Not Reported in S.W.3d, 2000 WL 1515158 (Tex.App.-Dallas)
(Cite as: 2000 WL 1515158 (Tex.App.-Dallas))

Court of Appeals of Texas, Dallas.
CENTENNIAL INSURANCE COMPANY; Atlantic Mutual Insurance Company; and Atlantic Lloyd's Insurance Company of Texas, Appellants,
v.
Barry BAILEY; Central Texas Annual Conference of the United Methodist Church, Inc.; Fort Worth West District of the Central Texas Annual Conference of the United Methodist Church, Inc.; General Conference of the United Methodist Church; Council of Bishops of the United Methodist Church; South Central Jurisdiction of the United Methodist Church; Joe A. Wilson; John W. Russell; First United Methodist Church of Fort Worth, Inc.; Jake Shelley; William Longsworth; Weldon Haynes; and Kay Johnson, Appellees.
No. 05-98-00007-CV.

Oct. 12, 2000.

On Appeal from the 14th Judicial District Court, Dallas County, Texas, Trial Court Cause No. 95-12126-A.

Before Justices KINKEADE, RICHTER,[FN1] and ROSENBERG.[FN2]

FN1. The Honorable John Ovard, Retired Justice, was a member of the original panel and participated in the submission of this case. He, however, did not participate in the opinion. The Honorable Martin Richter has reviewed this case.

FN2. The Honorable Barbara Rosenberg, Former Justice, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

OPINION

ROSENBERG.

***1** Centennial Insurance Company, Atlantic Mutual Insurance Company, and Atlantic Lloyd's Insurance Company of Texas (collectively, Centennial) brought suit against Barry Bailey and their insureds, Central Texas Annual Conference of the United Methodist Church, Inc., Fort Worth West District of the Central Texas Annual Conference of the United Methodist Church, Inc., General Conference of the United Methodist Church, Council of Bishops of the United Methodist Church, South Central Jurisdiction of the United Methodist Church, Joe A. Wilson, John W. Russell, First United Methodist Church of Fort Worth, Inc., Jake Shelley, William Longsworth, Weldon Haynes, and Kay Johnson (collectively, the Church and Bishops), seeking a declaratory judgment that Centennial owed no duty under its policies to defend three underlying lawsuits. [FN3] Following a bench trial, the trial court ruled against Centennial, requiring it to defend the Church and Bishops in two causes of action, *Cooke & Levin v. Central Texas Annual Conference of the United Methodist Church, Inc.*, and *Allbaugh v. First United Methodist Church of Fort Worth, Inc.* The trial court did not rule on the duty to defend Bailey in the third suit, *Allbaugh v. Bailey*. The Church and Bishops stipulate that they are not seeking representation in one of the suits, *Allbaugh v. First United Methodist Church of Fort Worth, Inc.* Centennial appeals, contending, in three points of error, that the allegations in the petitions exclude coverage and the duty to defend because the allegations are inextricably intertwined with or derived from Bailey's abusive or assaultive conduct, which is non-covered conduct, and because there is no fortuity. Because of our disposition of Centennial's second point of error, we reverse the trial court's judgment ordering Centennial to provide a defense in the underlying litigation and render judgment that Centennial has no duty to defend the Church and Bishops against the claims of Dorayne Levin. Further, we modify the judgment to exclude Centennial's duty to defend the Church and Bishops in *Allbaugh v. First United Methodist Church of Fort Worth, Inc.* We affirm the trial court's judgment as

modified in all other respects.

> FN3. The three cases are: *Allbaugh v. Bailey*, No. 96-157827-95 (96th Dist.Ct., Tarrant Co., Tex.), filed in 1995; *Cooke & Levin v. Central Tex. Annual Conference of the United Methodist Church*, No. 96-159407-95 (96th Dist.Ct., Tarrant Co., Tex.), filed in 1996; and, *Allbaugh v. First United Methodist Church*, No. 96-10548-353 (353rd Dist.Ct., Travis Co., Tex.), also filed in 1996.

