IN THE COURT OF APPEALS OF IOWA

No. 7-249 / 86-1600

FILED
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CLERK SUPREME COURT

MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

292

vs.

MARK ROBERT WHITE, WARREN COHEN, DIAMOND DAVE'S TACO COMPANY, and **BO-JAMES RESTAURANT,**

Defendants-Appellants,

BRADLEY L. NIELSON,

Defendant.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Insured appeals from summary judgment granted to his insurer. He contends a genuine issue existed as to whether his insurer was compelled to defend him in a civil suit stemming from a fight he was engaged in. Insured claims his participation in the fight was limited to actions taken in self-defense. **AFFIRMED.**

C. Peter Hayek and James C. Larew of Hayek, Hayek, Hayek & Holland, Iowa City, for defendant-appellant White.

Douglas R. Oelschlaeger and John M. Bickel of Shuttleworth & Ingersoll, Cedar Rapids, for remaining defendants-appellants.

William M. Roemerman of Crawford, Sullivan, Read & Roemerman, Cedar Rapids, for plaintiff-appellee.

Lloyd E. Humphreys of Humphreys & Associates, Cedar Rapids, for defendant Nielson.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

DONIELSON, P.J.

Mark White had an insurance policy with Mutual Fire and Automobile Insurance Company (Mutual). The policy provided liability coverage, but it contained an exclusion stating coverage did not extend to bodily injury or property damage "which is expected or intended by the insured."

White was involved in an altercation with Bradley Nielson. White contends Nielson and others attacked him without provocation and his own involvement in the fight was entirely in self-defense. However, White later pled guilty to a criminal charge of assault based on the altercation.

Nielson was injured in the fight. He filed a suit against White alleging the intentional tort of assault. Nielson also sued three dram-shop defendants which he alleged had served alcoholic beverages to White before the altercation.

In reliance on his insurance policy, White looked to Mutual to defend him against the Nielson lawsuit. Mutual took the position its policy did not cover the Nielson claim because White had expected or intended the injuries sustained by Nielson.

Mutual filed the present declaratory judgment action seeking a declaration that it was not required to defend White against the Nielson suit or to pay any judgment resulting therefrom. The district court agreed with Mutual

and granted it summary judgment. The district court relied on McAndrews v. Farm Bureau Insurance Co., 349 N.W.2d 117 (Iowa 1984), in which the Iowa Supreme Court held an act of self-defense was an intentional act within the meaning of a liability exclusion similar to that involved in this policy.

White appealed from the declaratory judgment in favor of Mutual. The dram-shop defendants to the underlying Nielson suit also appealed. Pursuant to 11 U.S.C. section 362, this matter was stayed following the filing of a bankruptcy petition by one of the parties. Defendants Warren Cohen, Diamond Dave's Taco Company, and Bo-James' Restaurant dismissed their appeal on May 15, 1989. Absent any resistance, White's motion to remove the bankruptcy stay was granted November 30, 1989.

White contends the district court erred because a genuine issue of material fact existed concerning coverage of this action. He argues the district court erred in holding the policy did not cover this incident because the injury to Nielson had been "expected or intended" by White. White contends the district court improperly expanded the holding of McAndrews, and he criticizes the reasoning of McAndrews and argues acts of self-defense should not ordinarily be classified as intentional acts within the meaning of liability exclusions.

I. **Summary Judgment.** A summary judgment is properly granted only when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237; Froning & Deppe v. South Story Bank & Trust, 327 N.W.2d 214, 215 (Iowa 1982). A court must examine the entire record (i.e. pleadings, motions, affidavits and testimony) to determine if it discloses a genuine issue as to any material fact. City of Ankeny v. Armstrong Co. Inc., 353 N.W.2d 864, 867 (Iowa App. 1984).

The burden is upon the moving party to establish the absence of any genuine issue of material fact. Colton v. Branstad, 372 N.W.2d 184, 188 (Iowa 1985). The court must view the record in the light most favorable to the party against whom summary judgment is sought. Id. Every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984).

Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of its pleading. It must set forth specific facts showing there is a genuine issue. Bauer v. Stern Finance Co., 169 N.W.2d 850, 853 (Iowa 1969), cert. denied, 396 U.S. 1008 (1970).

In reviewing the grant or denial of a summary judgment motion, this court is guided by the same principles utilized by a trial court in making that determination. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984). Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Id.

Mutual contends White never set forth any affidavits detailing his claim of self-defense. The only references to White's allegation of self-defense are found in his answer to the petition for declaratory judgment and in his affidavit and brief filed in resistance to the motion for summary judgment. White's affidavit includes only the mere conclusion he believed he was acting in self-defense. The only detailed description of events supporting this claim are found in his brief filed in resistance. Without deciding whether White's claims of self-defense had to be more fully elaborated in his affidavit, we find that in any case Mutual was entitled to summary judgment in this action.

II. Effect of Policy Exclusion. In McAndrews v. Farm Bureau Insurance Co., 349 N.W.2d 117, 120 (Iowa 1984), our supreme court held, in light of a policy exclusion for bodily injury which is either "expected or intended from the standpoint of the insured," an insurer does not have a duty to defend an insured who struck a third party, even if

the insured had acted in self-defense. White attempts to distinguish McAndrews by characterizing it as a mutual affray in which the insured exerted some control and could have walked away before violence erupted. We reject this argument. The decision in McAndrews is essentially an absolute view that one acting in self-defense or in response to provocation, intends the actions he takes in defense of himself, including the movements of his arm and fist and the physical contact he has with another. Such intentional contact is not covered by policy provisions excluding intentional acts.

> The question of self-defense is a standard of [the insured's] liability to [the victim]. It presents an issue of motive or justification for an intentionally caused harm, but it does nothing to avoid the inference of intent to harm that necessarily follows the deliberate blow to [the victim's] face.

Altena v. United Fire and Cas. Co., 422 N.W.2d 485, 488 (Iowa 1988), quoting McAndrews, 349 N.W.2d at 120.

White's arguments with regard to degrees of intention (he contends striking Nielson was only "incidental" to his intent to defend himself) have been addressed in McAndrews and Altena. We are under a duty to follow the holdings of our supreme court; if such decisions are to be overruled it is the supreme court's prerogative to do so. State v. Eichler, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (Iowa 1957).

To determine whether Mutual had a duty to defend White, we are to construe the policy and look to the pleadings and all other admissible and relevant facts in the record to ascertain whether there is coverage under the policy for White's claim. Kartridg Pak Co. v. Travelers Indem. Co., 425 N.W.2d 687, 688 (Iowa App. 1988). An insurer is not required to defend in an action against an insured unless the action subjects the insurer to potential liability under the insurance policy. First Newton Nat. Bank v. Gen. Sas. Co., 426 N.W.2d 618, 627 (Iowa 1988).

The record in this case reveals White admitted striking Nielson, albeit in self-defense, and the extent of Nielson's claim against White was for intentional assault.[1] The policy at issue specifically excluded coverage for bodily injury which is "expected or intended by the insured." In light of McAndrews, the district court did not err in ruling as a matter of law that Mutual was not obligated to defend White in Nielson's action against him. No genuine issue of fact existed which would affect the outcome of Mutual's declaratory action. The district court did not err in granting Mutual's motion for summary judgment.

AFFIRMED.

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1. Pursuant to the decision in First Newton Nat. Bank, 426 N.W.2d at 630, an insurer has an obligation to defend an entire action even though it involves both covered and noncovered claims. As Nielson's action against White involved only a noncovered claim, Newton has no application in this matter.