IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-71

No. COA20-883

Filed 1 February 2022

Wake County, No. 16 CVS 00630

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., Plaintiff,

v.

CARON KERBY, et al., Defendants.

Appeal by Defendants Arlene and Cindy from order entered 13 July 2020 by Judge A. Graham Shirley, II in Wake County Superior Court. Heard in the Court of Appeals 21 September 2021.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for plaintiff-appellee.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by William E. Moore, Jr., for defendants-appellants Arlene and Cindy.

MURPHY, Judge.

¶ 1 Where an insurance policy does not provide coverage for the acts of the insureds, the insurance company does not have a duty to defend the insureds. Where there is no duty to defend, the insurance company does not have an obligation to indemnify the insureds. Here, neither the insureds' Homeowners Policy nor General

Liability Policy provides coverage for the acts of the insureds. The insurance company does not have a duty to defend the insureds and does not have an obligation to indemnify the insureds.

BACKGROUND

¶ 2 This appeal arises from a *Complaint for Declaratory Relief* filed by Plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. against Defendants Caron Kerby, individually and d/b/a Caron's Daycare; Robert Kerby, individually and d/b/a Caron's Daycare; Arlene;[1] and Cindy, individually and as the parent and natural guardian of Arlene.[2] During the time that Arlene was enrolled in Caron's Daycare, a series of events occurred where Robert Kerby abused and molested her. Robert was subsequently arrested and charged with numerous sex crimes, and ultimately pled guilty to seven counts of first-degree sexual offense; twelve counts of indecent liberties with a child; and one count of dissemination of obscene material to a minor. Arlene and her mother, Cindy, subsequently sued Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare, in Gaston County ("Gaston County Action") for negligence and invasion of privacy. Arlene and Cindy's complaint alleges neither Arlene nor Cindy would have sustained any injury if Caron, individually and d/b/a

[1] Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

[2] Prior to this appeal, Arlene obtained the age of majority.

Caron's Daycare, had warned of Robert's pedophilia and taken steps to prevent Robert from interacting with and spending private, unsupervised, and unmonitored time with Arlene.[3]

¶ 3 The question currently before us is whether Farm Bureau is required to defend and indemnify Caron Kerby, individually or d/b/a Caron's Daycare, against any claims by Arlene and Cindy under the Homeowners Policy issued by Farm Bureau to "Robert Y. Kerby" and "Caron Kerby" and/or the General Liability Policy issued by Farm Bureau to "Robert Kerby & Caron Kerby DBA Caron's Day Care." Arlene and Cindy's complaint in the Gaston County Action alleges the following facts:

> 7. In 2006, [Cindy] entered into a contract with [Caron] and [] Caron's Daycare, a licensed daycare provider, to provide daycare and supervision to [Cindy's] child, [Arlene], at [Caron's home] while [Cindy] worked to provide for her family. [Cindy] and [Caron] were friends who socialized in each other's homes and shared [h]olidays with each other's families.
>
> 8. [Caron] and Caron's Daycare represented and agreed that it would provide a safe and healthy environment for [Arlene], and further represented that Caron's Daycare was properly licensed, adequately insured, maintained compliance with all laws, rules and regulations concerning daycare facilities and services in the State of North Carolina, and that [Arlene], along with all other children enrolled in Caron's Daycare would be properly supervised and cared for, by qualified personnel. Specifically, [] Caron Kerby, individually and doing business as Caron's Daycare,

[3] The Gaston County Action has been stayed pending the outcome of this declaratory judgment appeal.

represented and held herself out to [Arlene and Cindy] and the public as qualified, duly licensed and insured, appropriate daycare providers, who would keep [Arlene] and the other children in their care safe and free from harm while on the premises of [] Caron's Daycare.

9. [Cindy] timely paid all amounts due to [] Caron's Daycare under their contract.

10. Upon information and belief, at all times relevant to this complaint, [Robert] . . . lived and worked at [the] property co-owned and occupied by Caron Kerby. [Robert] was at all relevant times acting within the course and scope of his ownership of the premises, and/or within the course and scope of his employment by, or agency for Caron's Daycare in performing duties for and on behalf of [Caron] and the Daycare.

