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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HEAVEN MASSAGE AND WELLNESS CENTER, Cross-complainant and Appellant, v. CONTINENTAL CASUALTY COMPANY, Cross-defendant and Respondent.	B237987 (Los Angeles County Super. Ct. No. BC437342)

APPEAL from an order of the Superior Court of Los Angeles County, Abraham Khan, Judge. Reversed.

Mastroianni Law Firm and A. Douglas Mastroianni for Cross-complainant and Appellant.

Woolls & Peer, John E. Peer, and Caitlin R. Zapf for Cross-defendant and Respondent.

Jaime Weinberg (Weinberg) sued appellant Heaven Massage and Wellness Center (HMWC), alleging that she was sexually assaulted by an HMWC employee during a massage. HMWC tendered Weinberg's claim to its comprehensive general liability insurer, respondent Continental Casualty Company (Continental), which asserted there was no coverage for Weinberg's claim under the policy's "professional services" exclusion. HMWC then cross-claimed against Continental for breach of insurance contract and breach of the implied covenant of good faith and fair dealing. The trial court granted summary judgment for Continental, concluding that there was no coverage and no duty to defend as a matter of law. We reverse.

FACTUAL AND PROCEDURAL HISTORY

I. The Underlying Sexual Assault Complaint

On May 7, 2010, Weinberg filed a complaint against HMWC and Luiz Baek (Baek). The complaint alleged that Baek, an HMWC massage therapist, sexually assaulted her during a massage on January 3, 2010, "when he touched, fondled, rubbed, grabbed and squeezed Plaintiff's breasts, buttocks, inner thighs and genitals, all while making and emitting moans, groans, grunts and other sounds and noises of sexual pleasure." In five causes of action—for sexual battery in violation of Civil Code section 1708.5 (second cause of action), assault (third cause of action), battery (fourth cause of action), false imprisonment (fifth cause of action), and intentional infliction of emotional distress (sixth cause of action)—the complaint alleged that HMWC was vicariously liable for Baek's alleged assault. In two causes of action—for sexual harassment (first cause of action) and negligence (seventh cause of action)—the complaint alleged that HMWC was directly liable for its own tortious conduct.

II. HMWC's Cross-claim Against Continental

HMWC tendered Weinberg's suit to Continental, which had issued a comprehensive general liability (CGL) policy to HMWC for the policy period

November 10, 2009, through November 10, 2010. The following policy provisions are relevant to the instant appeal:

Coverage. The policy provided that Continental would "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies." The insurance "applies . . . [t]o . . . 'bodily injury' . . . caused by an 'occurrence' that takes place in the 'coverage territory' [and] during the policy period," and to "'personal and advertising injury' caused by an offense arising out of your business, but only if the offense was committed in the 'coverage territory' during the policy period."

"Occurrence" and "personal and advertising injury." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." It defined "personal and advertising injury" as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses: [¶] (a) False arrest, detention or imprisonment . . . ."

Professional service exclusion. The policy excluded coverage for claims arising out of professional services, as follows: "This insurance does not apply to" "'[b]odily injury,' 'property damage,' 'personal and advertising injury' caused by the rendering or failure to render any professional service."

Continental declined to defend Weinberg's claim, asserting that it alleged sexual and other intentional conduct, not an "occurrence." Continental also contended that Weinberg's claim was excluded by the "professional services" provision because Weinberg alleged that the sexual assault occurred during a massage by a professional massage therapist.

On December 14, 2010, HMWC filed a cross-complaint against Continental for breach of insurance contract and breach of the implied covenant of good faith and fair dealing.

Continental moved for summary judgment. It asserted that the CGL policy excluded coverage for bodily injury "caused by the rendering or failure to render any professional service," including health or therapeutic services. Thus, because Weinberg

"specifically alleges she was injured during the course of [a] massage, which is an excluded professional service," Continental contended it had no duty to defend any of Weinberg's claims. Continental also asserted that, as a matter of law, HMWC could not demonstrate that it acted in bad faith or that HMWC was entitled to punitive damages.

HMWC opposed the motion for summary judgment, urging that sexual assault and false imprisonment could not reasonably be characterized as "professional services." In any event, HMWC said, even if there was no coverage for *Baek's* conduct, the "separation of insureds" clause required Continental to cover claims against *HMWC*.

The trial court granted the motion for summary judgment. It explained: "The Court determines that the policy's professional-services exclusion applies to the pleading allegations of sexual battery occurring during medical m[a]ssage therapy, as matters of law."

