The court rejected that contention and, more broadly, the " 'misapprehension that all claims for negligence must at least potentially come within the policy and therefore give rise to a duty to defend. That is not so 'Negligent' and 'accidental' are not synonymous ' " (*Id.* at p. 596, quoting *American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1572-1573.) " 'An accident . . . is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that

produces the damage.’ ” (*Quan, supra*, 67 Cal.App.4th at p. 598, italics removed, quoting *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50.)

In *Gonzalez* we concluded that, under this reasoning, Doe’s slander claims could not be found to arise from an occurrence. We noted that Doe had alleged that “the men in the room . . . slandered her in the days and months following the incident. Any utterance by [a defendant] . . . would have been an intentional act and not an accidental occurrence that would be potentially covered by the Fire policy.”² (*Gonzalez, supra*, 234 Cal.App.4th at p. 1236.) We are bound by that decision here.

DISPOSITION

The judgment is affirmed.

² The policy excluded intentional acts as follows: “We do not cover bodily injury, property damage or personal injury which: [¶] [¶] 3. is either: [¶] a. caused intentionally by or at the direction of an insured; or [¶] b. results from any occurrence caused by an intentional act of any insured where the results are reasonably foreseeable.”

RUSHING, P. J.

WE CONCUR:

MÁRQUEZ, J.

GROVER, J.

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