11. Upon information and belief, [Robert] suffers from a non-obvious, uncontrollable condition and mental illness rendering him incapable of and/or impairing his abilities to resisting prurient impulses, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger), including [Arlene] (referred to as "pedophilia").

12. Upon information and belief, [Caron] and [Robert] developed both a personal and professional relationship with [Arlene and Cindy], as family friends, surrogate-parents/custodians/guardians for [Arlene] (while [Cindy] was at work), caretakers, and confidants, and gained the trust, friendship, admiration, and obedience of [Arlene]. As a result, [Arlene] was conditioned to trust [Caron] and [Robert], to comply with [their] directions, and to respect both [Caron] and [Robert] as persons of authority. (This course of conduct is referred to hereinafter as "grooming" with respect to [Robert's] condition, impairment or disability.)

13. Between approximately 2009 and 2013, while under the

care of [Caron] and Caron's Daycare, [Arlene] was surreptitiously and lasciviously kissed, touched, and fondled beneath her clothing on scores of occasions; on at least ten separate occasions, [Robert] was allowed to lay down with [Arlene], simulate sexual relations with [Arlene] while lying on top of her, masturbate (both himself and [Arlene]) and engage in oral sexual acts.

14. Upon information and belief, on more than one occasion, [Robert] was allowed to videotape [Arlene] without permission or authority and publish such material on the internet.

15. The above occurrences took place at [Caron and Robert's home], on both the business and residential portions of the premises, at times when [Caron] and Caron's Daycare were responsible for the care, custody and control of, and/or supervised all access to [Arlene].

16. Upon information and belief, pedophilia (including fantasies, sexual urges, or behaviors) can cause clinically significant distress or impairment in social, occupational, or other important areas of functioning; upon information and belief, [Robert] was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong and/or during his interactions with [Arlene], [Robert] experienced a total incapacity to control his conduct in the circumstances, which condition was not obvious or apparent.

17. At all material times herein, [Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare] knew, had reason to know, and/or should have known of the non-obvious psychiatric condition, impairment, and incapacity of its agent, representative, co-owner, and employee, [Robert].

¶ 4 In February 2020, Farm Bureau moved for summary judgment in this declaratory judgment action, asking the trial court to

> declar[e] that Farm Bureau has no duty to defend or obligation to indemnify Caron Kerby (individually, as a partner in Caron's Daycare, and d/b/a Caron's Daycare) . . . against the [Gaston County Action], or any other civil action or claims [Arlene] or [Cindy] may bring against the [Kerbys] because of or arising out of the sexual assault of [Arlene] by Robert Kerby.

"In support of its motion, Farm Bureau relie[d] upon the pleadings in [this declaratory judgment action], the complaint in the [Gaston County Action], the written discovery, the depositions and exhibits, the certified [insurance] policies, [and] the affidavits[.]" After a hearing on the motion, the trial court granted Farm Bureau's motion for summary judgment and declared Farm Bureau

> has no duty to defend or obligation to indemnify Caron Kerby (individually, as a partner in Caron's Daycare, and d/b/a Caron's Daycare) . . . or Caron's Daycare (as a partnership, a sole proprietorship, or otherwise) against the [Gaston County action].

Arlene and Cindy timely filed a Notice of Appeal.[4]

ANALYSIS

[4] In the declaratory judgment action, default judgments were entered against the other Defendants Caron Kerby, individually and d/b/a Caron's Daycare, and Robert Kerby, individually and d/b/a Caron's Daycare.

¶ 5 "Although this is an action for declaratory judgment, because it was decided by summary judgment, we apply the standard of review applicable to summary judgment." *N.C. Farm Bureau Mut. Ins. Co. v. Paschal,* 231 N.C. App. 558, 563, 752 S.E.2d 775, 779 (other portions disapproved by *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 851 S.E.2d 891 (2020)), *disc. rev. improvidently allowed*, 367 N.C. 642, 766 S.E.2d 282 (2014). "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Integon Nat'l Ins. Co. v. Helping Hands Specialized Transp., Inc.,* 233 N.C. App. 652, 654, 758 S.E.2d 27, 30 (2014) (marks omitted). "[S]ummary judgment is an appropriate procedure for the resolution of [] declaratory judgment action[s]" involving insurance coverage if "none of [the] factual issues are material to the issue of whether [the] policy of insurance provides coverage . . . [for the alleged] liability." *Id*.

