STATE OF MICHIGAN

COURT OF APPEALS

ROBERT SCHULTZ,

Garnishee Plaintiff-Appellee,

v

AAA MICHIGAN,

Garnishee Defendant-Appellant.

UNPUBLISHED
May 28, 1999

No. 201175
Grand Traverse Circuit Court
LC No. 94-012764 NO

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

JANSEN, P.J. (dissenting).

I respectfully dissent. Finding one issue to be dispositive of this case, specifically that whether defendant may raise the criminal act or omission exclusion defense is not relevant because the underlying action was decided on a theory of premises liability and plaintiff is entitled to judgment in this garnishment action as a matter of law, I would affirm the trial court.

This is a garnishment action. In the underlying action, plaintiff was injured on December 31, 1993, when a firework struck him at the home of C. Andrew and Jean Bonner, who were hosting a New Years' Eve Party. Plaintiff filed suit against the Bonners and Steven Campeau, who was setting off the fireworks that night. The complaint was filed on September 30, 1994, and alleged that the Bonners and Campeau purchased and provided numerous legal and illegal fireworks at the party. With regard to the Bonners, the complaint alleged that they owed a duty to plaintiff to maintain their residence premises in a safe condition so as to avoid the unreasonable risk of danger or harm to the people at the party. Specifically, the complaint alleged that the Bonners breached this duty by (1) having the presence of alcohol and intoxicated individuals at the party; (2) the staging area for the fireworks was inadequate and poorly located; (3) allowing the use of, or contributing to the use of, fireworks that were illegal; and (4) consuming alcohol.

On November 7, 1994, by letter, defendant denied coverage to the Bonners because of the criminal act exclusion in the homeowner's insurance policy. The Bonners then hired their own attorney to defend the action. Later, plaintiff moved for summary disposition under MCR 2.116(C)(10) and entry of judgment against the Bonners on the theory of premises liability. In an order entered July 12, 1995, the trial court granted the motion, finding that no genuine issue as to any material fact existed

regarding liability. Based on the statement of uncontroverted facts submitted and the other documentary evidence, the trial court found that: (1) the Bonners were the owners and were in control of and present at the premises where plaintiff was injured; (2) the Bonners knew of the fireworks display and should have realized that it would involve an unreasonable risk of harm to the guests, which danger the guests should not have been reasonably expected to fully recognize, unless the display was properly staged, conducted, and supervised; (3) the Bonners failed to exercise reasonable care to make the condition safe, or to properly supervise those engaged in the fireworks display, or to warn their guests of the nature and extent of the risk involved; (4) that plaintiff, who relied on the Bonners to act responsibly and supervise the display condition and who was standing at an apparently safe distance from the staging area, did not regard the situation as constituting a danger; (5) that as a direct and proximate result of such acts or omissions by the Bonners, plaintiff suffered a severe and permanent physical injury; and (6) judgment was entered in favor of plaintiff and against the Bonners for $200,000. This order was entered under MCR 2.604.

Turning to the garnishment action, the trial court granted summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). At the hearing held on October 17, 1996, the trial court stated that there was no question that a well-pleaded claim of landowner premises liability was found in the underlying action and there was no question that premises liability is included within the scope of coverage of the homeowner's insurance policy. The trial court found:

> So in summary, it would be this Court's primary holding where the carrier fails to both defend and to file a declaratory action, that it loses the right to collaterally attack the judgment by raising issues of exclusion. However, alternatively, the Court finds even when those exclusions are viewed, there was an adequate notice as to the significant expansion in the scope of the intentional act exclusion that was as I've said inadequate as a matter of law, and prevents its operation, and again as a matter of law, and the uncontested facts that form the judgment, that even if the carrier were allowed to raise the issue of exclusions, bound by these uncontroverted facts, simply cannot rise as a matter of law to create the causal relationship between an ostensible, criminal act as a social host for injury here.

Although I agree with the majority that the trial court's initial ruling regarding whether defendant could attack the underlying judgment was incorrect because defendant preserved the criminal act exclusion by raising it in a letter denying coverage, *In re Smith Estate*, 226 Mich App 285, 289; 574 NW2d 388 (1997), I believe that the trial court's second, alternative ruling is correct and requires affirmance of this case.

