**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

December 27, 1996



**No. 96-1430-FT**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

**JEROME G. MUELLER,**

**Plaintiff-Respondent,**

**v.**

**ROGER M. JAMES, RICHARD MAURICE and JUNE MAURICE, d/b/a GEE O'S GOOD TIME SALOON,**

**Defendants-Respondents,**

**STETTIN MUTUAL INSURANCE COMPANY,**

**Intervenor-Defendant-Appellant.**

APPEAL from an order of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Stettin Mutual Insurance Company appeals an order concluding that it has a duty to defend Roger James in a battery action

filed by Jerome Mueller.[1] The trial court ruled that James's answer and affidavit create a prima facie case of self-defense and that Stettin must defend James if James was acting in self-defense. Stettin argues that its duty to defend depends solely on the allegations contained within the four corners of Mueller's complaint and without reference to extrinsic evidence. Stettin also argues that it should not be required to defend when its insured alleges self-defense because there is no circumstances in which Stettin would be required to pay money damages. Because these arguments were rejected in ***Berg v. Fall***, 138 Wis.2d 115, 405 N.W.2d 701 (Ct. App. 1987), and there is no basis for modifying or distinguishing ***Berg***, we affirm the order requiring Stettin to defend James.

James and Mueller were both patrons of a tavern in which a fight took place. Mueller's complaint states that James intentionally and violently kicked and punched his face and body. James's answer and affidavit state that he struck Mueller in self-defense after Mueller swung at him.

In ***Berg***, the court rejected both of the arguments Stettin raises in this appeal. There, the insurance company claimed that its decision to defend should be based solely on the allegations contained in the complaint. This court rejected that argument, concluding that when an examination of the complaint discloses no duty to defend, an insurer possessed of other knowledge that would give rise to a duty to defend cannot ignore that information. Because a complaint would never allege that the defendant acted in self-defense, it is only reasonable to look beyond the complaint to determine the question of insurance coverage.

In ***Berg***, the insurance company also argued that it had no duty to defend because the policy did not cover bodily injury expected or intended by the insured (battery), and could not result in judgment against the insurance company because there would be no liability if the insured acted in self-defense. The court rejected that argument. When the validity of a defendant's acts cannot be determined until trial has been completed, an insurance company cannot use the expected result of the trial as justification for its failure to defend its insured. Unless the privileged act of self-defense is specifically excluded from coverage by the language of the insurance policy, the policy is ambiguous

[1] This is an expedited appeal under RULE 809.17, STATS.

with respect to providing a defense for an insured acting in self-defense and the ambiguity must be construed against the insurer. ***Id.*** at 121, 405 N.W.2d at 704.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.