> On a motion for summary judgment the [trial] court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial. When considering a motion for summary judgment, the trial [court] must view the presented evidence in the light most favorable to the nonmoving party.

Austin Maint. & Constr., Inc. v. Crowder Constr. Co., 224 N.C. App. 401, 408, 742 S.E.2d 535, 540-1 (2012) (marks and citation omitted).

¶ 6 On appeal, Arlene and Cindy argue the trial court erred by granting Farm Bureau's motion for summary judgment. Specifically, Arlene and Cindy argue Farm Bureau has a duty to defend the insured under its Homeowners Policy and/or its General Liability Policy for (A) their negligence claims; and (B) their invasion of privacy claims. Arlene and Cindy also argue that, because Farm Bureau has a duty to defend the insureds, the issue of whether Farm Bureau has an obligation to indemnify should be stayed pending the resolution of the Gaston County Action.

¶ 7 In order to determine whether the acts of the insureds are covered by the provisions of the Homeowners Policy and/or the General Liability Policy, "the policy provisions must be analyzed, then compared with the events as alleged. This is widely known as the 'comparison test': the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 378, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). "If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010). "[W]hen the pleadings allege facts indicating that the event in question is not covered, . . . then [the insurance company] is not bound to defend." *Id.* at 28, 692

S.E.2d at 623. "[T]he question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury." *Id.* at 7, 692 S.E.2d at 611.

> Where an insurance policy's language is clear and unambiguous, our courts will enforce the policy as written. When interpreting the language of a policy, non-technical words are given their ordinary meaning unless the evidence shows that the parties intended the words to have a specific technical meaning. Ambiguous policy language, by comparison, is subject to judicial construction.
>
> However, our courts must enforce the policy as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the policy and impose liability upon the insurance company which it did not assume and for which the policyholder did not pay. When interpreting provisions of an insurance policy, provisions that extend coverage are to be construed liberally to provide coverage, whenever possible by reasonable construction.

Plum Props., LLC v. N.C. Farm Bureau Mut. Ins. Co., 254 N.C. App. 741, 744-45, 802 S.E.2d 173, 175-76 (2017) (marks and citations omitted).

A. Duty to Defend Negligence Claims

¶ 8 Section II(A)[5] of the Homeowners Policy and Section I(A) of the General Liability Policy control the extent of coverage for personal liability claims and bodily injury claims, respectively, such as negligence claims, brought against persons insured under the policies. Section II(A) covers, in relevant part, all claims "brought

[5] We note that there is more than one Section II(A) contained in the Homeowners Policy. Throughout this opinion, we refer to the Section II(A) entitled "Liability Coverages."

against an 'insured' for damages because of 'bodily injury' . . . caused by an 'occurrence' . . . [.]" The named insureds listed under the Homeowners Policy are "Robert Y Kerby [and] Caron Kerby[.]" The definitions section of the Homeowners Policy defines "bodily injury" as "bodily harm, sickness or disease, including required care, loss of services and death that results." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" that results in bodily injury. "Accident" is not defined in the Homeowners Policy. Where Section II(A) applies, the insurance company has a duty to defend and will pay up to the policy's liability limits for any damages for which an insured is legally liable.

¶ 9 Section I(A) of the General Liability Policy covers, in relevant part, all claims against the insureds for "damages because of 'bodily injury' . . . to which [the] insurance applies." The insurance "applies to 'bodily injury' . . . [that] is caused by an 'occurrence' that takes place in the 'coverage territory'[] and . . . occurs during the policy period."[6] The relevant portions of the definitions of "occurrence" and "bodily injury" in the General Liability Policy are the same definitions that are used in the Homeowners Policy. Where Section I(A) applies, the insurance company has a duty to defend and will pay up to the policy's limits for any damages for which an insured

[6] It is undisputed that the injuries took place within the coverage territory and during the policy period.

is legally liable. As both the Homeowners Policy and the General Liability Policy contain functionally equivalent relevant provisions for the purpose of determining whether coverage exists for the bodily injury caused by the insureds, we analyze them together.

