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Allstate Indemnity Company v. Thomas F. Thatcher, Kathlyn J. Thater, and Richard Grow and Todd Lloyd : Reply Brief

Utah Court of Appeals

Tim Dalton Dunn; Kathleen M. Liuzzi; Dunn and Dunn, P.C.; Attorneys for Appellee Allstate Indemnity Company; cameron M. Hancock; Ray, Quinney and Nebeker, P.C.; Attorneys for Richard Grow and Todd Lloyd.
D. Scott Crook; J. Craig Smith; Smith Hartvigsen PLLC; Attorneys for Appellants Thomas and Kathlyn Thatcher.

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IN THE UTAH COURT OF APPEALS

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Appeal From the Third District Court, Salt Lake County, State of Utah
The Honorable Stanton Taylor

Tim Dalton Dunn
Kathleen M. Liuzzi
DUNN & DUNN, P.C.
505 East 200 South, 2nd Floor
Salt Lake City, Utah 84102
Attorneys for Appellee Allstate Indemnity Company

Cameron M. Hancock
RAY, QUINNEY & NEBEKER, P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84145-0385
Attorneys for Richard Grow and Todd Lloyd

D. Scott Crook (7495)
J. Craig Smith (4143)
Smith Hartvigsen, PLLC
215 South State, Suite 650
Salt Lake City, Utah 84111
Tel. (801) 413-1600
Fax. (801) 413-1620
Attorneys for Appellants Thomas and Kathlyn Thatcher

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Fax. (801) 413-1620
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ARGUMENT

THE DISTRICT COURT INCORRECTLY CONCLUDED THAT ALLSTATE HAD NO DUTY TO DEFEND.

A. The Acts of the Thatchers Constitute an "Occurrence" Covered by the Policy

As set forth in the Policy, Allstate promised the Thatchers that it would "pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence." (R. at 193). Thus, the determination of whether Allstate has a duty to defend depends partly upon the meaning of "occurrence," which the Policy defines as "an accident." (R. at 107).

According to Utah state law, "[t]he word [accident] is descriptive of means which produce effects which are not their natural and probable consequences." *Green v. State Farm Fire & Casualty Co.*, 127 P.2d 1279, 1283 (quoting *Nova Cas. Co. v. Able Constr. Inc.*, 983 P.2d 575, 579 (1999) (quoting *Richards v. Standard Accident Ins. Co.* 58 Utah 622 (1921) (quoting *Western Commercial Travelers' Ass'n v. Smith*, 85 F. 401, 405 (8th Cir. 1898). Indeed, even cases cited by Allstate suggest that an intentional act that causes injury may yet be considered accidental unless the injury is "the natural result" of the act, or the "natural and probable consequence" of the act.[1] *Millard Warehouse Inc. v. Hartford Fire Insurance Co.*, 283 N.W.2d

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[1] From a philosophical perspective, of course, Allstate's single-minded reliance upon this "natural and probable consequence" definition of *accident* is problematic, since it ultimately leads to the bizarre conclusion that no conceivable incident could ever be "accidental." An ignorant housekeeper, for example, thinking to clean more efficiently a heavily soiled tile floor, might add some ammonia (NH3) to their bleach (NaOCl), releasing lethal chlorine gas (Cl2). Under Allstate's definition—since chlorine has long been known to be the "natural and probable" outcome of the mixtures—the ignorant housekeeper's probable death must be considered ***suicide***, since he or she ***intended*** to combine the two compounds. Allstate's refusal to include the highly relevant considerations of expectation and intention lead to such absurd results that the Court must reject its overbroad definition of *accident* out of hand. The Titanic—from Allstate's perspective—was sent to the bottom of the Atlantic in two pieces **on purpose**: it is quite natural for icebergs to drift into sea lanes, for trans-Atlantic luxury liners to use those sea lanes, and for the two of them (berg and liner), on the courses and at the speeds they were each pursuing, to bash into each other. The Titanic's resulting loss of buoyancy was the natural and

56, 62-63 (Neb. 1979). Concerning such consequences, the Utah Supreme Court has stated that, "[t]he natural consequence of means used [is] the consequence which ordinarily follows from their use—the result which may be reasonably anticipated from their use, and which ought to be ***expected***. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow." *Nova*, 983 P.2d at 579 (emphasis added; quoting *Richards*, 58 Utah at 1023) (quoting *Smith*, 85 F. at 405).

