

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FIRST COMMUNITY INSURANCE
COMPANY,

CIRCUIT CIVIL DIVISION

CASE NO. 2022-000602 CA 13

Plaintiff,

vs.

CATALINA WEST HOMEOWNERS
ASSOCIATION, INC., et al.,

Defendants.

**DEFENDANT CATALINA WEST HOMEOWNERS
ASSOCIATION NOTICE OF APPEAL**

NOTICE IS GIVEN that Defendants/Appellant Catalina West Homeowners Association, Inc. appeals to the Third District Court of Appeal, the final judgment of this court dated September 20, 2023. A conformed copy of the final judgment is attached hereto in accordance with Rule 9.110(d). The order appealed from is final.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal to Justin N. Shindore, Esquire, justin.shindore@lewisbrisbois.com; Attorneys for Plaintiff First Community Insurance Company, Lewis Brisbois Bisgaard & Smith LLP, 401 East Jackson Street, Suite 3400, Tampa, Florida

33602; Douglas J. Jeffrey, Esquire, dj@jeffreylawfirm.com; amarquez@jeffreylawfirm.com; Attorneys for Defendant South Florida Security Group, Inc., Law Offices of Douglas J. Jeffrey, P.A., 6625 Miami Lakes Drive East, Suite 365, Miami Lakes, Florida 33014 and David S. Henry, Arianna Hernandez, Esquire, dshpleadings@kelleykronenberg.com; dhenry@kelleykronenberg.com; anhernandez@kelleykronenberg.com; aprieto@kelleykronenberg.com; Attorneys for Defendant Old Cutler Lakes by the Bay Community Association, Inc., Kelley Kronenberg, 10360 West State Road 84, Fort Lauderdale, Florida 33324 and Jose P. Gutierrez, Jr.; Service@TheGutierrezFirm.com; JPG@TheGutierrezFirm.com; Paralegal2@TheGutierrezFirm.com; Attorneys for Defendant Melissa Khan Macko, as Personal Representative of the Estate of Daniel Macko, Deceased, The Gutierrez Firm, 250 Catalonia Avenue, Suite 601, Coral Gables, Florida 33134 on October 17, 2023.

GRAHAM LEGAL, P.A.
Counsel for Defendant Catalina West
Ponce Plaza, Suite 410
814 Ponce de Leon Boulevard
Coral Gables, Florida 33134
Telephone (305) 445-9185
Telecopier (305) 444-8015
eservice@grahamlegalpa.com

By: s/ Dillon Graham

H. Dillon Graham, III, Esquire
Florida Bar Number 0371955

STATE OF FLORIDA, COUNTY OF MIAMI-DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the
Original on file in this office 10-18 AD 20 23
_____, Clerk Ad Interim of Circuit and County Courts
Deputy Clerk _____



**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2022-000602-CA-01

SECTION: CA13

JUDGE: Gina Beovides

FIRST COMMUNITY INSURANCE COMPANY

Plaintiff(s)

vs.

CATALINA WEST HOMEOWNERS ASSOCIATION, INC. et al

Defendant(s)

FINAL JUDGMENT IN FAVOR OF PLAINTIFF

THIS CAUSE came before this Court on Plaintiff, FIRST COMMUNITY INSURANCE COMPANY'S ("FCIC") Motion for Summary Judgment (the "Motion"). The Court, having considered FCIC's Motion, the various Defendants' responses thereto, and the arguments of counsel during the hearing, it is

ORDERED AND ADJUDGED: Plaintiff's Motion for Summary Judgment is GRANTED for the reasons stated below.

Facts

FCIC issued Policy No. 09 0075003082 7 00 (the "Policy"), to Catalina West Homeowners Association, Inc. ("CATALINA WEST"), and provided businessowners liability insurance to CATALINA WEST under the Policy for the period of May 28, 2019 to May 28, 2020. In the instant case, FCIC seeks a determination of coverage under the Policy with respect to negligent maintenance and security claims asserted against CATALINA WEST by the Estate of Daniel Macko (the "ESTATE") in the action styled, *Melissa Khan Macko, as personal representative of the Estate of Daniel Macko v. Old Cutler Lakes by the Bay Community Ass'n., Inc., et al.*, Case No. 2021-024419-CA-01, pending in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida (the "Underlying Lawsuit").