The court entered judgment on December 20, 2011. HMWC timely appealed.

DISCUSSION

The sole issue on appeal is whether Continental established as a matter of law that it did not have a duty to defend HMWC. Our review is de novo. (*County of San Diego v. Ace Property & Casualty Ins. Co*. (2005) 37 Cal.4th 406, 414 ["'"We apply a de novo standard of review to an order granting summary judgment when, on undisputed facts, the order is based on the interpretation or application of the terms of an insurance policy."'"].)

I. General Legal Principles

"'[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. [Citations.]' (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 19 . . . .) The insurer must defend any claim that would be covered if it were true, even if it is 'groundless, false or fraudulent.' (*Gray v. Zurich Insurance Co*. (1966) 65 Cal.2d

263, 273 . . . .) 'Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded. [Citations.]' (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) 'Thus, when a suit against an insured alleges a claim that potentially could subject the insured to liability for covered damages, an insurer must defend unless and until the insurer can demonstrate, by reference to undisputed facts, that *the claim cannot be covered*. In order to establish a duty to defend, an insured need only establish the existence of a potential for coverage; while to avoid the duty, the insurer must establish the *absence* of any such potential. [Citation.]' (*Ringler Associates Inc. v. Maryland Casualty Co*. (2000) 80 Cal.App.4th 1165, 1186, fn. omitted.) Doubts concerning the potential for coverage and the existence of [a] duty to defend are resolved in favor of the insured. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 299-300 . . . .)

". . . . . .

"'Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation.' (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647 (*MacKinnon*).) '"The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id*., § 1644), controls judicial interpretation. (*Id*., § 1638.)'"' (*MacKinnon, supra*, 31 Cal.4th at pp. 647-648.)

". . . . . .

"An insurance policy's coverage provisions must be interpreted broadly to afford the insured the greatest possible protection, while a policy's exclusions must be interpreted narrowly against the insurer. (*MacKinnon, supra*, 31 Cal.4th at p. 648.) The

exclusionary clause must be '"*conspicuous, plain and clear*."' (*State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 202.) 'This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.' (*MacKinnon*, *supra*, 31 Cal.4th at p. 648.)" (*Palp, Inc. v. Williamsburg National Ins. Co*. (2011) 200 Cal.App.4th 282, 288-290.)

II. The Professional Services Exclusion Does Not Bar Coverage for Weinberg's Vicarious Liability Claims

Continental asserts that a massage is a "professional service," which is specifically excluded from coverage under the plain language of its CGL policy. Thus, Continental urges, because the alleged sexual assault took place in the course of an excluded professional service, there can be no coverage for any of Weinberg's vicarious liability claims. For the following reasons, we do not agree.

A. Sexual Assault Is Not "Caused by the Rendering [of a] "Professional Service"

The parties agree that a massage is a "professional service" within the meaning of Continental's insurance policy.[1] The question before us, therefore, is whether Weinberg's injuries *resulted from* a professional service—or, stated differently, whether injuries resulting from a sexual assault committed during a massage were "caused by the rendering or failure to render [a] professional service."

The Court of Appeal considered a similar question in *Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928 (*Marie Y.*). There, plaintiff Marie Y. was sexually assaulted by her dentist, David Phipps, during a dental procedure. (*Id*. at

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[1] Continental cites several cases for the proposition that a massage is a "professional service." (See *Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800; *Antles v. Aetna Casualty & Surety Co.* (1963) 221 Cal.App.2d 438.) Because HMWC concedes the point for purposes of this appeal, we do not address the issue.

p. 936.) She sued Phipps, who tendered the claim to his professional liability insurer. The relevant policy provided that the insurer "'will pay all sums which the insured shall become legally obligated to pay as damages because of any claim that is first made against the insured *arising out of a dental incident* . . . and . . . in the practice of the profession of dentistry by the insured . . . .'" (*Id*. at p. 935, italics added.) The policy defined "dental incident" as "'any act, error, omission, or mistake in the rendering of or failure to render services in the profession of dentistry by an insured . . . .'" (*Ibid*.) The insurer declined to defend or indemnify Phipps, contending that a sexual battery did not arise out of a "dental incident" or "in the practice of the profession of dentistry." (*Ibid*.) Phipps unsuccessfully defended plaintiff's claim at trial, and then assigned to her his rights against his insurer. (*Id*. at p. 943.)

Plaintiff, as Phipps's assignee, sued the insurer for bad faith. (*Marie Y., supra*, 110 Cal.App.4th at p. 943.) The court found that the insurer had a duty to defend and indemnify Phipps as a matter of law. The insurer appealed. (*Id*. at p. 948.)

The Court of Appeal held that the insurer did not have a duty to indemnify Phipps because the sexual assault did not arise out of a "dental incident." (*Marie Y., supra*, 110 Cal.App.4th at p. 949.) It explained: "Marie Y.'s original complaint in the underlying action, even in its negligence count, specifically alleged that Phipps engaged in sexual abuse and sexual misconduct toward Marie Y. and that his behavior was '*unprofessional and totally void of a legitimate diagnostic motive*.' (Italics added.) Such behavior, even if performed during a dental procedure which included 'the use of drugs [and] anesthetic agents' (Bus. & Prof. Code, § 1625), cannot reasonably be construed as 'rendering . . . services in the profession of dentistry' within the meaning of Phipps's policy. Therefore, his alleged acts cannot be considered a 'dental incident' covered by the policy, or 'arising out of' such an incident." (*Id*. at p. 952.)[2]

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[2] For reasons not relevant to this appeal, the court also concluded that the insurer did have a duty to defend Phipps upon receipt of the first amended complaint. (*Marie Y., supra*, 110 Cal.App.4th at p. 959.)

The court reached a similar result in *State Farm Fire & Casualty Co. v. Century Indemnity Co.* (1997) 59 Cal.App.4th 648 (*State Farm*). There, three teenage girls alleged that a teacher sexually molested them. The teacher tendered his defense to the school district's insurer, INA, pursuant to a policy that obligated the insurer to pay "all sums" the "Insured" (defined to include teachers) "'while acting within the scope of their duties as such'" (*id*. at p. 652), became legally obligated to pay as damages because of personal injury. INA declined to defend. The teacher then tendered his defense to his homeowner's insurer, State Farm, which defended and subsequently sued INA's successor, Century, to recover its defense costs. The trial court granted summary judgment for State Farm. (*Id*. at p. 653.)

The Court of Appeal reversed. It concluded that INA had no duty to defend because the teacher was not "acting within the scope of [his] duties as such" when he sexually molested his students. The court explained: "In *John R. v. Oakland Unified School Dist*. (1989) 48 Cal.3d 438, the court held that a school district could not be vicariously liable to the victim of a teacher's alleged acts of molestation because such misconduct was outside the course and scope of the teacher's employment. [Fn. omitted.] [Citations.] As the court later explained in *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992 . . . , the connection between a teacher's instructional and supervisory authority and the abuse of that authority to indulge in personal, sexual misconduct '"is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer."' (*Id*. at p. 1007.) Indeed, except where sexual misconduct by on-duty police officers against members of the public is involved [citations], it is generally held that an employer is not vicariously liable to a third party victim for sexual misconduct by an employee because '. . . it could not be demonstrated that the various acts of sexual misconduct arose from the conduct of the respective enterprises.' [Citation.] Rather, in most instances, the sexual misconduct is undertaken for personal gratification and not for a purpose connected to employment. Moreover, such misconduct is usually not engendered by events or conditions relating to any employment duties or tasks; nor is it necessary to the employees' comfort, convenience,

health, or welfare while at work. [Citation.] [¶] Since a school district is not potentially vicariously liable for damages arising from a teacher's molestation of a student [fn. omitted], it follows that the district's liability insurer has no duty to defend the teacher against an action by the student and, therefore, would not become obligated to reimburse the carrier who provides a defense." (*State Farm, supra*, 59 Cal.App.4th at pp. 657-658.)

Marie Y. and *State Farm* are instructive. They suggest that a sexual assault does not "arise out of" the rendering of a professional service within the meaning of a professional services clause, even if the assault occurs while a professional service is being rendered. This is so, moreover, even if the abuser would not have had access to his victim but for the professional relationship, and even if—as in both *Marie Y.* and *State Farm*—the provision of the professional service caused the victim to be unusually vulnerable to abuse.[3] As relevant here, these cases support our conclusion that coverage for Weinberg's claims of sexual assault are not excluded by the professional services clause.

Continental contends that *Marie Y.* is inapposite because the policy in that case covered a "dental incident"—defined as an act or omission in the rendering of "services in the profession of dentistry"—not, as here, injury caused by the rendering or failure to render any "professional service." While we agree with Continental that the language of the two policies is not identical, the cases nonetheless raise analogous questions: whether sexual assaults committed *in the course of* rendering professional services are therefore *caused by* the rendering of the service. As to this issue, we find *Marie Y.'s* analysis persuasive.

