STATE OF MICHIGAN

COURT OF APPEALS

PIONEER STATE MUTUAL INSURANCE COMPANY.,

Plaintiff/Counter Defendant/Appellant,

v

RICHARD F. ROWLEY, JANET K. ROWLEY and RICK ROWLEY,

Defendants-Appellees,

and

JAMES BAUDERS,

Intervening Defendant/Counter Plaintiff/ Appellee.

UNPUBLISHED
August 1, 1997

No. 179331
Genesee Circuit Court
LC No. 92-012402 CZ

PIONEER STATE MUTUAL INSURANCE CO.,

Plaintiff/Counter Defendant/Appellee,

v

RICHARD F. ROWLEY, JANET K. ROWLEY and RICK ROWLEY,

Defendants-Appellants,

and

JAMES BAUDERS,

Intervening Defendant/Counter Plaintiff/

No. 181578
Genesee Circuit Court
LC No. 92-012402 CZ

Appellant.

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

These consolidated appeals stem from a declaratory action to determine whether plaintiff Pioneer State Mutual Insurance Company ("Pioneer") owed a duty to defend and cover losses incurred by defendants Rowley in a negligence action brought by intervening defendant Bauders. In Docket No. 179331, Pioneer appeals by right from a judgment entered in favor of intervening defendant Bauders in the amount of $50,000. In Docket No. 181578, defendants Rowley and intervening defendant Bauders appeal by right from an order denying their motion for offer of judgment sanctions. We affirm both the judgment and the order denying sanctions.

In the underlying negligence action, filed in April 1990, Bauders claimed that he was injured during an altercation at the Rowley home on December 20, 1986. While his parents were away from the home, defendant Rick Rowley hosted a party at which minors, including Darren White, consumed alcohol. Bauders alleged that White attacked him during the party and broke his jaw, resulting in a painful TMJ disorder. In addition to claims against White and his father, Bauders asserted claims against Rick Rowley for negligently allowing the consumption of alcohol by minors and negligent supervision of minors, and against Richard and Janet Rowley for negligently entrusting their premises to their son, Rick. However, Bauders never served Darren White with the complaint.

Following service of the complaint, the Rowleys did not immediately notify Pioneer, their insurer, of the underlying lawsuit. Instead, they retained their own attorney and defended the action. Only after the trial court sanctioned the Rowleys in December 1991, for failing to comply with a discovery order regarding their homeowners' insurance, did Richard Rowley contact his insurance agent to obtain the requested information. Upon receiving the information, Bauders' attorney notified Pioneer of the pending lawsuit by providing it with a copy of the complaint on January 21, 1992. Shortly thereafter, Pioneer commenced the instant action against defendants Rowley, requesting a declaratory ruling that it had no duty to defend them in the underlying action and that it was not obligated to cover any loss arising out of the action. Pioneer's position was that it had no duty to defend or provide coverage due to material prejudice stemming from the Rowleys' failure to notify it of the accident and claim in accordance with the terms of the insurance policy. Pioneer also contended that Bauders' claims alleged conduct that was not within the scope of coverage.

In October 1992, Bauders offered to stipulate to entry of a judgment in the amount of $50,000 with respect to his claims against the Rowleys. Under the terms of the agreement, the Rowleys would assign their claim against Pioneer to Bauders in exchange for his agreement to limit execution to the insurance proceeds. After Pioneer declined several requests that it acknowledge coverage and defend the underlying action, the Rowleys accepted the offer of judgment. The trial court entered a $50,000 judgment in favor of Bauders, and thereafter allowed Bauders to intervene in the declaratory action.

Intervening defendant Bauders and defendants Rowley filed their counter complaint on April 19, 1993, in which Bauders asserted a claim for $50,000 premised on the judgment in the underlying action, and the Rowleys asserted claims for attorney fees incurred in the defense of both the underlying action and the declaratory action.

After a bench trial, the trial court rendered an oral opinion finding that Pioneer owed the Rowleys a defense in spite of the insured's failure to comply with the notice provisions of their policy. The court also found that Pioneer was obligated to cover the Rowleys' loss arising out of the underlying action, and then entered a judgment in favor of intervening defendant Bauders in the amount of $50,000. The trial court subsequently denied defendants' and intervening defendant's motion for offer of judgment sanctions.