THE UNDERLYING SUITS

In *Cooke & Levin v. Central Texas Annual Conference of the United Methodist Church, Inc.*, Gail Cooke filed suit against the Church and Bishops, and Dorayne Levin intervened. In Cooke's Seventh Amended Petition, she alleged that she was employed as the Reverend Barry Bailey's sermon editor by the First United Methodist Church of Fort Worth, Inc. (FUMC) from 1976 to 1994, where Bailey was the pastor-in-charge. She alleged that, during that time, Bailey initiated inappropriate conversations with her of a sexual nature, exposed himself to her on several occasions, and accosted her on church property by inappropriately grabbing private areas of her body and physically blocking her exit from offices or rooms, forcing himself and his comments on her. Levin, a member of FUMC and a victim of previous sexual abuse, alleges that on September 1, 1993, she met with Bailey for counseling concerning the previous sexual abuse, and he inappropriately solicited information and sexually reacted to her disclosures, as well as gave inappropriate advice, causing her mental anguish.

***2** Cooke and Levin alleged that Bailey, prior to and after his transfer to FUMC, had engaged in lewd, lascivious, and abusive conduct with women at the First United Methodist Church in Richardson. Cooke and Levin alleged that this conduct was known or should have been known to the officials of the General Conference, the Council of Bishops, and Bishop John Russell.[FN4] Levin also alleged that Reverend Kay Johnson knew of Bailey's improper conduct with women. Cooke and Levin alleged that none of these took corrective action or warned of Bailey's propensity for wrongful sexual conduct. Further, they alleged that, during Bailey's tenure at FUMC, the First Methodist Church, Inc., the Central Texas Annual Conference, the Council of Bishops, and the General Conference had actual knowledge or had sufficient knowledge to put them on notice of inquiry into his behavior, and they did nothing to warn.

> FN4. They also made this claim against First United Methodist Church of Richardson, Dallas Northeast District of the North Texas Annual Conference of the United Methodist Church, Inc., and the North Texas Annual Conference of the United Methodist Church, Inc. Centennial nonsuited its action for declaratory judgment against them.

Among the legal theories Cooke and Levin have pleaded are intentional infliction of emotional distress, negligent hiring, negligent appointment, negligent supervision, negligent failure to warn, and negligence in performance of their duties as agencies, boards, councils, conferences, and districts of the Methodist Church. All these claims arise directly or indirectly from Bailey's alleged sexual misconduct.

In *Allbaugh v. Bailey*, three employees alleged Bailey engaged in offensive sexual conduct, including comments and embraces. Two other women alleged they consulted Bailey in counseling sessions, during which he made offensive sexual suggestions. Another woman alleged she sought counseling from Bailey when she was a teenager, and he later forced her into a sexual relationship. In 1994, these women filed grievances with the Church and Bishops, and, in 1995, they filed suit against Bailey.

DUTY TO DEFEND

In Centennial's first point of error, it complains that the trial court erred in determining that Centennial had a duty to defend Bailey. The trial court's judgment does not address the duty to defend Bailey. At the hearing, the parties represented that Bailey did not seek representation from Centennial. Because Centennial had no justiciable controversy concerning a duty to defend Bailey, the trial court did not err in failing to declare that Centennial had no duty to defend Bailey. *See* *Slinker v. Superior Ins. Co.*, 440 S.W.2d 730, 732 (Tex.Civ.App.-Dallas 1969, writ dism'd). We overrule Centennial's first point of error.

In Centennial's second and third points of error, it

complains that the trial court erred in finding Centennial had a duty to defend the Church and Bishops in the Cooke and Levin lawsuit. Centennial asserts the claims against the Church and Bishops are related to and interdependent with conduct excluded from coverage, making their conduct not covered by the policies. It further argues the doctrine of fortuity applies, precluding coverage and its duty to defend.

Standard of Review

Whether an insurance carrier owes a duty to defend under an insurance policy is a question of law that the appellate court reviews *de novo.* *State Farm Gen. Ins. Co. v. White*, 955 S.W.2d 474, 475 (Tex.App.-Austin 1997, no writ); *State Farm Lloyds v. Kessler*, 932 S.W.2d 732, 735 (Tex.App.-Fort Worth 1996, writ denied). The duty to defend arises when the plaintiff alleges facts that potentially support claims for which there is coverage. *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex.1997) (per curiam). Factual allegations in the pleadings and the policy language determine an insurer's duty to defend. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex.1997); *Kessler*, 932 S.W.2d at 736;*Mary Kay Cosmetics, Inc. v. North River Ins. Co.*, 739 S.W.2d 608, 612 (Tex.App.-Dallas 1987, no writ). The duty to defend is determined from the face of the pleading, without regard to ultimate truth or falsity of the allegations. *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex.1965). The focus of this inquiry is on the facts alleged, however, not on legal theories. *Maayeh v.. Trinity Lloyds Ins. Co.*, 850 S.W.2d 193, 195 (Tex.App.-Dallas 1992, no writ). We indulge a liberal interpretation of the allegations in the pleadings and resolve all doubts in favor of coverage. *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 451 (Tex.App.-Corpus Christi 1992, writ denied); *Colony Ins. Co. v. H.R.K., Inc.*, 728 S.W.2d 848, 850 (Tex.App.-Dallas 1987, no writ). All that is necessary is that the allegations, if taken as true, potentially state a cause of action that is within the policy. *Heyden Newport Chem. Corp.*, 387 S.W.2d at 24-25;*Houston Petroleum Co. v. Highlands Ins. Co.*, 830 S.W.2d 153, 155 (Tex.App.-Houston [1st Dist.] 1990, writ denied). If the petition only alleges facts excluded by the policy, however, the insurer is not required to defend. *Fid. & Guar. Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex.1982).

