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MAY 23 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-135 / 91-1463

MATTHEW MARK BOLES,

Appellant,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Appellee.

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Appeal from the Iowa District Court for Story County, M. D. Seiser, Judge.

Boles appeals the district court's grant of summary judgment to State Farm. **REVERSED AND REMANDED.**

Jerry L. Schnurr III of Trevino, Leehey & Schnurr, Fort Dodge, for appellant.

John B. Grier of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

On March 14, 1989, Matt Boles and two friends, Bob and Jana, were playing pool in Zazoo II, an Ames bar. At approximately 1 a.m. Greg Martin and three of his friends came into the bar. Martin was extremely intoxicated and was making catcalls at women as they walked past him to the restroom. Several people told Martin the sexually explicit and rude comments he made to women in the tavern were not appreciated, and he was asked to stop.

While Jana and Bob were shooting pool, Boles and Martin were sitting beside each other. Boles was also intoxicated. While watching Jana play pool Martin made a rude sexual comment about her. Jana later came around the pool table to the side where Martin and Boles were seated. When she bent over to take a shot on the pool table, Martin lifted up her long sweater and made another offensive remark. Boles protested.

Martin then leaned his body against Boles, blew smoke in Boles' face, and told him to "fuck off." Boles put his left hand on Martin's shoulder and pushed him away; he had a beer still in his right hand with which he struck Martin above the eye. Boles maintains his action in striking Martin was reflexive and he had forgotten about the beer glass resting in his hand. He states he did not intend to hit or harm Martin at any time and his actions were reflexive to separate himself from Martin.

Martin instituted a lawsuit against Boles alleging two counts: one based on battery; the other based on negligence. Boles sought coverage under a homeowner's liability policy issued by State Farm Fire & Casualty Company to Boles' mother, under which Boles is an insured. State Farm denied coverage contending its policy excludes coverage for bodily injury which is either expected or intended by an insured. Boles thus brought his petition for declaratory judgment asking the court to rule State Farm is required to provide him a defense and to indemnify him for any losses incurred in the litigation instituted by Martin. State Farm also made a motion for summary judgment.

The district court granted State Farm's motion for summary judgment and denied Boles' motion, finding the exclusion of the policy does apply. Boles appeals. Our review is based on the notion that summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, id., and the evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. Id.

A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423.

The insurance policy which is the subject of this action provides:

> SECTION II - LIABILITY COVERAGES
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> COVERAGE L - PERSONAL LIABILITY
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> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:
>
> 1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice. . . .
>
> * * *
>
> SECTION II - EXCLUSIONS
>
> 1. Coverage L and Coverage M do not apply to:
>
> a. **bodily injury** or **property damage**:
>
> (1) which is either expected or intended by an **insured**; . . .

(emphasis in original). State Farm has refused to provide Boles with a defense in the Martin action. It bases its refusal to defend on the policy exclusion for "bodily injury . . . which is either expected or intended by an insured."

We find the undisputed facts show Boles' action was unintentional. Accordingly, we reverse the trial court determination and grant Boles' motion for summary judgment.

In granting State Farm's motion, the trial court relied on McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). The supreme court in McAndrews held an act in self-defense was intentional and thus the act was excluded from coverage such that the insurance company had no duty to defend. Id. at 120. The insured in McAndrews had alleged self-defense as an affirmative defense. Id. at 118. We find there is adequate evidence in the record to show Boles struck Martin solely due to a reflex move; he did not act in self-defense.

After Martin blew smoke in Boles' face, Boles reflexively brought his hands up to separate himself from Martin. Testimony shows Boles did not intend to hit or harm Martin at any time on the night of March 14, 1989. As Boles' right hand reflexively came off the table, a beer glass was in his hand. The glass hit Martin above the left eye. Boles immediately stated "I'm sorry. I didn't mean to hit you." This incident lasted less than a second and a half. At this point, Boles and a friend helped Martin to the front of the bar. Once the police arrived, Boles told them he did not intend to hit Martin and that it was just a reflex. Boles was not acting intentionally in self-defense. Instead, he was acting reflexively without thought as to what was happening.

Because Martin's injury was not due to self-defense and because the facts show there is a possibility the injury was not intended or expected by Boles, we grant Boles' motion for summary judgment and require State Farm to defend Boles in the Martin action.

> [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 and is not dependent on the probable liability to pay based on the facts ascertained through trial.

7C J. Appleman, Insurance Law and Practice § 4684, at 83 (1979). We believe the totality of the facts indicate there is coverage of the claim.

The trial court erred in failing to grant Boles' motion for summary judgment requiring State Farm to provide a defense in the Martin action. We reverse the grant of State Farm's motion for summary judgment and remand for entry of judgment for Boles on his summary judgment action. All costs of this appeal are taxed to State Farm.

REVERSED AND REMANDED.