IN THE COURT OF APPEALS OF IOWA

No. 2-047 / 91-973



**AMCO INSURANCE COMPANY,**

Appellant,

vs.

**CHRISTOPHER J. HAHT, HENRY HAHT, KATHRYN HAHT, GARY L. LOTTMAN and LINDA K. LOTTMAN,**

Appellees.

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Appeal from the Iowa District Court for O'Brien County, Frank B. Nelson, Judge.

AMCO Insurance appeals from a district court ruling that its homeowner's policy provided coverage for the Lottmans' claims against the Hahts. **AFFIRMED.**

Barbara A. Hering and Marsha K. Ternus of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for appellant.

Ronald J. Shea of Smith, Grigg, Shea & Klinker, P.C., Primghar, for appellees Hahts.

Daryl L. Hecht and Dennis R. Ringgenberg of Crary, Huff, Raby, Inkster, Hecht & Sheehan, P.C., Sioux City, for appellees Lottmans.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ., but decided en banc.

**OXBERGER, C.J.**

AMCO Insurance Company issued a homeowner's insurance policy to Henry and Kathryn Haht with an effective policy period of August 26, 1987 to August 26, 1988. The Hahts' adopted son, Christopher, was an insured under that homeowner's policy.

During a neighborhood ball game on June 9, 1988, Christopher Haht threw a baseball that struck Gary and Linda Lottman's son, Matt, in the head. Matt Lottman died a few days later. The estate administrator and Matt's parents individually filed an action against Christopher Haht in district court, seeking damages for Matt's death.

After having been notified of the Lottmans' claim against Christopher Haht, AMCO filed a petition seeking a declaratory judgment that its homeowner's policy did not provide coverage to Christopher Haht for his legal liability, if any, arising from the death of Matt Lottman and that AMCO had no duty to defend Haht in the Lottman lawsuit. AMCO based its coverage position on the homeowner's policy exclusion for personal liability for bodily injury that is "expected or intended" by the insured.

The case proceeded to trial before the court. Following trial, the district court entered its ruling. The court found that Chris probably intended to hit Matt and to "hurt" him. However, the court concluded that Chris did not intend to cause bodily injury to Matt. As such, the court determined the policy exclusion did not apply and that AMCO had a duty to defend and provide coverage. AMCO has filed this appeal.

Scope of Review: We review for correction of errors at law. Iowa R. App. P. 4. Findings of fact in a law action are binding on this Court if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Policy Coverage: The sole issue on appeal is whether the trial court correctly determined the conduct of Christopher Haht was not excluded from insurance coverage according to the terms of the insurance policy. The exclusionary language in the policy upon which AMCO relies provides:

> "Coverage E - Personal Liability and Coverage. F-Medical payments to others do not apply to bodily injury or property damage:
>
> a: which is expected or intended by the insured.

This case turns on the meaning within the policy of the terms "expected" or "intended," and "required care," as it relates to the policy's definition of bodily injury. The trial court was faced with ascertaining the meaning of these terms as applied to the conduct of an eleven-year-old boy.

AMCO's position is based on a recorded statement given by Christopher to AMCO's adjuster, Jack Furleigh. After first talking to Christopher and being taken by the boy to the backyard where the incident occurred, Mr. Furleigh approached Christopher's parents and told them he needed a statement from Christopher and would like to do it that day. The trial court noted Christopher was understandably upset at this time and left for his room, crying. A recorded statement was made that day and was later introduced into evidence. In Christopher's recorded statement, he said when he threw the ball he did intend to hit Matt, and he intended to hurt him. The trial court found the recorded statement indicated that Mr. Furleigh "obviously asked leading questions and suggested answers," but did not browbeat or coerce him.

At the trial, Christopher's testimony conflicted with the statement. Christopher denied ever wanting to hurt Travis. The trial court concluded:

> It is the Court's conclusion that the recitation contained in the statement is probably the more believable and more accurate description of what transpired. Chris was upset, because Matt had hit his brother with the ball, Matt had shoved everyone around and Matt was quitting because he could not pitch. Chris probably intended to hit Matt when he threw the ball and probably intended to "hurt" Matt. Even assuming Chris did intend to hit Matt and did intend to "hurt" Matt, AMCO does not avoid coverage.

An insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms. Benzer v. Iowa Mutual Tornado Insurance Association, 216 N.W.2d 385, 388 (Iowa 1974). When insurance contracts are ambiguous, require interpretation, or are susceptible to two equally proper constructions, the court will adopt the construction most favorable to the insured. Id.

In the present case, the terms "expected" and "intended" are not defined within the policy. The policy defined "bodily injury" as follows:

> "Bodily Injury" means bodily harm, sickness or disease, including required care, loss of service and death that results.

The trial court, upon determining the facts and circumstances, found the term "hurt" as used by Christopher did not rise to the level of "bodily injury" as defined within the policy. We agree with the trial court the "hurt" intended by this eleven year old was not the intended or expected bodily injury contemplated within the meaning of the policy. We abide with the trial court's conclusion that at most, Christopher intended to hurt Matt like Matt had hurt his brother Travis. Such "hurt" was not bodily injury as defined within the policy, intended or expected to "require care" or cause "loss of service" or "resulting death". At the most, the "injury" might have left a red mark on Matt's leg, but Christopher did not intend to injure Matt to an extent requiring any kind of medical treatment. We find the words "required care" described the nature and extent of hurt caused by bodily injury. Trivial injuries not requiring medical care are not contemplated by the exclusion for bodily harm.

AMCO argues that even if Christopher did not actually intend to cause the injury to Matt Lottman, there should be no coverage under the policy because intent to cause bodily injury must, as a matter of law, be inferred from the nature of the act and the reasonable foreseeability of bodily injury resulting from the act. In support of this position, AMCO relies upon the case of Altena v. United Fire & Casualty Co., 422 N.W.2d 485 (Iowa 1988). In Altena, a declaratory judgment action was taken to construe two insurance policies owned by the defendant, Senard Altena, to cover damages caused by his sexual abuse of Gail Altena. The insurer filed a motion for summary judgment, contending the damages from the defendant's acts came within an exclusion from coverage of injuries intended by the insured.

The defendant admitted the sex acts but denied intending to injure the plaintiff. During a two month period, the defendant repeatedly and forcibly attacked the plaintiff, tearing her clothing and committing sex acts without the plaintiff's consent. Such sex acts constituted sex acts within the meaning of our criminal statute concerning sexual abuse. See Iowa Code § 709.1(1).

The court, in applying the majority view, addressed what kind of intent must be established under the intentional injury exclusions and stated:

> Senard admitted the sex acts but denied intending to injure Gail. Nevertheless, the nature of the acts, their repetition, the force used in carrying

> them out, and Gail's admitted sexual naivete convince us to infer intent to injure as a matter of law.

Altena, 422 N.W.2d at 490.

Under Altena, the kind of intent that must be established under the intentional injury exclusion is that the insured must have intended the act and to cause some kind of bodily injury. Id. at 488. According to the majority view adopted in Altena, the intent to do the act and cause injury may be actual or may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm. Id. The factors considered for intent to injure are (1) the nature of the acts, (2) the repetition of the acts, (3) the force used in carrying the acts out, and (4) the surrounding circumstances of the incident. (In Altena, the sexual naivete of the victim was a relevant circumstance).

In Altena, the supreme court recognized that homeowner policies are intended to cover chance or fortuitous happening. Id. at 487. The court concluded that sexual abuse is not a chance or unintended act. Id. at 490. In addressing the public policy issue involved in Altena, the court stated:

> As one court noted, "[t]he average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [the person] would not want to share that type of risk with other homeowner's policy holders.
> Moreover, our own sense of propriety dictates that coverage for these types of criminal acts should be against the public policy of this state.

Id.

In the present case, we concern ourselves with the conduct of an eleven year old boy who reacted to a conflict which arose not surprisingly among children in similar circumstances. Matt Lottman had thrown a ball at Christopher's brother, Travis, hitting him in the leg. Christopher retaliated and threw the ball at Matt.