Coverage Under The Policies

***3** Cooke did not specify any particular date Bailey's misconduct occurred. Because Cooke's allegations extend from 1976 to 1994, it is necessary to examine all the policies that were in effect during the entire period as to her allegations. Because Levin's claims arose in 1993, we review only the policies in effect at the time of her alleged injury.

Atlantic Mutual Policies for Agencies of the United Methodist Church: 1976-1979

Atlantic Mutual policy 290-64-15-01, effective from June 1, 1976 to June 1, 1979, and written in the name of the Agencies of the United Methodist Church, a rubric for the nationwide administrative entities of the Methodist Church, provided comprehensive general liability (CGL) coverage as follows:

I. COVERAGE A-BODILY INJURY LIABILITY

COVERAGE B-PROPERTY DAMAGE LIABILITY

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury or

B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations in the suit are groundless, false or fraudulent....

Exclusions

> This insurance does not apply:

* * * *

(i) to any obligation for which the insured or any carrier as his insurer may be held liable under any

workmen's compensation, unemployment compensation or disability benefits law, or any similar law;

(j) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under an incidental contract;....

The policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." In this policy form, coverage for employees was by endorsement, which read in part as follows:

It is agreed that the 'Persons Insured' provision is amended to include any employee of the named insured while acting within the scope of his duties as such, but the insurance afforded to such employee does not apply:

1. to bodily injury to (a) another employee of the named insured arising out of or in the course of his employment or (b) the named insured or, if the named insured is a partnership or joint venture, any partner or member thereof;....

A separate form provided coverage for personal injury liability. It provided the following exclusions:

PERSONAL INJURY LIABILITY INSURANCE

* * * *

Exclusions

This insurance does not apply:

* * * *

***4** (b) to personal injury arising out of the wilful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured;

(c) to personal injury sustained by any person as a result of an offense directly or indirectly related to the employment of such person by the named insured; ....

From 1976 to June 1, 1979, policy 290-64-15-01 did not extend coverage to employees for injuries arising out of and in the course of employment by FUMC. Provisions in both the general and personal liability sections exclude coverage for injuries to employees in the course of their employment. Accordingly, Centennial argues that Cooke's claims are excluded from coverage because of her employment by FUMC. *See* *Westchester Fire Ins. Co. v. Am. Gen. Fire & Cas. Co .*, 790 S.W.2d 816, 818 (Tex.App.-Austin 1990, no writ); *Aberdeen Ins. Co. v. Bovee*, 777 S.W.2d 442, 444 (Tex.App.-El Paso 1989, no writ).

Cooke alleged that she was an employee of FUMC from 1976 through 1994, when she was injured by Bailey's conduct. She alleged she was employed as Bailey's sermon editor and that Bailey's conversations with her were of a sexual nature, Bailey exposed himself to her on several occasions, and Bailey accosted her on church property by inappropriately grabbing private areas of her body and physically blocking her exit from offices or rooms. Thus, Cooke alleged hostile-work-environment sexual harassment. *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 131-32 (Tex.App.-Houston [1st Dist.] 1999, no pet.); *Garcia v. Schwab*, 967 S.W.2d 883, 885-86 (Tex.App.-Corpus Christi 1998, no pet.). Sexual harassment is an activity that occurs during the course of one's employment. *Nat'l Union Fire Ins. Co. v. Nat'l Convenience Stores, Inc.*, 891.W.2d 20, 21 (Tex.App.-San Antonio 1994, no writ); *Aberdeen Ins. Co.*, 777 S.W.2d at 444. Therefore, because Cooke alleged an injury within the scope of her employment, her claims were not covered under policy 290-64-15-01, effective from 1976 to 1979. Accordingly, Centennial had no duty to defend under this Atlantic Mutual policy issued for the years 1976 to 1979.

