FILED
JUN 24 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GRINNELL MUTUAL REINSURANCE CO.,)
Appellee,)
v.)
TRIM-LINE, INC., MERLE O. DANKOF, ROBERT D. ELLIS, ROGER W. BELDING, JAMES K. DRAMAN and LYLE STOBERL,)
Appellants.)

Filed June 24, 1977

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2-58903

Appeal from Adair District Court - James E. Hughes, Judge.

Appeal from order sustaining plaintiff's motion for summary judgment. Reversed and remanded.

Thomas D. Hanson and Philip H. Cless, Hurlburt, Blanchard, Cless & Porter, of Des Moines, for appellants.

Theodore T. Duffield, Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, of Des Moines, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Defendants appeal trial court's grant of summary judgment in favor of plaintiff. Plaintiff-insurer issued a general liability policy to defendant Trim-Line, Inc., also covering its agents and employees, the remaining defendants here, for Trim-Line's hog confinement operation. The policy excluded coverage:

> [T]o bodily injury or property damage arising out of discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental; . . .

On May 30, 1975, defendants were sued by landowners adjoining the hog confinement facility. The landowners' petition alleged:

> That due to the [defendants'] sewage lagoons and the deceased animals, obnoxious and offensive odors are generated and the stench and odor therefrom taint and pollute the air about the plaintiffs' residences, and penetrate therein, making the same unwholesome, offensive and at times uninhabitable, thus causing a nuisance. . .

The petition sought a permanent injunction and $50,000 damages.

After being notified of the suit, insurer had doubts concerning its duty to defend and indemnify because of its policy exclusion. Therefore, before its attorneys entered the suit in behalf of defendants, insurer obtained a written reservation of its rights to avoid indemnity under its exclusion. *See* Inghram v. Dairyland Mut. Ins. Co., 178 N.W.2d 299, 304-305 (Iowa 1970). Insurer also undertook an investigation of the landowners' claim. Subsequently on July 3, 1975, the insurer's-defendants' attorneys filed a motion to require the landowners to recast their petition. The landowners did so and the recast petition demanded $250,000 instead of $50,000.

On July 17, 1975, insurer commenced this action for declaratory judgment against defendants to determine whether because of

its policy exclusion it was required to defend or indemnify them in the landowners' lawsuit. Defendants denied the exclusion was applicable to the adjoining landowners' suit or alternatively alleged that (1) insurer's 'reservation of rights' agreement was ineffective, and thus insurer had waived enforcement of the exclusion by defending the suit or (2) insurer was estopped to enforce the exclusion because their motion to recast the landowners' petition ultimately increased the amount of damages being sought. On September 22, 1975, defendants sought from insurer production of all documents relating to its investigation of the landowners' suit and its decision that it had no duty to defend.

On September 25, 1975, before this production motion was complied with by it, insurer moved for summary judgment. After hearing, trial court found insurer's exclusion to be unambigious, that it applied to the allegations contained in the landowners' petition and granted summary judgment. For reasons not stated, it also dismissed defendants' counterclaim. Defendants appeal.

I. Dismissal of defendants counterclaim.

We believe trial court was half right and half wrong in granting insurer's summary judgment against defendants' counterclaim.

A. Reservation of rights.

Defendants challenge of the effectiveness of insurer's reservation of rights agreement was properly subject to summary judgment. Although defendants seem to argue to the contrary, an agreement between an insurer and insured whereby the insurer undertakes to defend a suit against the insured and reserves the right to later contest its duty to do so is given effect in Iowa. *See* Inghram v. Dairyland Mut. Ins. Co., 178 N.W.2d 299, 304-305 (Iowa 1970). Defendants vague reference in their answer that the

reservation of rights agreement was not executed by all defendants is dispelled by each of their signatures on it. Moreover, this vague reference did not comply with rule 100(a), Rules of Civil Procedure. Given the clarity of the law and the document before it, trial court could properly declare its legal effect.