Continental also contends that *State Farm* is distinguishable because it considered whether a teacher was acting within the scope of his duties when he sexually molested a student, while in the present case Baek was not an employee and "[c]overage under the Policy does not turn on whether Baek was acting within the scope of any employment duties." Again, while we acknowledge that the language of the *State Farm* policy differs

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[3] In *Marie Y.*, the victim was under the influence of nitrous oxide; in *State Farm*, the victims were young teenagers and the abuser was their high school teacher.

in important respects from the language of the policy in the present case, we do not agree that *State Farm* therefore is not relevant to our analysis. Rather, we conclude that the court's discussion of a sexual assault committed in an employment context is highly relevant here.

B. The Cases Cited by Continental Are Inapposite

Continental cites a series of cases which it says exclude coverage for intentional torts committed during the rendering of professional service. For the reasons that follow, the cases are inapposite.

1. *Cranford Insurance Co., Inc. v. Allwest Insurance Co.*

In *Cranford Insurance Co., Inc. v. Allwest Insurance Co.* (N.D.Cal. 1986) 645 F.Supp. 1440 (*Cranford*), a psychiatrist, Dr. R., entered a sexual relationship with his patient, who subsequently sued him for medical malpractice and infliction of emotional distress. Dr. R. tendered the claim to his malpractice carrier, Cranford, which accepted under a reservation of rights and, in turn, tendered the defense to Industrial, Dr. R.'s personal liability insurer. Industrial rejected the tender. Cranford settled with the patient and then sought contribution from Industrial. (*Id*. at p. 1441.)

Cranford's malpractice policy provided coverage for damages awarded against the insured "in respect of professional services rendered by him in his practice of psychiatry, or which should have been rendered by the Assured." (*Cranford*, *supra*, 645 F.Supp. at p. 1442.) Industrial's personal liability policy specifically excluded liability for bodily injury "arising out of the rendering of or failure to render professional services." (*Id*. at p. 1444.)

Industrial moved for summary judgment in the contribution action. In support, it submitted the declaration of Dr. Diebel, who stated that Dr. R. breached his duty of care as a psychiatrist by mishandling the transference process and abandoning his patient. Specifically, Dr. Diebel stated that Dr. R. knew or should have known that entering a sexual relationship with the patient, an incest victim, would "recreate[] for the patient the

incestuous relationship she had previously experienced with her stepfather." (*Cranford, supra,* 645 F.Supp. at p. 1443.) The patient's resulting psychiatric injuries "could have been anticipated." (*Ibid*.) Further, Dr. R.'s termination of the patient's treatment was "in and of itself a breach of the standards of practice of psychiatrists in this State." (*Ibid*.) Cranford opposed the summary judgment motion but did not offer any expert testimony in support. (*Ibid*.)

The court concluded that the patient's claim fell within the basic coverage of the malpractice policy and outside of the personal liability policy. (*Cranford, supra,* 645 F.Supp. at p. 1444.) It noted that the testimony of Industrial's expert witness, to the effect that Dr. R. violated the applicable standard of care, was unrebutted. The testimony thus "establishes that Dr. R.'s conduct arose out of the rendering of professional services. . . . It follows that the claim falls within the exclusion in the Industrial policy." (*Id*. at pp. 1442-1444.)

Cranford does not suggest, as Continental would have us believe, that claims arising out of sexual conduct between doctor and patient *necessarily* arise out of the rendering or failure to render professional services. Rather, *Cranford* found that the conduct at issue was within the professional services exclusion based on the particular facts of the case—specifically, the expert declaration that stated that entering into a sexual relationship with a molestation victim constituted professional malpractice. In other words, the court did not find that a sexual assault in the course of the rendering of professional services is per se an excluded professional service; instead, it found on the strength of expert testimony that the psychiatrist's entry into this particular (consensual) sexual relationship was psychiatric malpractice. *And,* in any event, the court found a duty to defend (although not a duty to indemnify) because although the original complaint alleged only medical malpractice, the insurer subsequently discovered facts suggesting that the psychiatrist *might* be liable for conduct committed outside of his professional activities. (*Cranford, supra,* 645 F.Supp. at pp. 1444-1445.)