Atlantic Mutual Policies for Agencies of the United Methodist Church: 1979-1985

Atlantic Mutual policy 290-64-15-01 was renewed using identical language for the period from June 1, 1979 to June 1, 1982, with one pertinent exception. Effective January 23, 1980, the policy provided umbrella coverage for the first time. That form read in pertinent part as follows:

COMMERCIAL UMBRELLA LIABILITY

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INSURANCE COVERAGE PART

* * * *

I. Coverage. To indemnify the insured for the ultimate net loss in excess of the retained limit hereinafter defined, which the insured shall become legally obligated to pay as damages by reason of the liability imposed upon the insured by law, or assumed by the insured under contract on account of

(a) Personal Injury Liability,

***5** (b) Property Damage Liability, or

(c) Advertising Liability

to which this insurance applies, caused by an occurrence anywhere in the world.

This form defines the following words or phrases it uses:

* * * *

(6) Occurrence-The term 'Occurrence' wherever used herein shall mean an accident, including continuous or repeated exposure to conditions, which results[ ] in personal injury, property damage or advertising liability neither expected nor intended from the standpoint of the insured.

(7) Personal Injury Liability-The term 'Personal Injury Liability' shall mean (a) bodily injury, sickness, disease, disability, shock, mental anguish and mental injury, including death at any time resulting therefrom; (b) false arrest, detention or imprisonment, malicious prosecution or humiliation; (c) the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of rights of privacy, except when any of the foregoing of this part (c) arises out of the insured's advertising activities; (d) wrongful entry or eviction, or other invasion of the right of private occupancy; and (e) assault and battery not committed by or at the direction of the insured, unless committed for the purpose of protecting persons or property; which occur during the policy period. In no event shall any of the foregoing be construed to include discrimination, whether actual or alleged.

Identical policy language applied in the renewal of policy 290-64-15-01, effective from June 1, 1982 to June 1, 1985, except that a "broadening amendatory endorsement" defined "occurrence" as "an accident, or a happening or event, or a continuous or repeated exposure to conditions, which unexpectedly or unintentionally results in personal injury...."

While the general liability policy during this period continued to have an exclusion for employees, the umbrella policy does not. It provides coverage for personal injury that the insured could be liable for under law or by contract. However, the umbrella policy excludes claims of discrimination. Bailey's acts of harassment are discrimination in the employment context. *See* *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2282-84 (1998) (holding sexual harassment constitutes discrimination in violation of Title VII, 42 U.S.C.A. §§ 2000e-2(a) (West 1994), and citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986)).

Certainly, any of Bailey's acts of discrimination would be excluded from coverage. Additionally, this Court has held that if the suit could not be brought absent the excluded conduct, the exclusion applies. *See* *Garrison v. Fielding Reinsurance, Inc.*, 765 S.W.2d 536, 538 (Tex.App.-Dallas 1989, writ denied). Cooke, however, argues her claims against the Church and Bishops are not for discrimination but for negligent hiring, negligent appointment, negligent supervision, negligent failure to warn, and negligence in performance of their duties in failing to prevent Bailey's misconduct, which would not be excluded.

***6** Nevertheless, Cooke's claims are simply actions in negligence that require a duty, breach of that duty, and damages proximately caused by a breach of that duty. *See* *Castillo v. Gared, Inc.*, 1 S.W.3d 781, 786 (Tex.App.-Houston [1st Dist.] 1999, pet. denied) (claims for negligent hiring and supervision against employer are not independent causes of action). An employer has a duty to adequately hire, train, and supervise employees. *Id.* The negligent performance of this duty may impose liability on an employer if the complainant's injuries are caused by the employer's failure to take reasonable precautions to protect the complainant from the misconduct of its employees. *Id.* In the context of negligent hiring claims,

an employer's liability for its negligence requires the commission of an actionable tort by its employee. *Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex.App.-San Antonio 1999, no pet.) (op. on reh'g). Here, the tort supporting the Church and Bishops' negligence is Bailey's discriminatory conduct through sexual harassment. Because Bailey's discriminatory conduct is excluded, there is no coverage for the Church and Bishops' negligence under policy 290-64-15-01. Accordingly, Centennial had no duty to defend under the Atlantic Mutual policies issued for the years 1979 to 1985.

Centennial Policies for Agencies of the United Methodist Church: 1984-1992

Beginning with Centennial policy 283-74-74-00, effective from April 1, 1984 to April 1, 1989, coverage for the national Methodist entities provided in pertinent part as follows:

PART I

COVERAGE A-Bodily Injury Liability

COVERAGE B-Property Damage Liability

This Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury or

B. property damage

to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations in the suit are groundless, false or fraudulent....

Exclusions

This insurance does not apply:

* * * *

E. to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under any contract;....

The policy also provided personal injury and advertising liability coverage based upon the following language:
PART V

ADDITIONAL COVERAGES

* * * *

B. Personal Injury and Advertising Injury Liability Coverage

1) The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies, sustained by any person and arising out of the conduct of the named insured's operations, within the policy territory, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such injury,....

***7** This policy also defined certain words and phrases, and the definitions were substantively identical with the other policies.

Effective December 1, 1984 until April 1, 1989, Centennial added to this policy another form of primary coverage "for 60 bishops located in the United States of America" called "Pastoral Professional Liability Coverage," providing in part as follows:

PASTORAL PROFESSIONAL LIABILITY FORM
CLAIMS MADE BASIS

This is a Claims Made Insuring Form. Except as otherwise provided herein, this insuring form covers only acts or omissions reported to the Company during the policy period. Please read carefully.

INSURING AGREEMENTS

The Company agrees with the insured named in the General Declarations, subject to the limits of liability, exclusions and other terms of this insuring form, and subject otherwise to all of the General Conditions of the policy to which this insuring form is attached and not in conflict herewith:

A. Coverage

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any act or omission of the insured and arising out of the performance of professional services for others in the insured's capacity as a pastoral counselor.

* * * *

C. Definition of Insured

For the purposes of this insuring form, the word "insured" means:

1) The named insured designated in the General Declarations;

2) The pastor or pastors officially appointed by the named insured but only while acting within a pastoral capacity for the named insured.

* * * *

Exclusions

This insurance does not apply

* * * *

H. to licentious, immoral or sexual behavior intended to lead to or culminating in any sexual act.

Policy 283-74-74-00 also included umbrella coverage. The duty to defend under the umbrella policy applies when there is no coverage for the underlying claim. The umbrella coverage included certain changes in language, principally in the definition of "personal injury" that was defined as follows:

'personal injury' means

(1) bodily injury, sickness, disease, disability, shock, mental anguish and mental injury, including death at any time resulting therefrom;

(2) false arrest, detention or imprisonment, malicious prosecution or humiliation;

* * * *

(5) assault and battery not committed by or at the direction of the insured, unless committed for the purpose of protecting persons or property, which occur during the policy period; and

(2) racial, religious, sex or age discrimination (unless insurance thereof is prohibited by law) not committed by or at the direction of the insured, but only with respect to the liability other than fines and penalties imposed by law which occurs during the policy period.

As with prior years, this umbrella policy defined "occurrence" as "an accident, or a happening or event, or a continuous or repeated exposure to conditions, which unexpectedly or unintentionally results in personal injury...."

***8** From April 1, 1989 to April 1, 1992, Centennial provided coverage that included a combination of commercial general liability (CGL) coverage, umbrella liability coverage, and pastoral professional liability coverage through policies numbered 499-84-74-00. The duty to defend under this umbrella policy also applies when there is no coverage for the underlying claim. The CGL provided coverage for bodily injury caused by an occurrence. The CGL excluded injured employees. Additionally, the pastoral professional liability excludes sexual behavior. Furthermore, an endorsement amends the umbrella liability form by providing that the umbrella liability coverage does not apply to bodily or personal injury arising out of the pastoral professional liability. Policy 499-84-74-00 umbrella liability coverage form provides coverage for personal injury only if caused by an offense committed in the coverage territory during the policy period and "[a]rising out of the conduct of your business...." Policy 499-84-74-00 umbrella form defined personal injury to include injury arising out of false

arrest, malicious prosecution, wrongful entry or eviction, or slander, libel, or violation of right of privacy from oral or written publication. However, the umbrella policy does not have the sex discrimination exclusion.

Again, for the period April 1, 1984 until April 1, 1992, the CGL policies would exclude Cooke's claims because of her employment status. Similarly, the pastoral professional policies would not be applicable to Cooke's claims during employment because coverage is for performance of professional services for others in the insured's capacity as a pastoral counselor.

Cooke alleged that the Church and Bishops were negligent in various ways that permitted Bailey's conduct to occur. She did not allege that the Church and Bishops directed or consented to Bailey's conduct. Nevertheless, Centennial argues that Bailey's conduct cannot be an occurrence because the policy requires an "accident," and Bailey's conduct was intentional and therefore not accidental under Texas law. Centennial asserts that because of Bailey's intentional conduct there can be no coverage for the negligence of the Church and Bishops in causing the injury. Centennial claims that if the injury is in part caused by intentional conduct there can be no coverage. Centennial cites authorities that it contends support this theory. *See* *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80 (5th Cir.1997); *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695 (5th Cir.1996); *Burlington Ins. Co. v. Mexican Am. Unity Council, Inc.*, 905 S.W.2d 359 (Tex.App.-San Antonio 1995, no writ); *Duncanville Diagnostic Ctr., Inc. v. Atlantic Lloyd's Ins. Co.*, 875 S.W.2d 788 (Tex.App.-Eastland 1994, writ denied); *Centennial Ins. Co. v. Hartford Accident & Indem. Co.*, 821 S.W.2d 192 (Tex.App.-Houston [14th Dist.] 1991, no writ). In these authorities, the court found there was no coverage either because the underlying conduct was intentional and not included in the definition of a personal injury or because there was a specific exclusion for the underlying tort. *See* *Cornhill Ins. PLC*, 106 F.3d at 84-85 (negligent hiring and supervision excluded because underlying sexual harassment claim was intentional and not included as a defined personal injury); *Canutillo Indep. Sch. Dist.*, 99 F.3d at 702-05 (Title IX, negligent failure to prevent abuse, breach of duty to provide protection, and intentional infliction of emotional distress related to *exclusion from coverage for* sexual abuse of school children); *Burlington Ins. Co.*, 905 S.W.2d at 363 (suit for negligently allowing patient to leave premises related to *exclusion from coverage for* assault and battery); *Duncanville Diagnostic Ctr., Inc.*, 875 S.W.2d at 791 (negligent failure to hire, train, and supervise and inadequate policies and procedures related to *exclusion from coverage for* failure to render proper professional medical services); *Centennial Ins. Co.*, 821 S.W.2d at 193-94 (negligent hiring and entrustment related to *exclusion from coverage of* son's negligent use of automobile).

***9** Centennial's theory for noncoverage would make Bailey's intent the insureds' intent, for purposes of the policy definition of occurrence. Policy 283-74-74-00 umbrella liability coverage language contradicts this assertion because it provides that personal injury can be defined as an assault not committed at the direction of the insured. All parties agree that Bailey is not an insured. The Church and Bishops are the insureds. For the provision defining personal injury to have meaning, the intentional conduct of the perpetrator cannot be inferred to the insured. *See* *White*, 955 S.W.2d at 476-77. The claims against the Church and Bishops are for negligence. Cooke's allegations of misconduct that occurred from April 1, 1984 to April 1, 1989 would appear to fall within the coverage afforded by the policy 283-74-74-00 umbrella liability coverage because they involve an assaultive injury committed not at the direction of the Church and Bishops and thus fall within that policy's definition of personal injury. There is no underlying insurance coverage. Therefore, Centennial has a duty to defend under the terms of that umbrella policy. However, Cooke's claims do not appear to fall within the coverage afforded under policy 499-84-74-00 umbrella liability coverage effective from April 1, 1989 to April 1, 1992, because her claims do not fall within that policy's definition of personal injury. *See* *Am. States Ins. Co. v.. Bailey*, 133 F.3d 363, 371 & n. 9 (5th Cir.1998).

Centennial Policies for Agencies of the United Methodist Church: 1992-1994

From April 1, 1992, until all coverage lapsed on April 1, 1994, Centennial provided the same coverage as it had from 1989 to 1992, through policies numbered 499-84-10-40, with one addition: an additional endorsement provides that the umbrella cover-

age does not apply to bodily and personal injury sustained by any person arising out of sexual misconduct by an insured's employee or negligence related to sexual misconduct.