¶ 10 Personal liability coverage under the policies extends to cover claims brought against an insured for bodily injury resulting from an "occurrence." An "occurrence," as defined by the policies, is "an accident." In *Plum Properties*, we interpreted what constitutes an "occurrence" within the context of a homeowners insurance policy that defined "occurrence" with language substantially similar to the policies here, reasoning:

> Our Supreme Court has previously interpreted what constitutes an occurrence within the context of an insurance policy issued by [Farm Bureau] containing the same operational definition of "occurrence" as is contained within the [p]olicies. Based on the nontechnical definition of "accident," the Court described an "occurrence" as being limited to events that are not expected or intended from the point of view of the insured. While acknowledging that it is possible to perceive ambiguity in determining the type of events that constitute an accident, the Court noted that under a commonsense reading of the language it strains logic to do so. Accordingly, where the potentially damaging effects of an insured's intentional actions can be anticipated by the insured, there is no "occurrence."

Id. at 743, 745, 802 S.E.2d at 174, 176 (citations and marks omitted).

¶ 11 The question here is not whether some interpretation of the events could possibly bring Arlene and Cindy's injury within the coverage of the policies, but "whether the events as alleged" are enough to bring the injuries within the coverage of the policies. *Buzz Off Insect Shield*, 364 N.C. at 6, 692 S.E.2d at 610. It strains logic to conjure ambiguity into the language of the policies as applied to the facts in the case at hand. The above-quoted provisions of the policies state that there is no insurance coverage for personal liability claims when the injury is not caused by an occurrence. These provisions are not ambiguous, and "this is an instance where nontechnical words (except for 'occurrence,' which is defined in the polic[ies]) can be given the same meaning they usually receive in ordinary speech." *Waste Mgmt.*, 315 N.C. at 694, 340 S.E.2d at 379 (analyzing an insurance policy with a definition of "occurrence" that is nearly identical to the definition contained in the policies here). The policies' definition of "occurrence" as an accident "significantly restrict[s] 'occurrences' to events that are unexpected and unintended as viewed from the standpoint of the insured." *Id.* at 695, 340 S.E.2d at 379; *see Plum Props.*, 254 N.C. App. at 745, 802 S.E.2d at 176. Where the potentially damaging effects of an insured's intentional actions can be anticipated by the insured, there is no "occurrence."

¶ 12 Caron and Robert's conduct, as alleged in the Gaston County Action, do not qualify as unexpected or unintended from the viewpoint of Caron and Robert. *See*

Plum Props., 254. N.C. App. at 745, 802 S.E.2d at 176 (holding the insureds' intentional acts of vandalism were reasonably certain to result in injury and did not qualify as an accident for purposes of insurance coverage). As such, the insureds' actions do not meet the definition of an occurrence, and the policies do not provide personal liability coverage for Arlene and Cindy's negligence claims.

¶ 13 However, Arlene and Cindy further argue that Farm Bureau has a duty to defend because Caron, individually and d/b/a Caron's Daycare, who herself is alleged of negligence and negligent supervision in the Gaston County Action, did not intend that Robert sexually molest Arlene. Thus, Arlene and Cindy argue the molestation should qualify as an occurrence as applied to Caron, individually and d/b/a Caron's Daycare. However, "this attenuation of the nexus between [Arlene and Cindy's] injury and the mechanism causing the damage is not sufficient to create a genuine issue of material fact as to whether intentional destructive actions qualify as an occurrence covered by the [p]olicies." *Id.* at 746, 802 S.E.2d at 176. Section II(A) of the Homeowners Policy and Section I(A) of the General Liability Policy cannot be read to cover intentional damage knowingly caused by an insured, namely Robert, which severally would not qualify as an occurrence, merely because the damages inflicted were not intended by other insureds covered by the policies. Caron, individually and d/b/a Caron's Daycare, never purchased, nor did Farm Bureau provide, coverage to protect against the intentional destructive acts of Robert.