It is this critical consideration of expectation and intent that separates Utah's reasonable test for *accident* from the naïve and unrealistic formulaic definition Allstate wishes this Court to adopt. An injury caused by a deliberate or intentional act, realistically speaking, can be considered an accident if the injury could not be "reasonably anticipated or expected." *Fire Insurance Exchange v. Rosenberg*, 930 P. 2d 1202, 1205-06 (Utah Ct. App. 1997), *overruled in part by Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 23 n. 3, 140 P. 3d 1210. Utah courts have clearly held that "[w]hether, in a particular case, an intentional act leading to unintended harm is considered accidental or not generally depends on the likelihood that the intentional act will result in harm of the type that in fact occurred." *Allstate Ins. Co. v. Patterson*, 904 F. Supp. 1270, 1279 (D. Utah 1995).

Allstate tries to claim that the mere intentional nature of the Thatcher's building of the sports court disqualifies its alleged inadvertent misplacement from being an "accident" under the policy. Utah caselaw, however, does not "stand for the proposition that any injury caused by an intentional act cannot be an occurrence under [a] polic[y] at issue," *Rosenberg*, 930 P. 2d at 1206; Utah courts—focusing as they do on expectation rather than mere consequence—realize

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predictable result of the application of the laws of hydrostatics. Therefore, because the captain was in fact fully aware of what he was doing when he chose the Titanic's course and speed, the deaths of the 1500 casualties were obviously a simple case of mass murder. Fortunately, Utah law as to the nature of accidents is not the shortsighted, simplistic, broadbrush natural-and-probable formula Allstate suggests it to be.

rather, that "it does not follow that the result of an insured's intentional conduct can *always* be reasonably anticipated or expected." *Id.* Although the Thatchers intentionally built a sports court, any encroachment onto their neighbor's property was not "reasonably anticipated or expected." In short, trespass of the sort the Thatchers were accused of is neither the "natural result" nor the "probable consequence" of building a sports court. Under Utah law, "[t]he probable consequence [of an act] is the consequence which is ***more likely to follow*** . . . than it is to fail to follow." *Smith*, 85 F. at 405 (emphasis added). In this case, trespass upon a neighbor's property was not the more likely consequence of building the sports court at issue.

Because Utah courts have not yet directly addressed this issue, it is helpful to note that Courts throughout the country consistently hold that trespass can be an "occurrence" under an insurance policy, especially if the trespass occurs due to a mistaken belief that the individuals had a legal right to be on the land. *See Mutual of Enumclaw Ins. Co. v. Gass*, 786 P. 2d 749, 750-51 (Or. Ct. App. 1990); *Am. Empire Surplus Lines Ins. Co. v. G.E. Leach Constr. Co.*, 272 Cal. Rptr. 704, 705-06 (Cal. Ct. App. 1990).[2] Utah law is very clear: trespass may be committed accidentally or negligently as well as intentionally. *See Pehrson v. Saderup*, 28 Utah 2d 77, 498 P.2d 648, 651 (Utah 1966) ("[T]he legislature did not intend that such a penalty should apply to cases in which the trespass was committed through an innocent mistake as to the boundary or location of a tract of land claimed by the defendant.").

Utah courts consistently hold that "an effect which is not the natural or probable consequence of the [act] which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the [act], an effect which the actor did not intend to produce . . . is produced by accidental means." *Smith*, 85 F. at 405. Thus, because the trespass

[2] Allstate does not cite a single contrary decision, but instead attempts to dilute this obvious trend by reminding the Court that it need not follow out-of-state decision. It is interesting to note that the Allstate brief relies heavily upon *Millard Warehouse*, a 1979 Nebraska case, to support its own argument.

was not the natural and probable consequence of building the sports court, trespass does not usually follow from building sports courts, and the Thatchers did not intend to trespass, the injury was produced by an accident, and thus covered under the Policy.

B. The Policy Does Not Expressly Exclude the Thatcher's Acts from Coverage

Because the results of the Thatcher's intentional acts were unintentional and unexpected, the act does not fall under the exclusions listed in the Policy because even the Policy requires that the injury must be "intended" or "reasonably expected to result from the intentional . . . acts" in order to be excluded from coverage. (R. at 123). As explained above, however, any injury in this case was neither intended nor reasonably expected to occur. Allstate argues that it is clear under the policy that "intentional" acts are not covered, even if the result was different from what was expected or reasonably foreseen. They base this conclusion on the portion of the Policy that states that the Policy does not apply if the injury or damage is of a different kind or degree than intended or reasonably expected. (R. at 123). In this case, however, the alleged damage could not be "of a different kind than intended or reasonably expected" because no one intended or expected any damage of any. The language of the Policy in this case is consistent with case law throughout the state, requiring that damage of some kind must be reasonably expected to result from the intentional acts of the insured before the insurer may refuse coverage.

