No. 26738 -- State of West Virginia ex rel. David Davidson, individually, and Davidson Construction Services v. Honorable Jay M. Hoke, Judge of the Circuit Court of Lincoln County, Mary Ellen Loy Mabe and Tommie C. Mabe

FILED
July 19, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 21, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

This case presents the arcane world of "commercial general liability" policies, where the typical owner of a small commercial enterprise buys insurance to provide protection for "general liability" -- when, unknown to the small business owner, the policy is actually so laced with exclusions that the policy provides virtually no protection against liability whatsoever. The applicability of the "intentional acts" exclusion asserted by the insurance company in this case is a perfect of example of the policyholder not getting what he thought he paid for.

Figuring out whether or not the exclusion applies is an incredibly fact-intensive question, yet the insurance company filed this petition for a writ of prohibition contending that the applicability of the exclusion is entirely a legal question. I agree with the majority's decision to deny the writ of prohibition, because whether the petitioner in this case is affected by the exclusion is a question of fact for a jury, not a question of law for a judge.

The facts of this case appear to be quite simple. The petitioner is a contractor who built the respondents a home. The respondents claim that the contractor did a shoddy job, and sued the contractor for breaching the contract and for inflicting emotional distress upon the respondents.

The contractor then proceeded to declare bankruptcy. The bankruptcy court granted the respondents leave to pursue in state court any claims against the contractor to the extent that the contractor had insurance -- otherwise, the assets of the contractor were protected by federal bankruptcy laws.

The insurance company, of course, now claims that there is no insurance coverage. While the contractor purchased a "commercial general liability" policy, that policy is apparently in no way "general." Instead, it contains numerous exclusions. First, the insurance company claims the policy does not cover any actions arising from a "breach of contract." In other words, even if the contractor's employees negligently, recklessly, and stupidly threw caution, the blueprints and their measuring tapes to the wind when they built the respondents' house, the insurance company says there is no coverage. The circuit court granted a declaratory judgment in favor of the insurance company on this issue.[1]

The second issue raised in the trial court by the insurance company, and the focus of its petition for a writ of prohibition, concerns an "intentional acts" exclusion in the policy. The insurance company argues that because of the exclusion, its policy does not cover claims for the intentional infliction of emotional distress, also called the "tort of outrage." The insurance company contends that its policy only covers bodily injury or property damage resulting from an accident. The policy language used in the "intentional acts" exclusion states:

> This insurance does not apply to:
>
> a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

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[1]Keep in mind that this ruling by the circuit court is not before the Court -- the current case is not an appeal of the circuit court's rulings, but is instead a writ of prohibition by the insurance company to stop the circuit court from enforcing another portion of its order against the insurance company.

The insurance company argues that this exclusion, also known as the "expected/intended" exclusion, automatically, as a matter of law, excludes any coverage for the intentional infliction of emotional distress by the policyholder. This is untrue.

Commercial liability insurance policies generally provide coverage for negligent, grossly negligent, and reckless acts. *See, e.g., Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 827 P.2d 1024, 1034 (Wash.Ct.App. 1992) ("Even gross negligence or willful wanton conduct may covered, where there has been no actual intent to injure."); and *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888 (Me. 1981) (a finding that the policyholder recklessly discharged a shotgun and seriously injured a third party was insufficient to establish that the policyholder "expected and intended" to cause the injury).

The question in this case is whether there is coverage for the policyholder against the respondents' "intentional infliction of emotional distress" claim. Under the "expected/intended" exclusion, a policyholder may be denied coverage only if the policyholder (1) committed an intentional act *and* (2) expected or intended the specific resulting damage.

When faced with whether there is coverage for allegedly "intentional" actions, most courts do not look at whether the *act* was intentional, but focus more on whether the policyholder expected or intended the *result*. Courts look at the subjective intent of the policyholder, because the policy language specifically says to determine if the loss was "expected or intended from the standpoint of *the insured*." Accordingly, courts should not look at a case with an "objective" standard in mind -- whether the resulting

injury or damage was reasonably foreseeable to a reasonable person is irrelevant. The question to ask is, "Did this policyholder expect or intend the injury or property damage?"[2]

During the drafting process of the expected/intended exclusion, insurance companies wanted the exclusion to be applied in a subjective manner, hence the choice of the language "expected or intended from the standpoint of the insured." The drafters intended to

> . . . provide coverage for routine, intentional business operations involving activities that might give rise to unexpected damage. This intent was, and is, consistent with the purpose of insurance, which is to protect the policyholder against foreseeable, but unintended, injury resulting from the policyholder's negligence. The policyholder may have intended to run the stop sign but did not intend to rear-end the car ahead.

E. Anderson, 1 *Insurance Coverage Litigation* 398 (1997).

I agree that, without the presence of the current "expected/intended" language in a policy, the policy language might be interpreted as creating an objective standard. However, such an interpretation