Therefore, Robert and Caron's actions that gave rise to Arlene and Cindy's negligence claims do not fall within the coverage of Section II(A) of the Homeowners Policy or Section I(A) of the General Liability Policy.[7]

¶ 14 As an adequate and independent reason to affirm the trial court, the Homeowners Policy also contains exclusionary clauses to the personal liability coverage. Under Section II(E),[8] coverage of Section II(A) is excluded where the bodily injury that occurs "is intended by or which may reasonably be expected to result from the intentional acts or omissions or criminal acts or omissions of one or more 'insured' persons." This exclusion applies regardless of whether the insured is charged with or convicted of a crime. Assuming, *arguendo*, that Section II(A) of the Homeowners Policy provided coverage for Robert's intentional actions resulting from the negligence or negligent supervision of Caron, individually and d/b/a Caron's Daycare, Farm Bureau would still not have a duty to defend because Section II(E) excludes coverage for damages that occur as the reasonably expected result of an insured's intentional acts.

¶ 15 The insureds' acts as alleged in the pleadings are not covered under either Section II(A) of the Homeowners Policy or Section I(A) of the General Liability Policy.

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[7] Arlene and Cindy do not argue that their negligence claims are covered under any other section of either policy.

[8] We note that there is more than one Section II(E) contained in the Homeowners Policy. Throughout this opinion, we refer to the Section II(E) entitled "Exclusions."

Because there is no coverage, Farm Bureau does not have a duty to defend the insureds against Arlene and Cindy's negligence claims in the Gaston County Action. *Buzz Off Insect Shield*, 364 N.C. at 28, 692 S.E.2d at 623. The trial court did not err in granting Farm Bureau's motion for summary judgment on this issue.

B. Duty to Defend Invasion of Privacy Claims

¶ 16 Arlene and Cindy also allege two claims for invasion of privacy in their complaint. The complaint states, in relevant part:

> **SEVENTH CLAIM FOR RELIEF**
>
> *Invasion of Privacy – Offensive Intrusion*
>
> . . . .
>
> 69. [Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare,] intruded upon the privacy of [Arlene] when the solitude, seclusion, private affairs or personal concerns of [Arlene] were invaded by [Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare].
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> 70. The invasion of [Arlene's] privacy was physical and mental.
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> 71. [The intrusion done by Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare,] was done intentionally or with reckless indifference to its consequences, and a reasonable person, under the same or similar circumstances, would be highly offended by such intrusion.
>
> 72. [The publication by internet transmission done by Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare,] of material depicting the image of

> [Arlene] violated [Arlene's] right of privacy and *was done by or at the direction of [Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare,] (and/or their agent/employee) with knowledge of its falsity*.
>
> . . . .
>
> **EIGHTH CLAIM FOR RELIEF**
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> *Invasion of Privacy – Appropriation of Name and Likeness*
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> . . . .
>
> 75. [Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare,] appropriated [Arlene's] likeness for [the] commercial use and benefit [of Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare] without [Arlene and Cindy's] consent.
>
> 76. [The] misappropriation, and the publication by internet transmission, [done by Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare,] of material depicting the image of [Arlene] violated [Arlene's] right of privacy and *was done by or at the direction of [Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare,] (and/or their agent/employee) with knowledge of its false nature and commercial impropriety*.

(Emphases added).

¶ 17 Section I(B) of the General Liability Policy controls the extent of coverage for personal and advertising injury claims brought against persons insured under the General Liability Policy.[9] Section I(B) covers, in relevant part, "those sums that the

[9] The Homeowners Policy does not contain any coverage for personal and advertising injury claims and is not applicable to Arlene and Cindy's invasion of privacy claims.

insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which [the General Liability Policy] applies." "Personal and advertising injury" is defined as "injury, including consequential bodily injury, *arising out of* one or more of the following offenses: . . . [o]ral or written publication, in any manner, of material that violates a person's right of privacy[.]" (Emphasis added).