In pertinent part, the Underlying Lawsuit asserts that on November 5, 2019, Daniel Macko ("Mr. Macko") was at his home located at 22265 S.W. 99 Ave., Cutler Bay, Florida 33190 when he was "ambushed and incurred grave bodily injury by unknown assailants who gained unrestricted access to the premises owned and/or managed and/or controlled and/or maintained by OLD CUTLER LAKES, CATALINA WEST, and SECURITY GROUP, resulting in severe bodily

injuries that lead to his death.” The Underlying Lawsuit asserts that CATALINA WEST was negligent in multiple respects, including the failure to put up adequate deterrents to prevent criminal assault. It is also alleged that “[c]riminals could carry out physical assault on . . . [CATALINA WEST’S] premises without fear of being caught, discovered, and/or prosecuted.”

In this declaratory judgment action, FCIC specifically asks this Court to determine that the claims against CATALINA WEST in the Underlying Lawsuit are excluded from coverage under the Policy pursuant to the Policy’s Physical and Sexual Abuse Exclusion (the “Physical Abuse Exclusion”) which provides, in pertinent part, as follows:

PHYSICAL AND SEXUAL ABUSE EXCLUSION

This endorsement modified insurance provided under the following:

BUSINESSOWNERS COVERAGE FORM

The following is added to SECTION II - LIABILITY, B. Exclusions:

This insurance does not apply to "bodily injury", "property damage", "personal and advertising injury", medical payments or any other damages directly or indirectly because of, arising out of, related to or in any other way connected to actual, threatened or attempted:

- a. physical abuse, physical molestation, habitual neglect; or*
- b. sexual abuse, sexual assault, sexual battery, sexual molestation; or*
- c. licentious, amoral, immoral or similar behavior;*

that was committed or alleged to have been committed by the insured, their "employees", any person acting on behalf of the insured, customers, patrons, guests or any other person on the insured's premises.

This exclusion applies to all causes of action arising out of any of the acts enumerated above, including but not limited to:

- a. allegations of negligent hiring, placement or training of employees;*
- b. improper or non-existent supervision of employees, patrons or guests;*
- c. negligence in failing to protect customers, patrons or guests.*
- d. error or omissions relating to any of the above mentioned acts.*

In addition, this exclusion applies regardless of whether the acts enumerated above were committed intentionally, negligently, inadvertently, or with the belief, erroneous or otherwise, that the other party consented and had the legal and mental capacity to consent thereto.

This exclusion applies regardless of whether or not the insured, their "employees", any person acting on behalf of insured, customers, patrons or guests, are actually charged with or convicted of a crime.

FCIC contends that the policy language excludes coverage such that FCIC has no duty to defend or

indemnify CATALINA WEST for the claims in the Underlying Lawsuit.

Analysis

Under Florida law, terms used in a policy are to be given their plain meaning and read in light of the skill and experience of ordinary people. *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 222 (Fla. 3d DCA 2006); *Lindheimer v. St. Paul Fire & Marine Ins. Co.*, 643 So. 2d 636, 638 (Fla. 3d DCA 1994). Insurance contracts are to be construed in a manner that is “reasonable, practical, sensible, and just.” *Doctors Co. v. Health Mgmt. Associates, Inc.*, 943 So. 2d 807, 809 (Fla. 2d DCA 2006) (citing *Gen. Star Indem. Co. v. Fla. Village Inn, Inc.*, 874 So. 2d 26, 29 (Fla. 2d DCA 2004)). Insurance policies will not be construed to reach an absurd result. *Deni Assocs. of Fla. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998) (citing *Travelers Indem. Co. v. Miligen Dev., Inc.*, 297 So. 2d 845 (Fla. 3d DCA 1974)). The interpretation of insurance contract provisions is a matter of law to be decided by the court. *Adeberg v. Berkshire Life Ins. Co.*, 97 F.3d 470, 472 (11th Cir. 1996) (citing *Gas Kwick, Inc. v. United Pac. Ins. Co.*, 58 F.3d 1536, 1538-39 (11th Cir. 1995)).