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[2]It appears that a majority of jurisdictions have adopted the subjective approach to the "expected/intended" exclusion. As the court stated in *Smith v. Hughes Aircraft Co.*, 783 F.Supp. 1222, 1236 (D.Ariz. 1991), a subjective standard for determining the policyholder's intent "is supported by the fact that the 'neither expected nor intended' language is followed by the phrase 'from the standpoint of the insured.'" For other jurisdictions, *see Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *James Graham Brown Found. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273 (Ky. 1991); *Espinet v. Horvath*, 597 A.2d 307 (Vt. 1991); *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146 (2d Cir. 1989); *Poston v. USF&G*, 320 N.W.2d 9 (Wis.Ct.App. 1982); *Farmers Ins. Group v. Sessions*, 607 P.2d 422 (Idaho, 1980); *Hanover Ins. Co. v. Newcomer*, 585 S.W.2d 285 (Mo.Ct.App. 1979); *Ambassador Ins. Co. v. Montes*, 371 A.2d 292 (N.J. 1977); *Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121 (Minn. 1976); *Home Ins. Co. v. Neilson*, 332 N.E.2d 240 (Ind.App. 1975); *Cincinnati Ins. Co. v. Mosley*, 322 N.E.2d 693 (Ohio 1974); *Cloud v. Shelby Mut. Ins. Co.*, 248 So.2d 217 (Fla.Ct.App. 1971). *See also*, "Coverage or exclusion of intentional injuries," 43 *Am.Jur.2d* § 708 (1982) ("An exclusion from coverage for injuries expected or intended does not exclude liability for unintentional or unexpected injury. The mere act of doing an intentional act by the insured does not relieve the insurer where the resultant injuries were unintended.")

would be directly contrary to what the insurance industry intended when it drafted the policy. When the "expected/intended" language was removed from an early draft of the policy exclusion, thereby creating an objective standard, the committee of policy drafters "rejected the exclusion because of concerns that an objective standard would not sell and because the exclusion would have resulted in a dramatic reduction in coverage.[.]" *Id.* at 400. We can therefore conclude that the insurance industry intended for the exclusion to be construed using a subjective standard, and conclude that the exclusion was to be construed narrowly so as to avoid "a dramatic reduction in coverage."

There is evidence indicating that when the basic commercial general liability policy was drafted, the insurance industry believed that the definition of "occurrence" in a commercial general liability policy would cover intentional actions that resulted in unintended injuries -- including injuries such as the infliction of emotional distress. When the "expected/intended" exclusion was originally drafted in 1966, it was contained in the definition of "occurrence." An occurrence was defined as "an accident . . . which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[3] George Katz, a member of the Joint Drafting Committee from Aetna Insurance Company, wrote:

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[3]Prior to 1986, commercial general liability policies used the definition of "occurrence" contained above in the text. Substantial litigation occurred over the meaning of "occurrence," and many courts interpreted the "expected/intended" language as an affirmative defense to coverage. In other words, courts required insurance companies to prove that both the act and the result were expected and intended by the policyholders before coverage could be voided. In 1986, the standard commercial general liability policy forms were modified to make the "expected/intended" provision a specific policy exclusion. While this stylistic change made the policy more readable, it did nothing to change the insurance company's burden of proof. As this Court has often stated, the insurance company bears the burden of proving the applicability and operation of an exclusion.

> An occurrence as defined *includes the infliction of intentional injury*, provided the insured (that is the person against whom the claim is made) did not intend or expect it.

G. Katz, "Why the New Liability Policy?", *Insurance Advocate*, Sept. 24, 1966 at 32 (emphasis added). *See also*, S. Rynearson, "Exclusion of Expected or Intended Personal Injury or Property Damage under the Occurrence Definition of the Standard Comprehensive General Liability Policy," 19 *Forum* 513 (June 1984).

In sum, the insurance industry believed that the commercial general liability policy would cover negligent, grossly negligent and reckless actions. The insurance industry also believed that the policy would cover the infliction of intentional injuries when, viewed subjectively, (1) the policyholder acted intentionally, but (2) did not intend the specific injury incurred by the claimant.

Using these guidelines, is there coverage for the respondents' claims of intentional infliction of emotional distress? Maybe -- but the question is one of fact, best resolved by a jury. The reason the question is one of fact lies in the guidelines that a plaintiff must follow to prove "intentional infliction of emotional distress."

This Court has made clear that a defendant may be held liable for both intentionally inflicting emotional distress *and* recklessly inflicting emotional distress. We stated in Syllabus Point 6 of *Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982):

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

A defendant can be held liable for recklessly inflicting emotional distress "when it was certain or substantially certain emotional distress would result from his conduct." Syllabus Point 3, *Travis v. Alcon Laboratories, Inc.*, 202 W.Va. 369, 504 S.E.2d 419 (1998). A defendant may also be held liable "where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotional distress will follow." 202 W.Va. at __, 504 S.E.2d at 429, *quoting Restatement of Torts (Second)*, § 46, comment (i).

Whether a defendant has acted recklessly in inflicting emotional distress is usually a question of fact for the jury. *Id*.

In the instant case, the respondent homeowners allege only that the petitioner contractor committed the tort of "intentional infliction of emotional distress." The insurance policy covering the contractor would only exclude coverage if the contractor subjectively (1) acted with an intent to inflict severe emotional distress, and (2) caused the severe emotional distress he intended to cause. If the contractor acted recklessly in deliberate disregard of a high degree of probability that emotional distress would follow, or acted in a reckless manner such that he was certain or substantially certain that emotional distress would result from his actions, or intended to cause one kind of emotional distress and actually caused a different kind of emotional response, then the "intentional acts" exclusion would not apply.

Whatever the case may be, these questions are very fact intensive. As we said in *Travis v. Alcon Laboratories, Inc., supra*, the question of whether a defendant has intentionally or recklessly caused severe emotional distress is a question for a jury. It is a question of fact, not one of law -- and therefore should not be resolved as a matter of law by a trial court or this Court on a petition for extraordinary relief.

Accordingly, I concur in the majority's decision to deny the writ of prohibition.