IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

Filed September 25, 1986

VERNON LOMBARDI,

Plaintiff-Appellee/Cross-Appellant,

vs.

UNITED FIRE and CASUALTY COMPANY,

Defendant-Appellant/Cross-Appellee.

6-128
85-1351

107

Appeal from the Iowa District Court for Dubuque County (No. 44813) - Thomas H. Nelson, Judge.

Defendant insurance company appeals from a district court judgment that defendant was obligated to defend plaintiff who was sued by a third person for the intentional tort of assault. Plaintiff cross-appeals contending the district court erred by refusing to award him exemplary damages or to award him attorney fees and costs in the instant action as a part of his actual damages. **REVERSED IN PART, PLAINTIFF'S CROSS-APPEAL IS DISMISSED.**

Louis P. Pfeiler and Mark S. Beckman, of Pfeiler, Pearce & Beckman, Dubuque, for the defendant-appellant/cross-appellee.

Stephen J. Juergens, of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for the plaintiff-appellee/cross-appellant.

Heard by Snell, P.J., and Hayden, and Sackett, J.J.

SACKETT, J.

Defendant United Fire and Casualty Company appeals from a district court judgment that United was obligated to defend Plaintiff Vernon Lombardi who was sued by a third person for the intentional tort of assault and battery. United contends the district court erred in holding that it was obligated, under the terms of the insurance policy, to defend Lombardi in the earlier tort action. We agree.

Lombardi cross-appeals from the district court judgment, contending the district court erred by refusing to award him exemplary damages or to award him attorney fees and costs in the instant action as an element of his actual damages. We dismiss Lombardi's cross-appeal.

Vernon Lombardi and his son were involved in an altercation with Lombardi's former son-in-law, Thomas Schuster. Schuster was injured and later sued Lombardi and his son for the intentional tort of assault and battery.

Lombardi asked United, which had written his homeowners' insurance policy, to defend him against the Schuster lawsuit. United insured Lombardi under its "Homeowners 76 Policy," a standardized general personal liability policy. It provided personal liability protection under Coverage "E" as follows:

> If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, we will:
>
> a. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> b. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide *is appropriate. Our obligation to defend* any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our limit of liability. (emphasis added).

The policy also provided that Coverage "E" personal liability did not apply to "bodily injury . . . which is expected or intended by the insured."

United refused to defend Lombardi, taking the position that the personal liability sections of the homeowners' policy did not cover bodily injury caused by the insured's intentional acts:

> We have received a copy of the summons and complaint filed by Thomas Schuster against you. This complaint alleges that you committed acts of assault and battery upon the plaintiff resulting in the injury and damages demanded.
>
> Your policy number 80-244-001, which you have with this company contains the following exclusion:
>
> > "1. Coverage E - Personal Liability . . . do not apply to bodily injury and property damage . . . (a) which is expected or intended by the insured."
>
> Since the complaint is for willful and deliberate acts committed by you, upon the person of the plaintiff, no coverage is provided by your policy for this lawsuit.
>
> I regret that we cannot be of any assistance to you in this matter.
>
> It will be necessary for you to retain your own legal council (sic) for defense of this matter . . . .

Lombardi defended the Schuster lawsuit through a private attorney and the lawsuit was eventually settled. Although Lombardi did not pay any money to Schuster as part of the settlement, he did incur over $8,000 in attorney fees and costs defending the Schuster lawsuit.

Thereafter Lombardi sued United for its failure to defend him in the Schuster lawsuit. Lombardi contended that Schuster began the fight and that Lombardi acted only in self-defense. Lombardi also denied striking or injuring Schuster in defending himself. Lombardi contended Schuster's injuries were caused by the actions of others and that he was innocent. Therefore, Lombardi

argued that the exclusionary language did not apply and United had a duty to defend him.

Lombardi's suit was tried to the court, which entered a judgment for Lombardi. The court concluded United was obligated under its homeowners' policy to defend Lombardi because the Schuster pleadings and other facts available at that time did not make it clear that Lombardi had intended bodily injury to Schuster.

The district court awarded Lombardi actual damages of $8,110.36 plus interest for attorney fees and costs in defending the Schuster lawsuit. The district court denied both Lombardi's request for exemplary damages and a request that his actual damages include attorney fees and costs incurred in the instant case against United. United appeals from the judgment in favor of Lombardi. Lombardi cross-appeals from the district court's denial of his request for exemplary damages and for attorney fees and costs in the instant action.

I.

We first address Lombardi's cross-appeal. Lombardi filed a cross-appeal from the district court's refusal to award him exemplary damages or to award him attorney fees and costs in the instant action as an element of his actual damages. Under Iowa R. App. P. 5(a), a cross-appeal must either be taken within thirty days from the entry of final judgment or within five days from the time an appeal is taken.

