

STATE OF MICHIGAN
COURT OF APPEALS

AMERICAN BUMPER & MANUFACTURING
COMPANY and JACK C. SKOOG,

Plaintiffs-Appellants,

v

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA

Defendant-Appellee,

and

AMERICAN INTERNATIONAL GROUP, INC.,
LANSING INSURANCE AGENCY, and L.
JOHN WENGLARSKI,

Defendants.

FOR PUBLICATION
March 23, 2004
9:15 a.m.

No. 245342
Ionia Circuit Court
LC No. 97-018096-CK

AMERICAN BUMPER & MANUFACTURING
COMPANY and JACK C. SKOOG,

Plaintiffs-Appellees,

v

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA

Defendant-Appellant,

and

AMERICAN INTERNATIONAL GROUP, INC.,
LANSING INSURANCE AGENCY, and JOHN
L. WENGLARSKI,

Defendants.

No. 245367
Ionia Circuit Court
LC No. 97-018096-CK

Updated Copy
June 18, 2004

Before: Fitzgerald, P.J., and Cavanagh and Hoekstra, JJ.

FITZGERALD, P.J.

In this declaratory judgment action, the trial court granted summary disposition in favor of plaintiffs American Bumper & Manufacturing Company and Jack C. Skoog¹ (American Bumper) on the ground that National Union Fire Insurance Company of Pittsburgh, PA wrongfully refused to defend American Bumper, its insured, in two wrongful death actions arising from a single incident in which two American Bumper employees were killed. The trial court entered judgment in favor of American Bumper for defense of the lawsuits in the amount of \$1,522,000 and awarded American Bumper prejudgment interest of \$885,732. The court refused to award the costs of settlement as an element of damages for breach of the duty to defend. Both parties appeal as of right. We vacate and remand.

FACTS

On September 20, 1991, two American Bumper employees, Stephen Eilar and Ricky Dora, were killed when a mechanical press allegedly malfunctioned and recycled on its own, crushing the employees. The personal representative of Eilar's estate brought a wrongful death action contending that Eilar's injuries were the result of an intentional tort outside the ambit of the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*² The personal representative of Dora's estate filed a similar complaint on the same grounds. The lawsuits were consolidated.

Each underlying complaint was designed to avoid the exclusive remedy provision of the WDCA.³ In the Eilar case, the second amended complaint contained three counts: count I—defendant Skoog (intentional tort); count II—American Bumper (intentional tort); count III—defendants American Bumper and Skoog (intentional nuisance in fact).⁴ In counts I and II, the complaint alleged that American Bumper

¹ Skoog was the principal stockholder and chief operating officer of American Bumper. He was therefore sued as an agent of American Bumper.

² It is well-settled that the WDCA's exclusive remedy provision applies equally to recovery against coemployees, officers, and agents of the employer. *Berger v Mead*, 127 Mich App 209, 213-214; 338 NW2d 919 (1983). Thus, the same analysis applies to both American Bumper and Skoog.

³ Any cause of action that did not plead intentional conduct would be barred by the exclusive remedy provision of the WDCA. Further, the National Union policy contains a worker's compensation exclusion.

⁴ Eilar's second amended complaint and Dora's first amended complaint did not contain any counts alleging nonintentional torts against American Bumper. Although Eilar and Dora subsequently moved to amend their complaints to add counts of fraudulent concealment and "willful/wanton misconduct and gross negligence," the trial court rejected the proposed amendments, finding that the counts were barred by the exclusive remedy provision of the

(continued...)

committed an intentional tort by [its] deliberate acts which caused dangerous and hazardous work conditions at the American Bumper Plant, and Defendant had actual knowledge that an injury was certain to occur as a result of [its] act, and defendant willfully disregarded that knowledge, and Defendant thereby *specifically intended the injury* to Stephen Christopher Eilar [Emphasis added.]

In count III of the Eilar complaint, entitled "Intentional Nuisance in Fact," the plaintiff incorporated the previous paragraphs of the complaint (1-23) and contended that the American Bumper Ionia Plant was

operated and maintained at or before the time of the injury to Stephen Eilar in such an intentional and deliberate manner that its condition had a natural tendency to create danger and to inflict injury to its employees.