The trial court found the extent of hurt that Chris intended when he threw the ball was the same kind Matt had inflicted on his brother. Unfortunately, the errant throw hit Matt in the temple. The nature of the act, however, did not involve criminal intent. The record does not show that any criminal allegation was made against Christopher. The conduct was not repetitious. The force of the act was no more than a normal force used in throwing a baseball.

The tragedy of this case simply cannot be compared to the nature of the act and circumstances that were present in Altena. The "hurt" to which Christopher referred in his recorded statement to AMCO's adjuster, does not approach the same conduct as repeated sexual abuse. We cannot say under the circumstances of this civil action, that intent to cause bodily injury can be inferred as a matter of law.

We believe the average person purchasing homeowner's insurance would not cringe at paying for coverage of an unfortunate accident as occurred in the present case. This kind of fortuitous happening is the kind of happening for which insurance coverage is intended.

In light of these reasons and the duty of an insurer to define in clear and explicit terms exclusionary clauses, we affirm the trial court's determination that Chris Haht is an insured under the terms of the policy and that AMCO owes him a defense and liability coverage.

Costs are taxed to AMCO.

**AFFIRMED.**

All judges concur except Habhab and Hayden, J.J., who dissent.

**HABHAB, J.** (dissenting)

I respectfully dissent. I would hold there is not coverage under the insurance policy in question.

The AMCO homeowners' policy issued to the Hahts contains the following exclusion:

> Coverage E - Personal Liability & Coverage F - Medical payments to others do not apply to bodily injury or property damage:
>
> A. Which is expected or intended by the insured.

The trial court correctly found that Christopher Haht intended to throw the ball at Matt Laughlin for the purpose of hitting Matt and that Christopher intended to "hurt" Matt when he did so. The trial court concluded:

> It is the court's conclusion that the recitation contained in the statement is probably the more believable and more accurate description of what transpired. Chris was upset, because Matt had hit his brother with a ball, Matt had shoved everyone around and Matt was quitting because he could not pitch. Chris probably intended to hit Matt when he threw the ball and probably intended to "hurt" Matt. Even assuming Chris did intend to hit Matt and did intend to "hurt" Matt, AMCO does not avoid coverage.

After making these findings, the trial court found that this did not rise to the level of "bodily injury" as defined within the policy. It is here I disagree with the trial court and the majority opinion.

Haht's homeowners' policy excludes bodily injury expected or intended by the insured. This type of exclusion is consistent with "the central idea that insurance concerns fortuitous losses only" and generally provides "no coverage for intentional loss." R. E. Keeton, Basic Text on Insurance Law § 5.4(b), at 291 (1971) (cited with approval in Altena v. United Fire & Casualty Co., 422 N.W.2d 485 (Iowa 1988)).

In Altena, our supreme court reviewed differing approaches to the type of intent that must be established under the intentional injury exclusion. Our supreme court adopted the majority view, which requires that "the insured must have intended the act and to cause some kind of bodily injury." Id. at 488 (emphasis added). But once the intent to cause some kind of bodily injury is found, it is "'immaterial that the actual injury caused is of a different character or magnitude than that intended.'" Id. (quoted citation omitted).

There is not much question that the intent to throw the ball existed and that Christopher intended to strike and hurt Matt. As the supreme court held in Altena, "once intent to cause injury is found, it is immaterial that the actual injury caused is of a different character or magnitude than that intended." Altena, 422 N.W.2d at 488.

The fact that Christopher may not have intended to cause the actual injury is not the test for determining whether the expected or intended exclusion applies. Neither the motive for the intentionally-caused harm nor the ultimate result determines the question. Rather, the exclusion applies if Christopher intended to throw the ball so as to strike Matt with the intent to injure him in some way.

I am convinced that Christopher did not intend to inflict the serious injury on Matt that resulted or caused his death. The result that was inflicted by the thrown ball is indeed tragic and regrettable. I have the deepest sympathy for Christopher and the decedent's family. But as I read Altena, our supreme court has rejected an interpretation of the exclusion that would require a specific intent to inflict the actual injury that occurred. Thus, I am compelled to conclude that no coverage exists under the policy and that AMCO has no duty to defend Christopher in the Laughlins' action or to indemnify for any judgment which might be entered.