Adopting the plain meaning of this exclusion, the policy does not provide coverage claims of bodily injury caused by physical abuse by any person on the insured’s premises. In defining physical abuse, the court finds instructive the case of *Miglino v. Universal Property & Cas. Ins. Co.*, 174 So. 3d 479, 480 (Fla. 4th DCA 2015). In *Miglino*, the Fourth District Court of Appeal considered a similar “physical abuse” exclusion in a policy. There, the insured lent his gun to his sister, who then proceeded to use the gun to shoot her son-in-law. *Id.* The injured son-in-law, Miglino, thereafter brought an action against the insured for negligent entrustment of a firearm. *Id.* The insurer denied coverage for this claim under an exclusion which excluded coverage for damages “[a]rising out of sexual molestation, corporal punishment or physical or mental abuse.” *Id.* Like the Policy in the instant case, the term “physical abuse” was not defined in the *Miglino* policy; however, the *Miglino* court noted that the lack of a definition of a term in a policy does not render it ambiguous or in need of interpretation by the courts, and that such “terms must be given their everyday meaning and should be read with regards to ordinary people’s skill and experience.” *Id.* at 481. (citing *Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, 1003 (Fla. 4th DCA 2010)). The *Miglino* court then turned to Black’s Law Dictionary and The American Heritage Desk Dictionary to construe the term “physical abuse” and noted that:

“Black’s Law Dictionary defines “physical,” in pertinent part, as “[r]elating or pertaining to the body, as distinguished from the mind or soul or the emotions.” Black’s Law Dictionary 1147 (6th ed. 1990). In pertinent part, Black’s defines “abuse” as “[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury,” and “[t]o injure (a person) physically or mentally.” Black’s Law Dictionary 10 (8th ed. 2004). Similarly, a non-legal dictionary defines abuse as “[t]o hurt or injure by maltreatment.” The American Heritage Desk Dictionary 5 (1981) (emphasis added). The plain meaning of “physical abuse” encompasses the intentional shooting of Miglino by the sister. Such an act clearly constitutes “physical ... maltreatment,” “physical injury,” and “hurt or injur[y] by maltreatment” as described in the definitions used in deciding this issue.”

Id. Based on this interpretation of “physical abuse” the Fourth District Court of Appeal affirmed the trial court’s determination that the policy excluded coverage for the claims at issue.

Applying *Miglino*’s definition of “physical abuse” in the instant case inevitably leads to the conclusion that Mr. Macko’s injuries and resulting death constitute “physical abuse” under the FCIC Policy. The Underlying Lawsuit specifically alleges “bodily injury” to Mr. Macko and therefore “relates or pertains to the body” as contemplated by the *Miglino* decision. Further, the Underlying Lawsuit alleges that Mr. Macko was ambushed and attacked in the doorway of his home, resulting in his death, and therefore asserts “hurt or injury by maltreatment” as contemplated by *Miglino*.

Although the defendants in this case, including CATALINA WEST, suggest that this Court should adopt narrower concepts of “physical abuse” which focus on a personal relationship between the abuser and the abused (such as intimate partner abuse), these definitions can be understood to constitute a *subset* of the broader definition of “physical abuse” adopted by the *Miglino* court. There is nothing in the *Miglino* decision to suggest that the *Miglino* court’s definition of “physical abuse” was situational and/or that a new definition should be supplied depending on the facts of the claim. The *Miglino* interpretation is broad enough to encompass various forms of physically abusive acts, including physical attacks between unrelated adults. This Court declines to adopt a novel (and narrower) definition to a term which the *Miglino* court already defined.

Similarly, although the defendants suggest that the term “physical abuse” is ambiguous in this context because it is part of a broader exclusion which also excludes coverage for other forms of harm, including sexual abuse, the exclusionary language in *Miglino* also excluded coverage for other forms of harm such as sexual molestation, corporal punishment, and mental abuse. There is no indication that the broader exclusionary language affected the *Miglino* court’s interpretation of “physical abuse” in any way. A plain reading of FCIC’s Physical Abuse Exclusion is that it excludes coverage for claims arising from physical abuse *along with* other forms of harm, including neglect and sexual crimes. However, there is nothing in the plain language of the Physical Abuse Exclusion which suggests that interpretation of the “physical abuse” term should be affected by exclusionary language relating to these other forms of harm. Accordingly, the Court does not find Defendant’s argument persuasive.