The first amended complaint in the Dora case alleged intentional torts against American Bumper and Skoog (counts I and II), asserting that Dora's death was caused by the "intentional, willful, and wanton acts of the Defendant" and that the deliberate acts "proximately caused and intended Plaintiff's decedent's death." Count III pleaded intentional nuisance in fact, asserting that

at the time of the Defendants' intentional acts, they knew that injury resulting from the condition was substantially certain to result from the conditions that existed.^[5]

American Bumper tendered the claims to each of its insurance carriers that issued policies in effect at the time of the accident, including Employers Reinsurance (worker's compensation/employer's liability), Federal Insurance Company (primary general liability), and National Union (excess umbrella). Federal denied the claim, and Employers Reinsurance agreed to pay its policy limits. National Union investigated the claim and advised American Bumper that coverage might not be afforded because of the nature of the Eilar and Dora allegations. On October 27, 1992, National Union declined American Bumper's claim.

In 1993, American Bumper filed a motion for summary disposition in the underlying consolidated cases in which it asserted that the plaintiffs had not and could not produce proofs to establish an intentional tort under the WDCA. The trial court agreed and granted summary disposition in favor of American Bumper in an opinion dated October 28, 1993. Both plaintiffs appealed to this Court. While the cases were on appeal, American Bumper settled both cases for a combined amount of \$2 million, with \$1.2 million allocated to Eilar and \$800,000 allocated to Dora. On April 28, 1997, this Court dismissed the appeals. On May 12, 1997, the circuit court entered an order of dismissal pursuant to the settlement.

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WDCA. Accordingly, because the proposed amendments were never approved in the underlying case, American Bumper's arguments regarding the duty to defend the claims are misplaced.

⁵ Count IV was against defendant D & S Machine Repair and count V was against defendant Midwest Brake Bond Company.

On several subsequent occasions during the course of the underlying proceedings, National Union examined American Bumper's claim for insurance coverage. On January 10, 1997, National Union advised American Bumper that it would not change its original position of declining coverage and refusing to defend. On March 7, 1997, American Bumper filed this declaratory action.

On April 30, 1999, the trial court denied National Union's renewed motion for summary disposition and granted partial summary disposition as a matter of law in favor of American Bumper concerning National Union's duty to defend American Bumper in the underlying lawsuits. The trial court interpreted the duty to defend language of the policy to be fully independent of the indemnity language:

However, the defense paragraph indicates that it covers occurrences covered under the policy which is a different language than what the coverage paragraph says. The coverage says, to which the insurance applies and occurrence is defined in the policy.

Nothing is excluded in the defense obligation. It doesn't say that the defense only applies if there's no coverage—or there's no defense if there's no coverage. I think to be clear, the section regarding defense should have said that the occurrence resulted in liability to pay and it didn't say that. It just says it covers an occurrence. So because of this difference, there must be some different intention of the parties to do this.

The court eventually awarded \$1,522,000 as defense costs for the underlying lawsuits, and prejudgment interest in the amount of \$885,732.

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The personal representatives of the estates of Eilar and Dora sued American Bumper under the intentional tort exception to the WDCA. MCL 418.131(1). The intentional tort exception allows imposition of liability under two distinct sets of circumstances. First, the employer specifically intended the injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996). The second set of circumstances is known as the legislatively prescribed "inferred intent" tort. A review of the complaints reveals that the Eilar plaintiff relied on the first exception (American Bumper "specifically intended to injure") and that the Dora plaintiff relied on the second exception (American Bumper had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge).

National Union's excess umbrella liability policy provides under the heading "Coverage":

A. We will pay on behalf of the insured that portion of the ultimate net loss in excess of the retained limit as hereinafter defined, which the Insured will become legally obligated to pay as compensatory damages (excluding all fines, penalties, punitive or exemplary damages) because of Personal Injury, Property Damage Liability or Advertising Liability, *caused by an occurrence to which this insurance applies* [Emphasis added.]

Under the heading "Defense," the policy provides:

A. The provisions of this section *apply solely to occurrences* covered under this policy but not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other underlying insurance providing coverage to the Insured. . . .

1. We will defend any suit against the Insured alleging liability *insured under the provisions of this policy* and seeking recovery for damages on account thereof even if such suit is groundless, false or fraudulent, but we will have the right to make such investigation and negotiation and settlement of any claim or suit as may be deemed expedient by us [Emphasis added.]

Under the heading "Definitions," "occurrence" is defined:

1. With respect to Personal Injury and Property Damage, the term occurrence means an event, including continuous or repeated exposures to conditions, which result in Personal Injury and Property Damage *neither expected nor intended from the standpoint of the Insured*. [Emphasis added.]

Under the heading "Exclusions," the policy provides:

This policy does not apply:

* * *

15. to any liability resulting from personal injury or property damage *which is expected or intended* by the insured, except that this Exclusion does not apply to Personal Injury resulting from the use of reasonable force to protect persons or property. [Emphasis added.]