Docket No. 179331

Pioneer initially contends that the trial court abused its discretion in allowing Bauders to intervene in the declaratory action. We disagree. We review the trial court's decision whether to grant a motion to intervene for an abuse of discretion. *Black v Dep't of Social Services,* 212 Mich App 203, 204-205; 537 NW2d 456 (1995). A person has a right to intervene in an action under the following circumstances:

> (1) when a Michigan statute or court rule confers an unconditional right to intervene;
>
> (2) by stipulation of all the parties; or
>
> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties. [MCR 2.209(A).]

The court rule is liberally construed to allow intervention when the applicant's interest may otherwise be inadequately represented. *Neal v Neal,* 219 Mich App 490, 492; 557 NW2d 133 (1996).

As the assignee of the Rowleys' right to coverage under the insurance contract, Bauders had an interest in the transaction that is the subject matter of the declaratory action. C.f. *Rutter v King,* 57 Mich App 152, 162-167; 226 NW2d 79 (1974) (a third-party judgment creditor who was assigned the insured's claim for wrongful refusal to settle may proceed directly against the insurer). The disposition of the action might impair or impede Bauders' interest because, as an assignee, he is in privity with the Rowleys and might be bound by the resulting judgment because he acquired the same interest enjoyed by the Rowleys. *State Mutual Life Assurance Co v Deer Creek Park,* 612 F2d 259, 268 n 7 (CA 6, 1979); *Apcoa, Inc v Dep't of Treasury*, 212 Mich App 114, 120; 536 NW2d 785 (1995). Finally, Bauders' interest in the litigation may have been inadequately represented because, other than cooperating with Bauders to establish insurance coverage, the Rowleys had no

incentive to vigorously litigate the coverage issue since Bauders' recovery was limited to that obtained from plaintiff. Liberally construing the rules of intervention, we find that the trial court did not abuse its discretion in allowing Bauders to intervene. *Neal, supra* at 492.

Next, Pioneer contends that the trial court erred in finding that it owed the Rowleys a defense in the underlying negligence action. We disagree. This Court's review of a declaratory judgment is de novo. *Attorney General ex rel Dep't of Natural Resources v Cheboygan Co Board of Co Road Comm'rs,* 217 Mich App 83, 87; 550 NW2d 821 (1996). However, this Court will not reverse the trial court's factual findings unless they are clearly erroneous. *Auto-Owners Ins Co v Harvey,* 219 Mich App 466, 469; 556 NW2d 517 (1996). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Triple E Produce Corp v Mastronardi Produce, Ltd,* 209 Mich App 165, 171; 530 NW2d 772 (1995). Yet in undertaking a de novo review, this Court will reverse even when the trial court's factual findings are not clearly erroneous if it disagrees with the court's legal conclusions *Attorney General, supra* at 87.

Pioneer asserts that it did not owe the Rowleys a defense because, in failing to timely notify the insurer of Bauders' claim, the insureds did not comply with the terms of the policy. We disagree. The failure to comply with a notice provision does not relieve an insurer of its obligation to provide a defense and coverage unless the insurer was prejudiced by the delay. See *Koski v Allstate Ins Co,* 213 Mich App 166, 173-175; 539 NW2d 561 (1995). The notice need not be provided by the insured, so long as the insurer was not prejudiced by the timing of the notice. *Id.* at 173-174. The insurer bears the burden of proving prejudice. *Burgess v American Fidelity Fire Ins Co,* 107 Mich App 625, 628; 310 NW2d 23 (1981).

Upon review of the evidence adduced at trial, we conclude that the trial court did not clearly err in finding that plaintiff was not prejudiced by the lack of timely notice. Plaintiff provided no support for its assertion that it was prejudiced by the fact that the same attorney represented the Rowleys and Darren White's father. Plaintiff's contention that it was prejudiced by the Rowleys failure to raise the defenses of no cause of action and mutual affray is likewise without merit. The defense of no cause of action, *i.e.*, failure to state a claim, may be raised at any time, MCR 2.116(D)(3), and mutual affray is not a defense to Bauders' claims against the Rowleys. C.f. *Archer v Burton,* 91 Mich App 57, 60-61; 282 NW2d 833 (1979) (mutual affray ordinarily is not a defense to a dram shop action).