> The words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than "caused by." They are ordinarily understood to mean "incident to," or "having connection with[.]"

State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 539, 350 S.E.2d 66, 69 (1986).

¶ 18 In the complaint for the Gaston County Action, Arlene and Cindy alleged "[Robert] was allowed to videotape [Arlene] without permission or authority and publish such material on the internet[,]" and their personal and advertising injuries arose out of this publication, which violated Arlene's right to privacy. Their claims fall within coverage under Section I(B) of the General Liability Policy because they are injuries that arose out of "[o]ral or written publication, in any manner, of material that violates a person's right of privacy[.]" However, the General Liability Policy also

contains specific exclusionary clauses to the personal and advertising injury liability coverage. Under Section I(B)(2)(b), coverage of Section I(B) is excluded where the personal and advertising injury that occurs "aris[es] out of oral or written publication of material, *if done by or at the direction of the insured with knowledge of its falsity*." (Emphasis added).

¶ 19 Taking the events alleged as true and comparing them to the language of the General Liability Policy exclusions, the General Liability Policy expressly excludes coverage for the invasion of privacy claims. In paragraphs 72 and 76 of the complaint in the Gaston County Action, Arlene and Cindy explicitly allege that the publication "of material depicting the image of [Arlene] violated [Arlene's] right of privacy and was done by or at the direction of [the insured] with knowledge of its" falsity or false nature and commercial impropriety. As these claims are excluded from coverage under the General Liability Policy, Farm Bureau does not have a duty to defend the insureds against Arlene and Cindy's invasion of privacy claims in the Gaston County Action. *Buzz Off Insect Shield*, 364 N.C. at 28, 692 S.E.2d at 623. The trial court did not err in granting Farm Bureau's motion for summary judgment on this issue.

C. Obligation to Indemnify/Obligation to Pay Damages

¶ 20 "Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377. "An insurer's duty to defend is

ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial." *Id.* "Because the duty to defend may be broader than the duty to indemnify[,] . . . if it fails, so too does the duty to indemnify." *N.C. Farm Bureau Mut. Ins. Co. v. Phillips*, 255 N.C. App. 758, 764, 805 S.E.2d 362, 366 (2017), *disc. rev. denied*, 370 N.C. 580, 809 S.E.2d 594 (2018).

¶ 21 We have determined that Farm Bureau does not have a duty to defend the insureds against Arlene and Cindy's negligence and invasion of privacy claims. As Farm Bureau does not have a duty to defend, it follows that it also does not have a duty to indemnify. *Id.* The trial court did not err in granting summary judgment on the obligation to indemnify issue.

CONCLUSION

¶ 22 As to Arlene and Cindy's negligence claims, the language of the policies issued by Farm Bureau did not provide coverage for, and specifically excluded from coverage, injuries caused by intentional acts of an insured. The language of the General Liability Policy specifically excluded coverage for injuries arising out of Arlene's invasion of privacy claims. As such, there was no genuine issue of material fact that Arlene and Cindy's claims are not covered by the policies, and the trial court did not err in granting Farm Bureau's motion for summary judgment.

¶ 23 We affirm the trial court's order granting Farm Bureau's motion for summary judgment. We hold that Farm Bureau "has no duty to defend or obligation to

indemnify" Caron Kerby, individually or d/b/a Caron's Daycare, in Arlene and Cindy's Gaston County Action.

> Although our decision denies [Caron's Daycare and Caron Kerby, individually and d/b/a Caron's Daycare] liability coverage under [the insurance] polic[ies], we are aware it is [Arlene and Cindy] who likely will suffer the effects thereof. . . . We are most sympathetic to [their] plight[s] as [] innocent victim[s] of [Caron and Robert's] deplorable conduct.

Nationwide Mut. Ins. Co. v. Abernethy, 115 N.C. App. 534, 540, 445 S.E.2d 618, 621 (1994). However, we are constrained by our binding caselaw to conclude the provisions of the policies are unambiguous, and, through his intentional actions, Robert placed his family and the business outside the area of coverage.

AFFIRMED.

Judges HAMPSON and JACKSON concur.

Report per Rule 30(e).