Finally, the defendants in this case, including CATALINA WEST, suggest that there are deficiencies in FCIC’s reservation of rights correspondence such that FCIC is estopped from denying coverage under the Physical Abuse Exclusion. Notwithstanding this contention, there is no competent summary judgment evidence before this Court to suggest any material deficiencies in FCIC’s reservation of rights correspondence. Moreover, even if such evidence was before this Court, it is well-established in Florida that the doctrine of estoppel cannot create or extend coverage where none exists. *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998, 1000 (Fla. 1989); *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998, 1000 (Fla. 1989). Even where an insurer fails to issue a reservation of rights letter altogether, that failure does “not bar an insurer from disclaiming liability where a policy or

endorsement has expired or where the coverage sought is expressly excluded or otherwise unavailable under the policy or under existing law.” *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998, 1000 (Fla. 1989). Accordingly, the Court does not find this argument by the Defendants to be persuasive.

For the reasons outlined above the claims in the Underlying Lawsuit plainly relate to “physical abuse” within FCIC’s Physical Abuse Exclusion and coverage does not apply under the Policy for the claims in the Underlying Lawsuit. Thus, FCIC has no further duty to defend CATALINA WEST in that Lawsuit and, in the absence of a duty to defend, FCIC also has no duty to indemnify CATALINA WEST for those claims. *See, e.g., Mid-Continent Cas. Co. v. Royal Crain, LLC*, 169 So. 3d 174, 184 (Fla. 4th DCA 2015) (“The eight corners of the complaint and the policy do not provide a basis for the insurer’s duty to defend. Because the accident arose from a claim excluded from coverage under the policy, the insurer has no duty of indemnification.”); *Essex Ins. Co. v. Big Top of Tampa, Inc.*, 53 So. 3d 1220, 1224 (Fla. 2d DCA 2011) (“Because Essex has no duty to defend Big Top . . . , Essex has no corresponding duty to indemnify.”); *WellCare of Fla., Inc. v. Am. Int’l Specialty Lines Ins. Co.*, 16 So. 3d 904, 907 (Fla. 2d DCA 2009) (“Having concluded that AISLIC had no duty to defend, we likewise conclude that it had no duty to indemnify WellCare for the sums [that WellCare] paid to settle the [underlying] action.”).

Conclusion

Accordingly, it is hereby **ORDERED** and **ADJUDGED**:

1. Plaintiff, FIRST COMMUNITY INSURANCE COMPANY’S Motion for Summary Judgment is hereby GRANTED.
2. FIRST COMMUNITY INSURANCE COMPANY has no further defense or indemnity obligations with respect to the claims asserted in the lawsuit styled, *Melissa Khan Macko, as personal representative of the Estate of Daniel Macko v. Old Cutler Lakes by the Bay Community Ass’n., Inc., et al.*, Case No. 2021-024419-CA-01, pending in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 20th day of September, 2023.

2022-000602-CA-01-20-2023 3:38 PM


2022-000602-CA-01 09-20-2023 3:38 PM

Hon. Gina Beovides

CIRCUIT COURT JUDGE

Electronically Signed

Final Order as to All Parties SRS #: **12** (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Electronically Served:

Brittany N. Cover, bcover@gallowaylawfirm.com
DOUGLAS J JEFFREY, dj@jeffreylawfirm.com
DOUGLAS J JEFFREY, amarquez@jeffreylawfirm.com
David Steven Henry, dhenry@kelleykronenberg.com
David Steven Henry, eorellana@kelleykronenberg.com
David Steven Henry, dshpleadings@kelleykronenberg.com
H. Dillon Graham III, eservice@grahamlegalpa.com
H. Dillon Graham III, dillon@grahamlegalpa.com
H. Dillon Graham III, marilyn.byrd@grahamlegalpa.com
Jorge P Gutierrez Jr, JPG@TheGutierrezFirm.com
Jorge P Gutierrez Jr, lperez@thegutierrezfirm.com
Jorge P Gutierrez Jr, service@thegutierrezfirm.com
Jose Gutierrez, Paralegal2@TheGutierrezFirm.com
Justin N Shindore, justin.shindore@lewisbrisbois.com
Justin N Shindore, michelle.hernandez@lewisbrisbois.com
Justin N Shindore, FLCourtMail@lewisbrisbois.com
Justin Shindore, justin.shindore@lewisbrisbois.com
Phillip S Howell, tampaservice@gallowaylawfirm.com
Phillip S Howell, phowell@gallowaylawfirm.com

Physically Served: