

IN THE CIRCUIT COURT OF CHRISTIAN COUNTY, MISSOURI

LOGAN YANDELL,)
)
 Plaintiff,) Case No. 23CT-CC00088
 v.)
 KANAKUK HERITAGE, INC., et al.)
 Defendants.)

KANAKUK HERITAGE, INC., KANAKUK)
 MINISTRIES, and JOE WHITE,)
 Cross-Claimants)
 v.)
 ACE AMERICAN INSURANCE)
 COMPANY)
 Cross-Claim Defendant.)

ACE AMERICAN INSURANCE COMPANY’S ANSWER AND AFFIRMATIVE
DEFENSES TO KANAKUK HERITAGE, KANAKUK MINISTRIES
AND JOE WHITE’S CROSS-CLAIM

Defendant ACE American Insurance Company (“ACE”), through its counsel, provides the following answer to Kanakuk Heritage, Kanakuk Ministries, and Joe White’s (collectively “Kanakuk”) cross-claim.

1. ACE admits the allegations in paragraph 1.
2. ACE is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 and therefore denies them.
3. ACE is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 and therefore denies them.

4. ACE is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 and therefore denies them.

5. ACE admits the allegations in the first sentence of Paragraph 5. As to the second sentence of paragraph 5, ACE admits that ACE issued insurance policies under the following policy numbers G2174640A and G21746459 which are written documents that speak for themselves. Further answering as to the second sentence of paragraph 5, ACE admits that ACE participated in the negotiations leading to the settlement of Plaintiff Yandell's claims against Kanakuk and that ACE paid the settlement amount. ACE denies the remaining allegations of the second sentence of paragraph 5.

6. ACE is without knowledge or information sufficient to form a belief as to whether each of the three defendants collectively referred to as "Kanakuk" owned and operated summer camps as alleged in paragraph 6 and therefore denies them.

7. ACE admits that ACE issued policies for the represented time periods, which are written documents and speak for themselves.

8. ACE admits that ACE issued the represented policy numbers for the represented time periods, which are written documents and speak for themselves.

9. ACE admits the allegations in paragraph 9.

10. ACE admits that the policies include an endorsement as stated in paragraph 10; the policies are written documents and speak for themselves.

11. ACE admits that the policies include the quoted sentence; the policies are written documents and speak for themselves.

12. ACE is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 and therefore denies them.

13. ACE is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 and therefore denies them.

14. ACE admits that Plaintiff makes these claims in the underlying claim. ACE does not admit the truth of Plaintiff's allegations.

15. ACE admits only that ACE participated in the negotiations leading to the settlement of the Plaintiff Yandell's claims and that ACE paid the settlement amount. ACE denies the remaining allegations of paragraph 15.

16. ACE admits only that ACE participated in the negotiations leading to the settlement of Plaintiff Yandell's claims and that ACE paid the settlement amount. ACE denies the remaining allegations of paragraph 16.

17. ACE admits that Plaintiff makes these claims in and filed the above-captioned lawsuit. ACE does not admit the truth of Plaintiff's allegations.

18. ACE admits that Plaintiff makes these claims in the above-captioned lawsuit. ACE does not admit to the truth of Plaintiff's allegations.

19. ACE admits only that ACE participated in the negotiations leading to the settlement of Plaintiff Yandell's claims, that ACE paid the settlement amount and that Plaintiff makes certain allegations in the above-captioned lawsuit, which is a written document that speaks for itself. ACE denies the remaining allegations of paragraph 19.

20. ACE admits only that Kanakuk shared certain limited information with ACE regarding Newman's activities, that ACE participated in the negotiations leading

to the settlement of Plaintiff Yandell's claims and that ACE paid the settlement amount. ACE denies the remaining allegations of paragraph 20.

21. ACE denies the allegations in paragraph 21.

22. ACE admits only that Kanakuk shared certain limited information with ACE regarding Newman's activities. ACE denies the remaining allegations of paragraph 22.

23. ACE admits that ACE participated in the negotiations leading to the settlement of Plaintiff Yandell's claims and that ACE paid the settlement amount. ACE also admits that Plaintiff makes certain allegations in the above-captioned lawsuit. ACE denies the remaining allegations in paragraph 23.

24. ACE admits only that Kanakuk drafted two letters with information regarding Newman's activities. ACE denies the remaining allegations of paragraph 22.

25. ACE is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 and therefore denies them.

26. ACE admits that Kanakuk sent draft letters to ACE adjustor Marilyn Cannon in June 2010. The letters are written documents and speak for themselves. ACE denies the remaining allegations in paragraph 26.

27. ACE denies the allegations in paragraph 27.

28. ACE admits that ACE adjuster Cannon sent a letter dated June 18, 2010 to Kanakuk. The letter is a written document which speaks for itself and ACE denies any allegations that are inconsistent with or conflict with the letter. ACE denies that the June 18, 2010 letter pertained to any allegations made by Plaintiff in the above-

captioned lawsuit regarding representations, misrepresentations or omissions to Plaintiff. Further answering, ACE admits that the complete paragraph from which the quote was taken states:

The purpose of this letter is to respond to your request, which was communicated to us by email on June 17, 2010, that ACE American Insurance Company ("ACE") to give a response on your proposed communication to the Kanakuk families slated to be sent out June 18, 2010. The communication received yesterday was our first notice concerning the 2003 probationary actions taken for Mr. Newman's improper behavior. While we are aware that you are concerned about the media coverage related to the recent sentencing of Mr. Newman, any written response by Kanakuk can and may be used in civil litigation as a tool to show knowledge of improper actions of Mr. Newman prior to his arrest. Such disclosures threaten to expose Kanakuk to greater liability and may interfere with ACE's contractual right to defend claims and to have Kanakuk's cooperation in that defense. We strongly recommend that you do not send out the proposed public disclosures about Mr. Newman's misconduct at camp and Kanakuk's response to that conduct.

Further answering, ACE denies that it "told Kanakuk defendants not to send information regarding Newman's activities that have been brought into question by Plaintiff's allegations to the families of Kanakuk campers."

29. ACE admits only that the June 18, 2010 letter included the following paragraph, among others:

Additionally, ACE American Insurance Company ("ACE") is proceeding under a Reservation of Rights on the basis that Condition 2 of the Commercial General Liability Conditions section of the Policies imposes certain obligations of notice and cooperation on Kanakuk Kamps, including but not limited to 2c(3), which obligates Kanakuk Kamps to "Cooperate with us in the investigation or settlement of the claim or defense against the suit..."

ACE denies that any statement in the letter constituted a "warning." Further answering, ACE states that the letter is a written document which speaks for itself and ACE denies

any allegations in paragraph 29 that are inconsistent with or conflict with the letter.

ACE denies the remaining allegations in paragraph 29.

30. ACE admits only that the June 18, 2010 letter included the following paragraph:

Also at issue is the potential failure to act in a way to prevent “physical abuse” or “sexual misconduct” such that Kanakuk then may not be an “insured” within the meaning and definition of the policies. As outlined in Section 2, Who is an Insured in the Physical Abuse or Sexual Misconduct Liability Coverage. This also gives rise to our proceeding under a Reservation of Rights.

Based upon these recent disclosures to ACE, ACE reserves its rights to deny coverage under this coverage and any other term or condition of the policies that may apply and may need to conduct additional investigation regarding the information Kanakuk had about Mr. Newman’s misconduct and Kanakuk’s response to Mr. Newman’s misconduct.

Further answering, ACE states that the letter is a written document which speaks for itself and ACE denies any allegations in paragraph 30 that are inconsistent with or conflict with the letter. ACE denies the remaining allegations in paragraph 30.

31. ACE denies the allegations in paragraph 31.

32. ACE admits that it has declined to defend Kanakuk in this lawsuit. ACE denies that Kanakuk is owed any “other benefits” under the policies.

33. ACE admits that it sent a letter dated December 14, 2022 to Kanakuk in which ACE stated the bases for its coverage position. ACE also admits only that the letter stated in part as follows:

First, the insuring agreement of Coverage A of the Policies provides coverage only for “bodily injury” and “property damage,” as those terms are defined in the Policies. The Lawsuit does not include any allegations of “bodily injury” or “property damage”. As

such, Coverage A of the Policies does not apply and ACE respectfully declines coverage under Coverage A of the Policies.

Second, even if the Lawsuit alleged "bodily injury" or "property damage", any such "bodily injury" or "property damage" must take place during the applicable policy periods of the Policies to trigger Coverage A. Here, the Lawsuit alleges that Yandell was injured in 2009 and 2010 when the defendants allegedly made misrepresentations which induced him to settle the sexual assault allegations. Because the injuries alleged in the Lawsuit took place after the expiration of the Policies, Coverage A is not triggered and ACE respectfully declines coverage under Coverage A of the Policies on that basis.

Third, the insuring agreement of Coverage A of the Policies provides coverage only for "bodily injury" and "property damage" caused by an "occurrence," defined in part as an "accident." The Lawsuit includes a single cause of action for "fraud" and alleges the defendants intentionally misrepresented facts pertinent to the sexual misconduct allegations to induce him to settle his claims to his detriment. The alleged conduct does not constitute an "occurrence," as that term is defined in the Policies. Accordingly, ACE respectfully declines coverage under Coverage A of the Policies on that basis.

Fourth, even if the Lawsuit could be read to trigger the Insuring Agreement of Coverage A, coverage would be precluded pursuant to the Expected or Intended Injury Exclusion, which precludes coverage for "bodily injury" or "property damage" which is "expected or intended from the standpoint of the insured." Here, the Lawsuit alleges that the defendants intended to induce the plaintiffs into settling based on their misrepresentations. Accordingly, ACE respectfully declines coverage under Coverage A of the Policies on the basis of the Expected or Intended Injury Exclusion.

Fifth, the insuring agreement of Coverage B of the Policies provides coverage only for "personal and advertising injury" as that term is defined in the Policies. The Lawsuit does not include any allegations of any of the enumerated offenses within the definition of "personal and advertising injury." As such, Coverage B of the Policies does not apply and ACE respectfully declines coverage under Coverage B of the Policies.

Sixth, even if the Lawsuit alleged "personal and advertising injury", Coverage B of the Policies requires that any offense must be committed during the policy period. Because the dates of the conduct at issue in the complaint are after the expiration of the policy periods of the Policies, ACE respectfully declines coverage under Coverage B of the Policies for any offense (if any) asserted in the Lawsuit.

ACE states that the December 14, 2022 letter is a written document which speaks for itself and ACE denies any allegations in paragraph 33 that are inconsistent with or conflict with the letter. ACE denies the remaining allegations in paragraph 33.

34. ACE admits that it has declined coverage to Kanakuk for this lawsuit under the policies. ACE denies the remaining allegations in paragraph 34.

35. ACE admits that it has declined coverage to Kanakuk for this lawsuit under the policies. ACE denies the remaining allegations in paragraph 35.

36. ACE denies the allegations in paragraph 36.

37. ACE denies that it threatened to deny coverage to Kanakuk if it disclosed information to Plaintiff. ACE denies the remaining allegations in paragraph 37.

38. ACE denies the allegations in paragraph 38.

39. ACE denies the allegations in paragraph 39.

40. ACE denies the allegations in paragraph 40.

41. ACE incorporates its responses to paragraphs 1 through 40 above.

42. ACE denies the allegations in paragraph 42.

43. ACE denies the allegations in paragraph 43.

44. ACE incorporates its responses to paragraphs 1 through 43 above.

45. Paragraph 45 contains a legal conclusion to which no response is necessary. To the extent a response is required, ACE denies the allegations in paragraph 45.

46. ACE admits that it issued insurance policies to Kanakuk. The remainder of paragraph 46 contains a legal conclusion to which no response is necessary. To the extent a response is required, ACE denies the remaining allegations in paragraph 46.

47. ACE denies the allegations in paragraph 47.

48. ACE denies the allegations in paragraph 48.

49. ACE incorporates its responses to paragraphs 1 through 48 above.
50. ACE denies the allegations in paragraph 50.
51. ACE admits that Kanakuk has demanded that ACE investigate and defend the claims against Kanakuk made in the above-captioned lawsuit. ACE denies that Kanakuk has demanded that ACE settle the claims brought against Kanakuk in the above-captioned lawsuit.
52. ACE admits that it has denied coverage to Kanakuk for this lawsuit under the policies. ACE denies that Kanakuk has made any demand on it to settle within policy limits.
53. ACE denies the allegations in paragraph 53.
54. ACE denies the allegations in paragraph 54.
55. ACE incorporates its responses to paragraphs 1 through 54 above.
56. ACE admits that Kanakuk has denied liability for Plaintiff's claims.
57. ACE denies the allegations in paragraph 57.
58. ACE denies the allegations in paragraph 58.
59. ACE incorporates its responses to paragraphs 1 through 58 above.
60. ACE admits that Kanakuk has denied liability for Plaintiff's claims.
61. ACE denies the allegations in paragraph 61.
62. ACE denies the allegations in paragraph 62.
63. ACE denies the allegations in paragraph 63.

Affirmative Defenses

Without admitting any of the allegations in Kanakuk's Cross-Claim, ACE asserts and alleges the following affirmative defenses. ACE does not agree or concede that Kanakuk has properly stated any cause of action or that ACE has the burden of proof or persuasion with respect to any of its defenses. For its affirmative defenses, ACE states:

1. Kanakuk's Cross-Claim fails to state a claim upon which relief may be granted.

2. The ACE policies do not provide coverage for Plaintiff's lawsuit against Kanakuk because the lawsuit does not seek damages because of "bodily injury" or "property damage" as those terms are defined in the policies.

3. The ACE policies do not provide coverage for Plaintiff's lawsuit against Kanakuk because the lawsuit does not allege "bodily injury" or "property damage" occurring during the policy periods.

4. The ACE policies do not provide coverage for Plaintiff's lawsuit against Kanakuk because the lawsuit does not allege "bodily injury" or "property damage" caused by an "occurrence" as that term is defined in the policies.

5. The ACE policies do not provide coverage for Plaintiff's lawsuit against Kanakuk because the expected or intended injury exclusion applies.

6. The ACE policies do not provide coverage for Plaintiff's lawsuit against Kanakuk to the extent that cross-claimants Kanakuk Heritage, Inc., Kanakuk Ministries, and Joe White are not Insureds under the policies.

7. Kanakuk's claims for bad faith with respect to Plaintiff's lawsuit for fraud against Kanakuk are barred to the extent that Kanakuk has not demanded that ACE settle Plaintiff's lawsuit for fraud against Kanakuk within policy limits.

8. Kanakuk is not entitled to recover any damages for its alleged claims because its purported damages are purely speculative and cannot be proven with reasonable certainty.

9. Kanakuk's claims are barred because, if it was damaged, it failed to mitigate its claimed damages, if any.

10. To the extent Kanakuk suffered any damages or losses, any such damages or losses were not caused by ACE, but were caused by Kanakuk and/or others who were outside the control and authority of ACE, and/or other factors beyond the control of ACE such that ACE is not liable for the alleged damages or losses.

11. To the extent Kanakuk seeks attorneys' fees, Kanakuk has failed to state a claim for which attorneys' fees may be awarded.

12. To the extent Kanakuk seeks punitive damages, Kanakuk is not entitled to recover any punitive damages because it has not and cannot set forth facts sufficient to support a claim for such damages under applicable law. Any claim for punitive damages would also be barred by Mo. Rev. Stat. § 510.261; barred by the excessive fines clause of the Eighth Amendment of the United States Constitution, made applicable to the states and territories by the Fourteenth Amendment, as well as the Missouri Constitution; and violate ACE's right to procedural due process under the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Missouri.

13. Kanakuk fails to state a cause of action because to the extent information pertaining to Newman was not disclosed to Plaintiff, such information could not be disclosed under the circumstances in that Newman's confidential personnel information would have been protected by the fundamental right to privacy that an employee has in their employment records as recognized under Missouri law.

14. ACE is currently without knowledge and information sufficient to form a belief as to whether it may have additional, as yet unstated, defenses available. ACE expressly reserves the right to add additional affirmative defenses pending further discovery.

WHEREFORE, having fully answered, Defendant ACE requests that the Court dismiss Cross-claimants' claims with prejudice and award ACE its reasonable attorneys' fees and costs incurred herein; and for such other and further relief as the Court deems just and proper under the circumstances.

/s/ Susan Ford Robertson

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J. Zachary Bickel #58731

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**ATTORNEYS FOR DEFENDANT ACE
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was submitted for filing and served on November 28, 2023 by electronic notification, via the court's filing system to all counsel of record.

/s/ Susan Ford Robertson
Susan Ford Robertson