2. *Uhrich v. State Farm Fire & Casualty Co.*

In *Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598 (*Uhrich*), State Farm issued a psychologist a personal liability umbrella policy, which defined a "loss" as "'an accident that results in personal injury or property damage.'" "Personal injury" was defined as "'bodily harm, sickness, disease, shock, mental anguish or mental injury,' as well as specified torts such as false imprisonment, defamation, invasion of privacy and assault and battery." The policy excluded personal injury "'expected or intended by you,'" "'any loss caused by providing or failing to provide a professional service,'" and "'any loss caused by your business operations or arising out of business property.'" (*Id*. at p. 604.)

The plaintiff sued the psychologist, alleging that while she was his patient, he hired her to form and direct a residential treatment program; later, he falsely accused her of stealing patient files and records. She alleged malpractice, malicious prosecution, stalking, assault and battery, false imprisonment, conversion, defamation, and negligence, among other torts. (*Uhrich*, *supra*, 109 Cal.App.4th at pp. 604-605.) The psychologist tendered the complaint to his insurer, which initially defended under a reservation of rights, but withdrew its defense after the psychologist pleaded guilty to conspiracy to pervert and obstruct justice. (*Id*. at p. 606.)

The trial court granted summary judgment for the insurer, and the Court of Appeal affirmed. As relevant here, the court found that because plaintiff alleged that her injuries resulted from "transference and countertransference," the professional services exclusion barred plaintiff's claim: "In [plaintiff's] memorandum in support of a motion for summary adjudication, she asserted State Farm knew [the psychologist] negligently allowed the 'phenomenon of transference and countertransference' to occur, which constituted malpractice. Further, State Farm knew 'the conduct giving rise to' various counts, including NIED and defamation, 'sprang from the phenomenon of transference and countertransference.' [Plaintiff] persisted in basing liability on 'countertransference' in her memorandum opposing summary judgment, stating the complaint 'alleges the other [non-defamation] personal injuries were caused not by motivation related to [the

psychologist's] business pursuits, but because of the onset of countertransference.' . . . The complaint itself explicitly ascribes [the psychologist's] 'harmful [mental] state' to his failure to prevent countertransference '[d]uring the course of treatment and continuing thereafter.' [¶] Uhrich contends the professional services exclusion is ambiguous and should be interpreted to cover injuries during 'an on-going professional relationship.' But she alleged ongoing duties were breached. The fact that [the psychologist's] campaign continued after severance of the professional relationship does not obviate the fact that her losses were 'caused by providing or failing to provide a professional service.'" (*Uhrich, supra*, 109 Cal.App.4th at p. 620.)

Continental urges that, applying *Uhrich*'s analysis, the professional services exclusion in its policy should bar coverage for HMWC's claim because that exclusion is "substantially similar" to the professional services exclusion in *Uhrich* and, in both cases, "[s]everal of the same causes of action were alleged . . . such as assault and battery and false imprisonment." We do not agree. *Uhrich* held that the professional services exclusion applied not because a psychiatrist-patient relationship existed, but rather because the plaintiff specifically alleged that her injuries resulted from the negligent manner in which that relationship was carried out. The same cannot be said here, where Weinberg alleged that her injuries resulted from the sexual assault, *not* the massage.

3. *Antles v. Aetna Casualty & Surety Co.*

In *Antles v. Aetna Casualty & Surety Co.*, *supra*, 221 Cal.App.2d 438 (*Antles*), a chiropractor obtained an insurance policy from Aetna that excluded claims for injuries "'due to the rendering of or failure to render any professional service.'" (*Id*. at pp. 438-439.) While the policy was in effect, a patient was burned when an infrared lamp used during treatment fell off the wall and onto the patient's back. (*Id*. at p. 440.) The insurer declined to defend the patient's resulting claim, and the chiropractor sued to recover the amounts awarded against him. (*Id*. at p. 439.) In support of his claim, the chiropractor contended that the injury did not arise out of the rendering of a professional service because "the act of affixing the bracket and lamp to the wall was a mechanical act and

was not a professional service." (*Id*. at p. 441.) The court disagreed: "In the present case, the lamp was the principal article or instrument used in giving the treatment, and preparatory to using it the doctor was required, in the exercise of his professional skill and judgment, to swing it from the wall to a proper place over the table and to adjust it to the proper height above the patient; and while the lamp heat was being applied, the doctor was required, in the further exercise of his professional skill and judgment, to observe the time during which the heat was applied, so that only the proper amount of heat for the specific treatment would be applied—and that a burn would not result from too much heat. Also in the present case, the doctor remained in the room while the lamp heat was being applied. As above stated, the doctor testified that the adjustment of the height of the lamp from the patient, and the matter of the length of time the patient stayed under the lamp, required his supervision in his capacity as a chiropractor. The finding of the trial court that the lamp was adjusted as a part of the doctor's professional services is supported by the evidence. It is apparent that the injury occurred during the performance of professional services." (*Id*. at pp. 442-443.)