The present action was brought by an employer against its insurers to determine whether allegations relating to its employees fell within the coverage provided by the insurance policy. Thus, the determination is not whether the allegations successfully avoid the exclusive remedy provision of the WDCA, but whether those allegations are comprehended by a particular insurance policy. Whether National Union is contractually obligated under the policy to defend American Bumper against the claims is a question of law requiring interpretation of an insurance contract. *Auto-Owners Ins v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997).

An insurer is not required to defend its insured against claims specifically excluded from policy coverage. *Protective Nat'l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991). Where policy language is clear, this Court is bound by the specific language set forth in the policy. *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 657; 572 NW2d 686 (1997).

The National Union policy provides coverage for injury caused by an "occurrence" to which the policy applies, and also provides that the defense provision of the policy applies solely to "occurrences covered under this policy." An occurrence is defined as "an event . . . neither expected nor intended from the standpoint of the insured." Similarly, the policy provides an

exclusion for "any liability resulting from Personal Injury . . . which is expected or intended by the insured." The plain language of the policy demonstrates that the policy excludes both coverage and a defense for occurrences of injury that were subjectively expected by the insured. This Court has interpreted exclusionary language identical to that in the National Union policy and concluded that it differs from the language of an insurance policy excluding coverage for events "caused intentionally" in that it excludes coverage for occurrences of injury that were subjectively expected by the insured. *Metropolitan Property & Liability Ins Co v DiCicco*, 432 Mich 656, 673; 443 NW2d 734 (1989). Indeed, this Court has acknowledged that "the addition of the word 'expected' expands the meaning of the 'caused intentionally' language" in an insurance policy exclusion clause. *Id.*

Thus, the policy exclusion will preclude coverage in this case if the court can find as a matter of law that, from the standpoint of American Bumper, the bodily injury to Eilar and Dora was either expected or intended. Because the Eilar complaint alleged that American Bumper specifically intended the injury, the policy exclusion clearly precludes coverage in the Eilar case.

The Dora complaint alleged that American Bumper had knowledge of the conditions that caused Dora's injury, that American Bumper had knowledge that an injury was certain to occur, and that American Bumper disregarded the fact that an injury was certain to occur. The only way that the Dora plaintiff could avoid the exclusive remedy provisions of the WDCA was by proving that injury was certain to occur and that American Bumper willfully disregarded the fact that injury was certain to occur.

In *Cavalier Mfg Co v Employees Ins Co of Wausau*, 211 Mich App 330, 333-334; 535 NW2d 583 (1995), remanded 453 Mich 953 (1996), this Court held that where an employee alleges acts sufficient to constitute an intentional tort within the meaning of the WDCA, those same allegations do not necessarily constitute "bodily injury intentionally caused" within the meaning of the insurance policy exclusion at issue in that case.⁶ The policy exclusion in *Cavalier*, however, excluded only "bodily injury intentionally caused." The exclusion in the present case is different in that it excludes injury *expected* or intended from the standpoint of the insured.

In *Golec v Metal Exchange Corp*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2002 (Docket Nos. 220166, 220444), a divided panel of this Court held that an employer's willful disregard of actual knowledge that an injury was certain to occur is not the legal equivalent of the injury being "expected or intended from the standpoint of the insured." *Id.*, p 8. The majority concluded that "it is possible to deliberately disregard actual knowledge that an injury is certain to occur without actually intending or expecting the injury." *Id.* Although the majority did not detail its reasoning, it explained:

⁶ The Court reasoned that because such an exclusion requires both an intentional act and an intentionally caused injury, it is possible for an employee to allege an implied intentional tort under the WDCA without coming within the policy exclusion as a matter of law because unlike the exclusion, the implied intentional tort does not require a specific intent to harm. *Id.*

The [implied intentional tort] provision holds an employer responsible for an intentional injury when, although the injury was not truly intended, the circumstances were such that the employer was aware of all the elements leading to certain injury, although for some reason, the employer ignored the obvious and placed the employee in harm's way. Under these circumstances, it may or may not be the case that the employer subjectively expected the injury to occur. The employer may have ignored the obvious, without actually intending injury, but, nevertheless, expecting it and being indifferent to it. Or, the employer may have ignored the obvious because although all the elements leading to certain injury were present and known to the employer, the employer did not bother to put two and two together in its haste to get the job done. The policy exclusion requires consideration of the subjective intent to the employer. Under this standard, liability under the [implied intentional tort] provision does not preclude coverage as a matter of law. Such is the case here. [*Id.*]