We also disagree with plaintiff's contention that it was prejudiced by the Rowleys' failure to assert a claim for contribution against Darren White. Although a tortfeasor who satisfies a judgment is only entitled to contribution if the alleged contributee was made a party to the action, MCL 600.2925a(5); MSA 27A.2925(1)(5), a claim for contribution is not barred by the running of the statute of limitations for the plaintiff's claim in the underlying action. *Duncan v Beres,* 15 Mich App 318, 332-333; 166 NW2d 678 (1968). Upon leave of the court, the Rowleys could have served a complaint upon Darren White for contribution at "any time after commencement of the action." MCR 2.204(A)(1). The trial court indicated that it would have accommodated Pioneer had it defended the action. Accordingly, we find that the trial court did not clearly err in determining that Pioneer was not

relieved of its duty to provide a defense or coverage by the Rowleys' failure to provide timely notice of the underlying action. See *Koski, supra* at 173-175.

Pioneer additionally argues that Bauders' claims against the insured were not covered by the policy, and that thus, the trial court erred in determining that Pioneer owed a defense. Again, we disagree. An insurer owes no duty to defend against claims that are expressly excluded from coverage. *Tobin v Aetna Casualty & Surety Co,* 174 Mich App 516, 519; 436 NW2d 402 (1988). However, the duty to defend is broader than the duty to indemnify. *Royce v Citizens Ins Co,* 219 Mich App 537, 542; 557 NW2d 144 (1996). The duty to defend arises when coverage is arguable, though the claim may be frivolous. *Arco Industries Corp v American Motorists Ins Co (On Remand),* 215 Mich App 633, 636; 546 NW2d 709 (1996). Whether the insurer has a duty to defend depends on the allegations in the complaint. *Fitch v State Farm Fire & Casualty Co,* 211 Mich App 468, 471; 536 NW2d 273 (1995). However, the characterization of the cause of action stated in the complaint does not control. There is no duty to defend or provide coverage where the complaint is simply an attempt to trigger coverage by characterizing excludable claims as outside the scope of the exclusion. *Tobin, supra* at 516.

Upon review of Bauders' complaint in the underlying action, we find that the trial court did not clearly err in determining that Bauders' claims fell within the scope of the insurance coverage. The insurance policy in this case excludes from coverage, "bodily injury or property damage which is either expected or intended from the standpoint of the Insured." The exclusionary language applies "when the injury sustained was the natural, foreseeable, expected, and anticipated result of the insured's intentional act." *Tobin, supra* at 518. Here, while Rick Rowley's actions in supplying alcohol to White were intentional, a fight was far from the expected result. Similarly, it can hardly be argued that White's assault of Bauders was the natural and anticipated result of the Rowleys entrusting their home to Rick's care while they were away for the evening. Thus, at least one of the theories of recovery in the underlying lawsuit against the Rowleys was based on a claim that, if substantiated, would fall within the scope of coverage. *Auto Club Ins Ass'n v Williams,* 179 Mich App 401, 405; 446 NW2d 321 (1989). Accordingly, Pioneer was required to defend Bauder's case against the Rowleys.

Finally, Pioneer contends that the trial court erred in entering a judgment against it on the basis of a consent judgment in the underlying action. We disagree. Pioneer correctly notes that the insured's decision to settle violated the provision of the insurance policy which required Pioneer's consent to any settlement. However, Pioneer's failure to provide a defense constituted a breach of the agreement and thus released the insureds from the obligation to obtain the insurer's consent. *Alyas v Gillard,* 180 Mich App 154, 160; 446 NW2d 610 (1989). Under these circumstances, the insurer is bound by any reasonable settlement entered into in good faith by the insured. *Id.* The rule applies in a case such as this, where the insured enters into a consent judgment and assigns his claims against the insurer to the underlying claimant. See *Id.* at 160-162.

Upon review of the evidence presented at trial, we find that the trial court did not err in concluding that the settlement was reasonable. In absence of proof to the contrary, a settlement is presumptive evidence of liability and the amount thereof. *Detroit Edison v Michigan Mutual Ins Co,*

102 Mich App 136, 145; 301 NW2d 832 (1980), quoting *Elliott v Casualty Ass'n of America*, 254 Mich 282, 288; 236 NW 782 (1931). Reasonableness is determined by looking at

the amount paid in light of the risk of exposure. *Ford v Clark Equipment Co*, 87 Mich App 270, 278; 274 NW2d 33 (1978). Risk of exposure is the probable amount of a judgment if the plaintiff were to prevail at trial balanced against the possibility that the defendant would have prevailed. *Id.* The possibility of a defense is but one factor to consider in the determination. *Id.*