Continental contends that *Antles* is analogous to the present case because "[n]ot only did Weinberg's injuries arise contemporaneously with the performance of the massage, but her injuries arose from the very instrumentality of the massage: Baek's hands." This contention ignores the analyses of *Marie Y.* and *State Farm*, to the effect that a sexual assault committed in the course of rendering a professional service is different than other torts committed in the same context because it is undertaken for personal gratification, not for any valid professional purpose. Injuries from a sexual assault therefore cannot be said to be "caused by the rendering or failure to render [a] professional service."

Based on all the authority discussed above, we conclude that Baek's alleged sexual assault of Weinberg was not "caused by the rendering or failure to render [a]

professional service" within the meaning of Continental's CGL policy. The trial court erred in concluding otherwise.[4]

III. The Professional Services Exclusion Does Not Bar Coverage for Weinberg's Direct Liability Claims

In two causes of action, the complaint alleged that HMWC was directly liable for its own tortious conduct. The first cause of action, for sexual harassment, alleged as follows:

"8. Beginning in or around April 2007 and lasting at least through May 9, 2007, and continuing, Defendants, and DOES 1-100, and each of them, while acting in the course and scope of their employment with Defendants and DOES 1-100, and in carrying out the policies and practices of Defendants and DOES 1-100, failed to properly implement policies, practices, and procedures to investigate sexual harassment, failed to investigate sexual harassment, failed to properly investigate sexual harassment, failed to properly train, failed to stop[/]prevent the hostile atmosphere, failed to provide a neutral party for clients to complain to without fear of retaliation and retribution.

"9. By the acts and conduct described above, Defendants, and each of them, in violation of said statutes, knew about, or should have known about, and failed to investigate, and failed to properly investigate, prevent, or remedy the sexual harassment. The acts of harassment described herein were sufficiently severe and pervasive so as to alter the conditions of the relationship, and created a quid pro quo and hostile working environment."

The seventh cause of action, for negligence, alleged as follows:

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[4] As we have noted, Continental's policy "applies . . . [t]o . . . 'bodily injury' . . . caused by an 'occurrence' that takes place in the 'coverage territory' [and] during the policy period." It defines "occurrence" as "an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions." (Italics added.) Continental has not asserted that Weinberg's vicarious liability claims are beyond the scope of the coverage because the alleged sexual assault by Baek was not an "accident," and thus we have not addressed this issue. (See *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 322, fn. 3.)

"79. Defendants, and each of them, so negligently, carelessly, recklessly and unlawfully maintained, operated, entrusted, controlled, directed, hired, trained, supervised, employed, continue to employ, contracted with, continued to contract with, their facilities and the Massage Therapists therein, including Defendant BAEK, thereby directly and legally causing the injuries and damages to Plaintiff as herein alleged.

". . . . . .

"81. Defendants, and each of them, knew or should have known about the offensive proclivities of Defendant BAEK, yet unreasonably continued to employ and/or contract with BAEK in a capacity where he had unrestricted access to clients, such as Plaintiff, where he could, and did, cause harm to them."

In its motion for summary judgment, Continental contended that HMWC's alleged negligence was not an independent source of Weinberg's injuries, and thus Weinberg's direct liability claims, like her vicarious liability claims, were excluded by the professional services exclusion. Continental repeats this contention on appeal, asserting that under *Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121 (*Century Transit*) and related authority, there can be no coverage for negligent hiring if there is no coverage for the underlying act that caused the injury. HMWC disagrees, urging that under *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal.App.3d 57 (*Purdie*), there may be coverage for an employer's negligence in hiring or retaining an employee who is incompetent or unfit, even if there is no coverage for the employee's tort against a third person.

We need not resolve the apparent split of authority between *Century Transit* and *Purdie*. Continental's reliance on *Century Transit* is premised on its assumption that the professional services exclusion excludes coverage for Baek's alleged sexual assault, an assumption we have rejected. We therefore need not decide whether, *if* such exclusion did exclude coverage for the assault, it would *also* exclude coverage for HMWC's alleged negligent hiring, retention, and supervision of Baek.

DISPOSITION

The summary judgment is reversed. HMWC shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.