The trial court cited *Morrill v Gallagher*, 370 Mich 584; 122 NW2d 687 (1963). *Morrill* involved a case in which the insured defendant played a prank at work by throwing a lit firecracker into a room in which the plaintiff was working. The "prank" resulted in rather serious injury to the plaintiff. The plaintiff filed suit against the defendant alleging negligence, assault and battery, and wilful and wanton negligence. The insurer sent a letter to the insured defendant denying coverage under certain exclusions. Ultimately, the case went to a jury trial, and the jury found in favor of the plaintiff on the negligence count. The counts of assault and battery and wilful and wanton negligence were withdrawn

by the plaintiff during trial. Garnishment proceedings were subsequently initiated by the plaintiff to collect on the judgment.

The Supreme Court held, in relevant part, that as a general rule, and in the absence of fraud and collusion, if an insurer who has a right to defend actions against the insured has timely notice of such action and defends or elects not to defend, the judgment in such case is binding upon the insurer regarding issues which were or might have been litigated when the insurer is later sued by the injured person. *Morrill, supra,* p 586. Therefore, where an insurer conducts the defense of an action for personal injuries against the insured, the insurer is bound by the judgment regarding all matters at issue even if the insurer is not a formal party, so that it cannot subsequently deny that the claim was covered by its policy where the issue was settled adversely to it in the underlying action for damages. *Id.,* p 587; see also *In re Smith Estate, supra,* p 288 (generally, a garnishee defendant is barred from challenging the validity of the judgment entered in the original action; however, an insurer may raise an exclusionary clause as a defense in a garnishment proceeding if that issue has been preserved.)

In the present case, the trial court's order granted summary disposition in favor of plaintiff in the underlying claim on a theory of premises liability. Thus, while defendant may raise the criminal act exclusion to contest coverage because it preserved that exclusion in the letter, the issue is whether there is a factual question whether the criminal act exclusion applies to the premises liability theory on which plaintiff prevailed. I agree with the trial court that there is no material factual dispute; the criminal act exclusion does not apply to the premises liability theory as a matter of law.

In *Morrill,* the Supreme Court went on to determine whether the exclusion provisions barred liability on the part of the insured defendant. The Supreme Court ultimately decided that the "business pursuits" exclusion, the "intentional injury" exclusion, and the "worker's compensation" exclusion (where the plaintiff was not an employee of the insured defendant) did not apply and, thus, did not bar liability on the part of the insured. The present case is factually similar. The underlying judgment was entered solely on a theory of premises liability, with no finding that the Bonners had engaged in any criminal act. The judgment was entered on the theory that the Bonners failed to exercise reasonable care to make the condition safe, or to properly supervise those engaged in the fireworks display, or to warn their guests of the nature and extent of the risk involved. Defendant is bound by this judgment. Therefore, the trial court properly ruled that there is no material factual dispute that the criminal act exclusion does not apply so that defendant is not liable for coverage on the underlying premises liability claim.

In re Smith Estate does not support reversal of the trial court's decision in this regard. There, the plaintiff brought an action against the estate of James Smith, who had shot the plaintiff during a dispute at a third party's home. The insurer sent a letter to Smith's wife (the personal representative of the estate) denying coverage on the basis that the damages did not result from an "occurrence" and that the injuries were "expected or intended." A jury subsequently found in the plaintiff's favor, finding that Smith was negligent. In the ensuing garnishment action, the insurer was permitted to raise the exclusionary defenses it had preserved in the letter, and the jury found that plaintiff had no cause of action against the garnishee insurer because there was no occurrence as defined in the policy. Thus, *In re Smith Estate* is distinguishable because that case involved a jury verdict specifically finding that there

was no occurrence to trigger coverage. This Court was not required to consider whether there was a material factual dispute regarding whether the exclusions asserted by the garnishee insurer applied to the underlying judgment. That issue was resolved by a jury.

Accordingly, the trial court did not err in relying on and applying *Morrill* to the facts of this case. Further, I would find that the trial court did not err in ruling that the criminal act exclusion in the homeowner's policy does not preclude coverage as a matter of law because the underlying judgment was a premises liability claim with no ruling or finding that the Bonners committed any criminal act. Garnishee defendant is liable to indemnify on the underlying claim.

I would affirm.

/s/ Kathleen Jansen