Under the CGL policy of this period, Cooke's claims continue to be excluded as an employee. Levin's claims, however, arose as a congregant, not as an employee. But Levin's claims arose from Bailey's conduct. Where liability is related to and interdependent on underlying tortious activity, we determine whether the underlying conduct constitutes an occurrence under the policy. *Folsom Invs., Inc. v. Am. Motorists Ins. Co.*, No. 05-99-00659-CV, 2000 WL 1239998, at *2-3 (Dallas Aug. 31, 2000, no pet. h.) (citing *Bailey*, 133 F.3d at 371-72 and *Cornhill*, 106 F.3d at 86-88). The CGL defines occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Conduct that is intentional and that results in injury that is the natural and probable consequence of the conduct is not accidental and thus not within the definition of occurrence. *Folsom Invs., Inc.*, 2000 WL 1239998, at *2-3. Bailey's conduct was intentional, and Levin's injury was the natural or probable result of his acts. Therefore, because Levin's claims are related to and interdependent on conduct that is not an occurrence, Centennial has no duty to defend under this CGL policy.

***10** Under the umbrella policy effective during this period, the endorsement specifically excludes claims arising from Bailey's sexual misconduct. Because Levin's and Cooke's claims are specifically excluded by the endorsement to policy 499-84-10-40, their claims are not covered under this policy's umbrella liability policy effective from April 1, 1992 to April 1, 1994. Therefore, there is no duty to defend under the umbrella policy.

Likewise, Levin's claims that fall under the pastoral professional policy involve sexual behavior, which is excluded from coverage by an endorsement. Because the negligence she alleged requires proof of the excluded sexual conduct, there is no coverage for her claims under this policy. *See* *Garrison*, 765 S.W.2d at 538. Consequently, Centennial had no duty to defend under the pastoral professional policy.

Because Centennial had a duty to defend the Church and Bishops against the Cooke claims under the 1984-1989 umbrella liability policy, we overrule its second point of error to this extent. However, because Centennial has no duty to defend the Church and Bishops against the Levin claims under the 1992-1994 CGL policy, we sustain its second point of error to this extent.

Fortuity Doctrine

Generally, fortuity is an inherent requirement of all risk insurance policies. *See* *Miles v. Royal Indem. Co.*, 589 S.W.2d 725, 729 (Tex.Civ.App.-Corpus Christi 1979, writ ref'd n.r.e.) (op. on reh'g); *Brownsville Fabrics, Inc. v. Gulf Ins. Co.*, 550 S.W.2d 332, 336-37 (Tex.Civ.App.-Corpus Christi 1977, writ ref'd n.r.e.). Insurance is designed to provide protection from fortuitous losses, which are losses that occur by chance or accident. *See* *Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495, 501 (Tex.App.-Houston [14th Dist.] 1995, no writ) (op. on reh'g). The fortuity doctrine precludes insurance coverage not only where offending conduct was intentional, but also where the insured is, or should be, aware of ongoing progressive loss or known loss when the policy is purchased. *Id.*

Because there is no duty to defend the Church and Bishops against Levin's claims, we address the application of the fortuity doctrine only as it relates to Cooke's pleadings. Cooke alleged that the Church and Bishops:

> had actual knowledge, or had knowledge of such information which would have put ordinarily prudent persons on inquiry, in 1976, or in the alternative, at some point thereafter through July 1994, that Reverend Barry Bailey was engaging in this reprehensible and tortious conduct to others.

Cooke did not allege specific dates Bailey's conduct occurred or when she reported it. Cooke alleged no particular date that the Church and Bishops acquired knowledge of Bailey's conduct. The umbrella policies in effect after 1985 could cover her claims. The proof of her allegations could show the Church and Bishops' knowledge prior to 1985 or after 1985. But because Cooke's petition did not allege facts that would exclude coverage, Centennial has a duty to defend under these policies. *See* *McManus*, 633 S.W.2d at 788.

***11** Because Cooke pleaded facts only excluding coverage under the fortuity doctrine, Centennial has a duty to defend. Therefore, we overrule Centennial's third point of error.

CONCLUSION

Because of our disposition of Centennial's second point of error, we reverse the trial court's judgment ordering Centennial to provide a defense in the underlying litigation and render judgment that Centennial has no duty to defend the Church and Bishops against Levin's claims. Further, we modify the judgment to exclude Centennial's duty to defend the Church and Bishops in *Allbaugh v. First United Methodist Church of Fort Worth, Inc.* We affirm the trial court's judgment as modified in all other respects.

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