IN THE COURT OF APPEALS OF IOWA

No. 2-092 / 91-1041

FILED
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CLERK SUPREME COURT

MINNESOTA MUTUAL FIRE & CASUALTY COMPANY,

Plaintiff-Appellee,

vs.

TIM SAGER,

Defendant,

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and

JEFFREY N. MANGRICH,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Alan L. Pearson, Judge.

Defendant appeals the district court's ruling he was not insured under his employer's insurance policy for liability resulting from an injury he caused to a coemployee. **AFFIRMED.**

Thomas C. Verhulst and Edward J. Gallagher, Jr., of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

Michael J. Coyle and Norman J. Wangberg of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee Minnesota Mutual Fire & Casualty Co.

Frederick G. White, Waterloo, for appellee Sager.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

The question this declaratory action addresses is whether a liability insurance policy provides coverage for an injury defendant-appellant Jeffrey N. Mangrich sustained when he was hit in the eye with a piece of plywood thrown by defendant Tim Sager. The trial court found no coverage. We agree with this finding and affirm.

Plaintiff-appellee Minnesota Mutual Fire & Casualty wrote a liability policy for Bertch Wood Specialties. Mangrich and Sager are employees of Bertch Wood. When the men were returning to their work stations following a lunch, they started in a playful way to throw pieces of veneer at each other. Veneer thrown by Sager hit Mangrich in the eye. The men agreed the actions were not malicious or part of their employment duties.

This matter was tried at law. We review to correct errors at law. In re Mt. Pleasant Bank & Trust Co., 426 N.W.2d 126, 129 (Iowa 1988).

The liability policy provides coverage for employees under "Additional Persons Insured." The provision provides:

> X. ADDITIONAL PERSONS INSURED
>
> As respects bodily injury, property damage and personal injury and advertising injury coverages, under the provision 'Persons Insured,' the following are added as insureds:
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> * * *
>
> (B) Employee--Any employee (other than executive officers) 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 or personal injury to another employee of the named insured arising out of or in the course of employment;
>
> * * *

The key language is "while acting within the scope of his duties." The trial court found, "throwing veneer at each other was neither within the scope of their duties of employment nor did it arise out of or in the course of employment."

In interpreting an insurance contract, we look to what a reasonable and ordinary person would believe the language to mean. City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1055-56 (8th Cir.)(1979); Goodsell v. State Auto & Casualty Underwriters, 261 Iowa 135, 140, 153 N.W.2d 458, 461 (1967). We construe the contract in the light most favorable to the insured. See Johnson v. Fireman's Fund Ins. Co., 272 N.W.2d 870, 873 (Iowa 1978).

The trial court found the act causing injury did not occur while Sager was acting within the scope of his duties. Because he was not insured under subsection (B), we need not address the exclusion under (1). We affirm the trial court on this issue.

Mangrich next contends plaintiff should have been estopped in denying coverage because they assumed the defense. The trial court found Minnesota Mutual notified Sager of a reservation of rights in assuming the defense. There is substantial evidence to support these findings.

Mangrich contends he has shown Minnesota Mutual is estopped from claiming they do not cover the event. Mangrich has the burden to prove his position by clear, convincing, and satisfactory proof. Knauss v. City of Des Moines, 357 N.W.2d 573, 576 (Iowa 1984). They must prove prejudice. See e.g. IMT Ins. Co. v. Myer, 283 N.W.2d 316, 318 (Iowa 1979). We affirm.

AFFIRMED.

Habhab, J., concurs; Oxberger, C.J., specially concurs.

OXBERGER, C.J. (specially concurring)

I concur in the result only.