The judgment determining United was obligated to defend Lombardi and awarding damages to Lombardi was filed on August 14, 1985. United's appeal was filed September 13, 1985. Lombardi filed a notice of cross-appeal on September 23, 1985. This was more than thirty days after the judgment on damages.

It was also more than five days after United's notice of appeal was filed. Lombardi's cross-appeal was not timely under either alternative of Rule 5(a). Thus, we have no jurisdiction to address Lombardi's cross-appeal. Hulsing v. Iowa National Mutual Insurance Co., 329 N.W.2d 5, 7 (Iowa 1983).

II.

The question in the instant case of whether United was required by its policy to defend Lombardi in the assault and battery action brought by a third party is a very close one. We note the briefs of both parties lay out authority and arguments in a persuasive and well-reasoned manner.

The rules of construction of insurance policies are well established. The insurance policy is a contract which must be construed as a whole. Aetna Casualty and Surety Co. v. Jewett Lumber Co., 209 N.W.2d 48, 49 (Iowa 1973). The words used must be given their ordinary, not technical meaning to achieve a practical and fair interpretation. Id. See Farm Bureau Mutual Insurance Co. v. Sandbulte, 302 N.W.2d 104, 108 (Iowa 1981). If words are fairly susceptible to two interpretations, the court should accept the one which will sustain the insured's claim. Id. Because the insurer drew the contract and has expertise in the field, we will strictly construe the policy against the insurer. Aetna Surety and Casualty Co., 209 N.W.2d at 49.

Under personal liability insurance policies an insurer's duty to defend arises whenever there is a potential or possible liability to pay based on the "facts at the outset of the case." McAndrews v. Farm Bureau Mutual Insurance Co., 349 N.W.2d 117, 119 (Iowa 1984) (citing 7C J. Appleman, Insurance Law and Practice §4684, at 83 (Berdal ed. 1979)). The duty to defend is not dependent on the probable liability to pay based on the facts ascertained at trial. Id. However, the Iowa Supreme Court is in agreement with the weight of authority

which generally limits the obligation to defend to those claims which would be covered under the liability policy. Chipokas v. Travelers Indemnity Co., 267 N.W.2d 393, 396 (Iowa 1978).

The "facts at the outset of the case" have traditionally been those alleged in the petition in the suit against the insured. Chipokas, 267 N.W.2d at 395. "In deciding whether an insurer has a duty to defend, the first inquiry is into plaintiff's pleadings to see if the pleadings state facts which bring the claim within the liability covered by the policy." Id. (citing 7A Appleman, Insurance Law and Practice §4683 at 436 (2d ed. 1962)). If the petition in the action brought against the insured on its face alleges facts which come within the coverage of the liability policy, the insurer is obligated to assume the defense of the action. Chipokas, 267 N.W.2d at 395 (quoting 44 Am. Jur. 2d Insurance §1539). If the alleged facts fail to bring the case within the policy coverage, the insurer is free of such obligation, at least initially. Id.

Sometimes, however, the insurer's scope of inquiry must be expanded beyond the petition, especially for "notice pleading" petitions which often give few facts upon which to assess an insurer's duty to defend. McAndrews, 349 N.W.2d at 119; Central Bearings Co. v. Wolverine Insurance Co., 179 N.W.2d 443, 445-46 (Iowa 1970). In Central Bearings Co., the court held it must consider all facts admissible and relevant under the allegations to determine whether there exists a duty to defend:

> Where there are facts extraneous to the allegations of the complaint which are known either to insurer or insured which, if proved, make out a case against the insured which is covered by the policy, the duty to defend exists.

Id., at 445-46.

On the other hand, an insurer is not required to provide a defense when no facts presently available to it indicate coverage of the claim merely because

such facts might later be added by amendment or introduced as evidence at trial. McAndrews, 349 N.W.2d at 119.

In the instant case we look to the pleadings and all other admissible and relevant facts to resolve the question whether the action comes within the insurance policy's duty to defend. If it appears from these facts that there was potential for coverage under the policy, Lombardi must prevail. McAndrews, 349 N.W. 2d at 119.

Schuster filed his petition for assault against Lombardi and his son alleging the following:

> 4. That at Timmerman's Supper Club, located at East Dubuque, Illinois, on the twenty-first day of December, 1980, at approximately 1 a.m., Defendants jointly and severally abused Plaintiff with vulgar language and wrongful accusations that Plaintiff had reported Defendant Vernon Lombardi to the Internal Revenue Service for income tax evasion and furthermore jointly and severally maliciously assauted (sic) Plaintiff by knocking him to the ground and kicking him and striking him in the face and on the body, thereby breaking his nose and cutting his forehead and bruising his face and body and created on-going nasal breathing difficulties requiring surgery.
>
> 5. That aforesaid assault and battery was unprovoked, willful, malicious, vicious, and violent.
>
> 6. That the sole cause of injuries herein complained of was the deliberate and unprovoked assault by Defendants upon Plaintiff. (emphasis added).

