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 L. JOHN 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.

CAVANAGH, J. *(dissenting).*

The issue is whether defendant insurer had a duty to defend against the underlying intentional tort claims in this declaratory judgment action. I respectfully disagree with the majority's determination that there was no such duty.

The insurance policy at issue provides that it does not give rise to a duty to defend or provide coverage for injuries unless they were the result of an "occurrence," which is defined as an event neither expected nor intended from the insured's standpoint.

With regard to the "duty to defend" obligation, the law provides:

> An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. [*American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 451-452; 550 NW2d 475 (1996) (citations and quotations omitted).]

Therefore, we must consider whether the intentional tort claims filed in the underlying cases could conceivably be covered by the policy; could the injuries have resulted from an "occurrence"—an event neither expected nor intended by the insured?

The underlying claims were brought under the intentional tort exception, which provides:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an 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. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1).]

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), our Supreme Court construed the first sentence as imposing a specific intent requirement—"the employer must deliberately act or fail to act with the purpose of inflicting an injury upon the employee." *Id*. at 172. The *Travis* Court then held that the second sentence was to "be employed when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence. It is a substitute means of proving the intent to injure element of the first sentence." *Id*. at 173. The Court noted that the second sentence reads: "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." *Id*. at 172. The Court concluded:

> If we read both sentences . . . together, it becomes evident that an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id*. at 180.]

Here, the personal representatives of the two deceased employees' estates brought separate intentional tort actions; the first, concerning Eilar, claimed that this employer specifically intended an injury, and the second, concerning Dora, claimed that this employer had actual knowledge that an injury was certain to occur and willfully disregarded it. The issue, then, is whether defendant had a duty to defend the employer against these allegations, i.e., whether it is at least arguable that there had been an occurrence within the scope of coverage triggering the duty, until it became clear from the factual development that the actions were outside the scope of coverage. See *American Bumper & Mfg Co*, *supra* at 455.

The majority seems to conclude that, because the underlying complaints against the insured alleged intentional torts, no duty to defend against those claims arose. The reasoning is that the mere *allegations* of specific intent to injure and willful disregard of knowledge that an injury was certain to occur are sufficient to negate the duty to defend. In essence the majority concludes, as a matter of law, that these allegations automatically trigger the exclusionary part of the occurrence provision—"for bodily injury . . . neither expected nor intended from the standpoint of the insured." I respectfully disagree.

The majority looks to *Golec v Metal Exchange Corp*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2002 (Docket Nos. 220166, 220444), for guidance in this case. However, in *Golec* the issue was whether the insurer was contractually obligated to provide *coverage*, i.e., pay a consent judgment, after the parties negotiated a settlement following our Supreme Court's holding that there was a genuine issue of material fact regarding whether the employer committed an intentional tort against its employee. The trial court dismissed the claim seeking insurance coverage regarding the judgment on the ground that, when an employer disregards the fact that an injury is certain to occur, the employer's subjective expectation of injury should be inferred as a matter of law, triggering the exclusionary part of the "occurrence" provision. The *Golec* Court disagreed with this absolute rule of law, holding that an employer's willful disregard of actual knowledge that an injury was certain to occur does not always mean that the insured "expected or intended" the injury within the contemplation of the insurance policy "occurrence" provision. In other words, the resolution of the issue whether the employer *expected* to injure the employee depends on the facts. I agree with the proposition that an automatic presumption of an employer's culpable mens rea without proper factual development is untenable. However, the resolution of the case before this Court does not depend on the *Golec* holding. The issue here is not whether the insurer must provide *coverage* for an alleged intentional tort; rather, the issue here is whether an insurer can deny its duty to defend simply because an intentional tort was alleged in a complaint against the employer.

The applicable reasoning in support of concluding that defendant in this case had a duty to defend can be found in the analogous case of *American Bumper, supra*. In that case, the plaintiff was charged by the Environmental Protection Agency with groundwater contamination. *Id*. at 445-446. The plaintiff filed claims with their insurance providers demanding that they

assume the defense against the EPA claims. *Id*. at 445. The insurers refused on the ground that they had no duty to defend because the claims did not arise from an "occurrence" (an accident neither expected nor intended) and because the claims fell within the ambit of the pollution exclusionary provision. *Id*. at 449, 453-454. Our Supreme Court rejected these arguments on the grounds that until factual determinations were made, it was unclear whether an "occurrence" had taken place and whether the exclusionary provision applied since it was not established whether the plaintiff had caused a contamination or that any such contamination was expected or intended. *Id*. at 453-456. The Court continued that such uncertainty must be resolved in favor of the policyholder, and thus gives rise to a duty to defend until such time as the uncertainty is resolved. *Id*. at 455. Hindsight acquired after the necessary factual development does not relieve an insurer of its initial duty to defend. *Id*. The Supreme Court opined that "[w]e find it difficult to believe that [the plaintiff] 'expected or intended' that its apparently lawful use of the seepage lagoon would result in property damage requiring remediation." *Id*. at 456.

Similarly, I find it difficult to believe that, under the "occurrence" provision of the insurance policy, the employer in this case expected or intended to kill two of its own employees through the use of a malfunctioning mechanical press. Without the benefit of factual development that resolves this uncertainty, I would not wholly relieve insurers, including defendant, of the duty to defend against these intentional tort claims, whether or not the insurers are eventually relieved of their duty to indemnify. Accordingly, I would affirm the trial court's decision, albeit for different reasons.

/s/ Mark J. Cavanagh