Given plain Utah law, summary judgment in Allstate's favor was erroneously rendered below. However, even if any credence remains to Allstate's claims, such credence, at best creates an ambiguity of interpretation as to the nature of intent. Under Utah state law, "[a]s a matter of public policy, ambiguities or inconsistent provisions in insurance contracts are construed against the insurer and in favor of coverage." *Li v. Zhang*, 2005 UT App 246, ¶10, 120 P. 3d 30, *cert. granted*, *Li v. Zhang*, 124 P.3d 634 (Utah 2005) (quoting *New W. Fed. Sav. & Loan Ass'n v. Guardian Title Co*, 818 P.2d 585, 589 (Utah Ct. App. 1991) (quoting *Moore v. Energy Mut. Ins.*

Co. 814 P.2d 1141, 1143 (Utah Ct. App. 1991)). The Utah Supreme Court has held that "insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance." *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 24, 140 P. 3d 1210. The Thatchers' act of building a sports court simply does not fall under the exclusions listed in the Policy, and in any argument concerning the Policy, the language "should be construed against the insurer and in favor of coverage," thus against Allstate in favor of the Thatchers.

C. Allstate Owes a Duty to Defend Even if the Complaint Did Not Allege Negligence

Under Utah law, an insurer has a broad duty to defend that can only be overcome if the insurer correctly concludes that there are no circumstances under which an insured could be found liable. In fact, an insurer has a duty to defend as long as "there are disputed facts which if proved by the plaintiff at trial would result in liability under the policy." *Deseret Fed. Sav. & Loan Ass'n v. United States Fid. & Guar. Co.*, 714 P.2d 1143, 1147 (Utah 1986). This rule applies even if a court were to find an insured liable for a claim not alleged. In such cases, where the "duty to defend is dependent on whether there is actually a 'covered claim or suit,'" an insurance company must look to both the "allegations in the complaint" and any "extrinsic evidence" such as the underlying factual allegations not specifically identified in the complaint. *Fire Ins. Esch. v. Estate of Therkelsen*, 2001 UT 48, ¶¶ 13, 23-25, 27 P. 3d 555. Thus, if either the specific allegations of the complaint, or the facts underlying those allegations, if true, could in any way, give rise to a potential for liability, an insurer has a duty to defend.

In the case of trespass, even if the allegations of the complaint allege an intentional trespass, because an "owner is still entitled to recover actual damages on proof of the unintentional trespass," an insurer is "obligated to defend" the claims. *Parker v. Hartford Fire*

Ins. Co., 278 S.E.2d 803, 804 (Va. 1981). Thus, "[i]f a complaint alleges a willful trespass but could also support liability for a nonwillful trespass, then the insurer has the duty to defend." *Gass*, 786 P.2d at 750. Although the underlying lawsuit in this case claims intentional trespass, both the facts in the claim and those set forth in subsequent affidavits could, if proven, support a recovery for negligent trespass, and, even when intentional torts are alleged in a complaint, where "the underlying factual allegations [are] sufficient to satisfy the elements of [an unintentional claim], the insurer is obligated to [defend claims of unintentional injury] until those claims are either dismissed or otherwise resolved in a manner inconsistent with coverage." *Benjamin*, 2006 UT 37 at ¶¶ 20, 24.

CONCLUSION

For the above reasons, the Thatcher's respectfully requests that this Court reverse the grant of summary judgment by the district court in Allstate's favor and Order that Summary Judgment be granted in Thatchers favor requiring Allstate to cover and defend its insureds agents the Trespass Claim.

DATED this 20th day of February, 2007.

J. Craig Smith
D. Scott Crook
SMITH HARTVIGSEN, PLLC
Attorneys for Defendants Thomas F. Thatcher and Kathlyn J. Thatcher

CERTIFICATE OF SERVICE

I certify that on this 20th day of February, 2007, I served a copy of the REPLY BRIEF OF APPELLANTS to the following via first class mail:

Tim Dalton Dunn
Kathleen M. Liuzzi
DUNN & DUNN, P.C.
505 East 200 South, 2nd Floor
Salt Lake City, Utah 84102
Attorneys for Appellee Allstate Indemnity Company

Cameron M. Hancock
RAY, QUINNEY & NEBEKER, P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84145-0385
Attorneys for Richard Grow and Todd Lloyd