Lombardi points out the petition does not allege he intentionally injured Schuster, only that he intentionally assaulted Schuster. As such, Lombardi argues the petition on its face does not exclude coverage under the policy. Lombardi bases his argument for coverage on the premise the exclusionary language quoted from the liability policy differentiates between intentional acts and intentional injuries. He argues the policy, by its language, excludes only intentional bodily injury from personal liability coverage. He argues further

that intentional acts which result in unintended bodily injury are not excluded from personal liability coverage.

Lombardi maintains that he acted in self-defense, that he did not intend to injure Schuster and that he did not strike Schuster. In addition, Lombardi asserts that intent to injure is not an element in an assault and battery action. Therefore, he contends that the Schuster lawsuit did not come within the exclusions to coverage for personal liability and that United had a duty to defend him against the Schuster lawsuit.

If we were to adopt Lombardi's proposition, which bifurcates intentional acts from intentional injury, we would render the policy's exclusionary language meaningless rather than giving it meaning. As Lombardi correctly points out, intent to injure is not an element of the tort of assault and battery. See In re Estate of Cuikendall, 223 Iowa 526, 273 N.W. 117 (1937). Thus, under Lombardi's interpretation of the exclusionary language the insurer always would be obligated to defend in assault and battery suits, unless the insured himself admitted his intent was to injure the victim. Lombardi's interpretation of the exclusionary language is both strained and not supported by Iowa case law.

In McAndrews, the court was presented with a similar set of facts and concluded the insurer was not obligated to defend the insured in an assault and battery action. There the insurance policy also provided an exclusion for "bodily injury or property damage which is either expected or intended from the standpoint of the insured." (emphasis added). McAndrews, 340 N.W.2d at 118. The plaintiff had argued that there was at least a possibility the intentional act exclusion would not apply based on his claim of self-defense and, therefore, the insurer was required to defend him. Id. The plaintiff argued his act of striking the third person in order to defend himself was deliberate but that

he did not intend to injure the third person. Id. at 119. The court, however, rejected the plaintiff's attempts to bifurcate intentional acts from intentional injury in order to save his claim from the exclusionary language. Id. The court held that a possible justification of self-defense did not save an otherwise intentional act from an intentional injury exclusion. Id. Therefore, the insured's intentional act, even if in self-defense, was excluded from coverage under the policy's intentional act exclusion. Id.

We find McAndrews to be controlling in the instant case. Lombardi asserts he acted in self-defense in the altercation with Schuster. However, Lombardi's defense is not a negation of the act. Rather, like McAndrews, Lombardi's defense presents an issue of justification for an intentionally caused harm, but does not avoid the inference of intent to harm that necessarily follows an intentional assaultive act. Even if we were to conclude, as Lombardi argues, that he had reason to strike Schuster, i.e., to prevent Schuster from harming him, this would not change the fact it was an intentional act. McAndrews, 349 N.W.2d at 120. Therefore, we conclude that the instant case comes within the rule established in McAndrews and that United had no duty to defend.

Lombardi, however, presents a new argument for coverage which McAndrews did not address. Lombardi contends that he never struck Schuster and that Schuster's injuries were caused by others. Lombardi contends that as a result United had a duty to defend him because he was innocent and because Schuster's claim was groundless.

The problem with Lombardi's argument is that his defense never appears in the record of the Schuster lawsuit. There is nothing in the record to show Lombardi filed an answer to the Schuster petition denying the allegations. As such, looking at both the facts of the case as set out in the petition and

the pleadings it was clear there was no potential for coverage under the policy. McAndrews, 349 N.W.2d at 119; Chipokas, 267 N.W.2d at 395. In addition, after United informed Lombardi it would not defend him in the assault action, Lombardi's counsel sent two letters to United demanding that United undertake Lombardi's defense. However, neither letter denied Schuster's allegations nor mentioned that Lombardi acted in self-defense or never struck and injured Schuster. Therefore, United had no duty to defend based on Schuster's petition, the pleadings and facts which Lombardi made available to United..

We therefore reverse the district court's judgment and award of actual damages to Lombardi. We dismiss Lombardi's cross-appeal.

REVERSED IN PART, PLAINTIFF'S CROSS-APPEAL IS DISMISSED.