In *National Union Fire Ins Co of Pittsburgh, PA v Rodriguez*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 12, 2004 (Docket No. 03-71738), in analyzing the majority holding in *Golec*, the court stated at slip op pp 14-15:

Thus, under the *Golec* court's understanding, an employer could accidentally or negligently disregard actual knowledge of certain injury "in its haste to get the job done." *Id.* To the contrary, however, the Michigan Supreme Court clearly indicated that the terms "willfully disregards" in the WDCA are 'intended to underscore that the employer's act or failure to act must be more than mere negligence' *Travis [v Dreis & Krump Mfg Co]*, 453 Mich 149; 551 NW2d 132 (1996)]. Furthermore, the *Golec* opinion seems inconsistent with *Travis* in that *Travis* stands for the proposition that the implied intentional tort provision of the WDCA provides an avenue to infer a specific intent to injure on the part of the employer. *Id.* at 143. If a specific intent to injure is inferred as a matter of law based on the employer's willful disregard of actual knowledge that an injury is certain to occur, this Court fails to see how the same state of mind is not also sufficient to infer a subjective expectation of injury as a matter of law. This is also the conclusion arrived at by Judge Talbot, who dissented in *Golec*.

In his dissent in *Golec*, Judge Talbot stated:

It [the trial court] opined that the exception to the WDCA that applied to the instant case, that plaintiff's employer "disregarded actual knowledge that an injury was certain to occur," did not amount to *intentionally causing* an injury for the purposes of the WC/EL policy exclusion, but did not amount to *expecting* an injury for the purposes of the CUP policy exclusion. Accordingly, the subjective expectation of injury could be inferred as a matter of law. I agree.

It appears that plaintiff was in a no-win situation with regard to the CUP. Whether his employer disregarded actual knowledge that plaintiff would be injured is a question of fact for the jury to resolve. See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 184-187; 551 NW2d 132 (1996). If the case had gone to trial, plaintiff would have had to prove that his employer disregarded actual

knowledge that plaintiff would be injured in order to survive the exclusive remedy provision of the WDCA. *Id.*; see also *Cavalier Mfg Co v Employees Ins Co of Wausau*, 211 Mich App 330, 340; 535 NW2d 583 (1996). If plaintiff had been successful in that regard, then in my opinion and contrary to the majority's holding, the CUP would not cover plaintiff's injuries; they would be excluded as bodily injuries expected by the insured employer. If, instead, plaintiff had failed to prove that his employer disregarded knowledge of certain injury, the CUP exclusion for "bodily injury . . . either expected or intended from the standpoint of the insured" would not preclude coverage, but the exclusion for workers compensation claims would do so.

I disagree with the majority's distinction between the disregard of knowledge of certain injury and the expectation of injury. Because I do not subscribe to the majority's conclusion that "it is possible to deliberately disregard actual knowledge that an injury is certain to occur without actually intending or expecting the injury, I would affirm the trial court's conclusion that the CUP excludes coverage for plaintiff's injuries. [*Id.*, pp 1-2 (emphasis in original).]

We are persuaded by the reasoning in Judge Talbot's dissent and in the *National Union* opinion and conclude that American Bumper's subjective expectation of injury is inferred as a matter of law. We fail to see how American Bumper could have committed any acts with the belief that the deceased employees were certain to be injured, yet not have expected such injuries to occur. The policy exclusion for "bodily injury . . . either expected or intended from the standpoint of the insured" effectively bars coverage for the underlying claims. See also *Wedge Products, Inc v Hartford Equity Sales Co*, 31 Ohio St 3d 65; 509 NE2d 74 (1987), and *Westfield Ins Co v Jarrett Reclamation Services, Inc*, 114 Ohio App 3d 492; 683 NE2d 415 (1996) (no coverage afforded for intentional tort in a policy providing protection for injuries "neither expected nor intended from the standpoint of the insured"). Because there is no possibility of coverage under the policy for either of the actions filed against American Bumper, it follows that National Union had no duty to defend against those actions. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 315; 575 NW2d 324 (1998), modified on other grounds by *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999) (the duty to defend is tied to the availability of coverage).⁷

The judgment in favor of American Bumper and Skoog is vacated, and the case is remanded for entry of an order granting summary disposition in favor of National Union. Jurisdiction is not retained.

Hoekstra, J., concurred.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

⁷ In light of our holding, we need not address the remainder of the issues raised in Docket Nos. 245342 and 245367.