B. Estoppel.

We have doubts, however, as to the propriety of granting summary judgment on the rest of defendants' counterclaim. Defendants alleged that the 'motion to recast' the landowners' petition "so heedlessly and recklessly jeopardized and prejudiced" the defendants that insurer is estopped to terminate its defense and enforce its exclusion. When an insurer assumes the duty of defending claims against an insured, the obligation is one requiring due care and strict performance in good faith. In such cases, the insurer owes the duty of reasonable care in conducting the defense and is liable for damages resulting to the insured by reason of its negligence in performing such duty. *See* 44 Am.Jur.2d Insurance § 1552 (1969). In this case, all we have is defendants' allegations and insurer's general denial of them. With only a denial, it was error to summarily dismiss defendants' allegations. While the counterclaim may be anemic, it is not for a court in a summary judgment motion to determine whether it has a meritorious factual basis. *See* Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974).

II. Summary judgment on insurer's declaratory judgment.

Turning to trial court's grant of summary judgment on the issue that its exclusion applied to the landowners' petition, insurer's argument finds its basis in interrelated premises: (1) its exclusion is unambigious; (2) the allegations of the landowners' petition are controlling as to its duty to defend; (3) the landowners' petition shows defendants' nuisance was not

"sudden and accidental". While the issue is close, we believe trial court erred in granting summary judgment.

We agree with insurer that its policy exclusion is unambigious in its description as to what type of incidents are excluded from coverage. *See* State Auto. & Cas. Under. v. Hartford Acc. & Ind. Co., 166 N.W.2d 761, 763-764 (Iowa 1969). Yet this conclusion does little to aid in clarifying the problems when it is applied to an individualized situation. Necessarily the phrase "but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental" is an operational definition hinging on the type of activity which is ongoing or the quality of the incident which occurred. What is a sudden and accidental discharge at a nitroglycerin factory may be an entirely different type of event than that which occurs on a livestock farm. Hence, the problem simply stated: is the nature of the stench coming from defendants' hog farm one of the situations which the exclusion defines? This inherent problem in the application of this exclusion becomes critical when examining the allegations of the landowners' petition.

It is true that normally the allegations of the petition control an insurer's duty to defend and indemnify. *See* New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834, 837-839 (Iowa 1972). However, in looking to the allegations of the petition to determine an insurer's duty, a court must draw the distinction between its essential and nonessential allegations. New Hampshire Ins. Co. v. Christy, supra. Here the landowners' petition alleged the hog operation to be a nuisance due to sewage problems and dead hogs. But the landowners' allegations of nuisance do not need to specify whether the odor was 'sudden and accidental'. While a nuisance ordinarily arises from continuous activity it could result from a single 'sudden and accidental' event. *See* Sound Storm Ent., Inc. v. Keefe, In and For Fayette Cty., 209

N.W.2d 560, 567 (Iowa 1973); Kriener v. Turkey Valley Comm. Sch. Dist., 212 N.W.2d 526 (Iowa 1973); *see also*, Patz v. Farmegg Products, Inc., 196 N.W.2d 557 (Iowa 1972); Note, 57 Iowa L. Rev. 451 (1971). In short, given the multifacet acts which can constitute a nuisance we do not believe the mere allegations of the landowners' petition control insurer's duty to defend. *See* New Hampshire Ins. Co. v. Christy, supra. Necessarily, a question of fact remains as to application of the exclusion to this individualized case.

We believe this conclusion is reinforced by the award of summary judgment before defendants were allowed discovery of what insurer's investigation of the landowners' lawsuit disclosed. *See* Carter v. Jernigan, 227 N.W.2d 131 (Iowa 1975). Without intimating whether insurer had a duty to defend or indemnify, we conclude trial court erred in granting summary judgment. Trial court's judgment is reversed and remanded.

All judges concur except DONIELSON, J., who specially concurs.

DONIELSON, J. (specially concurring)

I am in agreement with Chief Judge Allbee, but wish to add that since this is a Petition for Declaratory Judgment to interpret the rights of the parties under an insurance policy that I place a great deal of emphasis and importance on the September 18, 1975, Motion for Production of Documents.

This motion essentially relates not only to requesting documents concerning the investigation of the landowner's suit and the decision that the company had no duty to defend, but more importantly to me, the motion asked for numerous documents relating to the insurance contract itself under §§ 1 and 6 of the motion. These documents may well be imperative to any interpretation under this declaratory judgment lawsuit. It seems to me that this is specifically covered under Carter v. Jernigan, 227 N.W.2d 131, at 135 (Iowa 1975) where it states: *"Hence the modern decisions hold that a party against whom a summary judgment motion is made should first be allowed to discover the facts if he desires. ..."* I believe that *Carter, supra,* relating to discovery is entirely dispositive.