Here, Bauders' claim against Richard and Janet Rowley would ultimately fail because, despite their knowledge that Rick Rowley had previously consumed alcohol with friends at their home in their absence, they did not owe a duty to control the behavior of their adult son. *Reinert v Dolezel*, 147 Mich App 149, 156-157; 383 NW2d 148 (1985). However, Bauders' claim against Rick Rowley may well have been successful because he admitted to furnishing alcohol to a minor, Darren White, in violation of MCL 436.33; MSA 18.1004. The violation of the statute created a rebuttable presumption of negligence. *Longstreth v Gensel*, 423 Mich 675, 692-693; 377 NW2d 804 (1985). In light of Bauders' allegation that he suffers from a painful TMJ disorder as a result of the incident, and the potential liability of Rick Rowley, we find that the trial court correctly determined that the settlement was reasonable.[1]

Pioneer's argument that the Rowleys entered into the settlement in bad faith is likewise without merit. Contrary to Pioneer's assertion, the same attorney did not represent both Bauders and the Rowleys in underlying action, but rather represented the Rowleys in the declaratory action only after they assigned their rights to Bauders. Nor does the fact that Bauders and the Rowleys agreed to limit collection to that recoverable under the Rowleys' insurance policy evince bad faith. See *Alyas, supra* at 160. An underlying tort action should not be delayed pending resolution of a coverage dispute. *Zurich Ins Co v Rombough*, 384 Mich 228, 235; 180 NW2d 775 (1970). Thus, by relying on the declaratory judgment action, Pioneer risked becoming liable for a settlement in the underlying tort action. Furthermore, plaintiff was given the opportunity to present evidence on the issues of reasonableness and bad faith at trial, and thus, remand would not be proper. See *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 308; 486 NW2d 351 (1992). Accordingly, we affirm the judgment in favor of intervening defendant Bauders.

Docket No. 181578

Defendants Rowley and intervening defendant Bauders contend that the trial court abused its discretion in declining to award them offer of judgment sanctions. We disagree. We review the trial court's decision to award offer of judgment sanctions for an abuse of discretion. *J C Building Corp v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). Under the offer of judgment court rule, if an offer is rejected and the "adjusted verdict" is more favorable than the "average offer," the offeree must pay the offeror his actual costs including a reasonable attorney fee. MCR 2.405 (D)(1). Here, Pioneer rejected defendants' and intervening defendant's offer of judgment filed on April 19, 1993, by not accepting it in accordance with the court rule.[2] MCR 2.405(C)(2)(b). Because Pioneer failed to make a counter offer, the "average offer" is equal to defendants' and intervening defendant's offer of $50,000. MCR 2.405(A)(3).

In this case, the trial court simply concluded that sanctions were not warranted because the parties acted reasonably throughout the litigation. Although we disagree with the trial court's reasoning, we affirm its decision because it reached the correct result, albeit for the wrong reason. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993). Defendants Rowley were not awarded money damages by the trial court, and consequently, are not entitled to an award of sanctions. With respect to intervening defendant Bauders, the "adjusted verdict" is the $50,000 verdict rendered by the court plus interest and costs from the filing of the complaint through the date of the offer. MCR 2.405(D)(1). The trial court entered the judgment in favor of Bauders on his counter-complaint, which was filed on the same day as his second offer of judgment. Because the pleading and offer of judgment were filed on the same day, the "adjusted verdict" does not include costs and interest under the circumstances of this case. As a consequence, Bauders was not entitled to offer of judgment sanctions because the adjusted verdict was equal to, not more favorable than, the average offer. MCR 2.405(D)(1). Accordingly, we affirm the trial court's denial of defendants' and intervening defendant's motion for offer of judgment sanctions.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin

[1] We note that this Court recently held that outside of the drunk driving context, social hosts are not liable for the actions of minors who later commit criminal acts. *Rogalski v Tavernier*, 208 Mich App 302; 527 NW2d 73 (1995). However, given that the parties settled the underlying action in this case well before this Court's decision, we find that the Rowleys' failure to anticipate our holding does not render the settlement unreasonable.

[2] Intervening defendant Bauders' second offer of judgment is controlling under the court rules. MCR 2.405(D)(3). The joint offer likewise controls defendants Rowleys' entitlement to sanctions.