2006

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

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

ALLSTATE INDEMNITY COMPANY, Plaintiff/Appellee, v. THOMAS F. THATCHER, KATHLYN J. THATCHER, Defendants/Appellants, and RICHARD GROW and TODD LLOYD, Defendants/Appellees.	Appellate Case No. 20060538 CA District Court Civil No. 050908816

BRIEF OF APPELLEE

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE STANTON TAYLOR, PRESIDING

D. SCOTT CROOK
J. CRAIG SMITH
SMITH HARTVIGSEN, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Telephone: (801) 413-1600
Facsimile: (801) 413-1620
Attorneys for Appellants Thomas and Kathyln Thatcher

TIM DALTON DUNN #0936
KATHLEEN M. LIUZZI #7924
DUNN & DUNN, P.C.
505 East 200 South, 2nd Floor
Salt Lake City, Utah 84102
Telephone: (801) 521-6677
Facsimile: (801) 521-9998
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 Appellees Richard Grow and Todd Lloyd

IN THE COURT OF APPEALS OF THE STATE OF UTAH

ALLSTATE INDEMNITY COMPANY, Plaintiff/Appellee, v. THOMAS F. THATCHER, KATHLYN J. THATCHER, Defendants/Appellants, and RICHARD GROW and TODD LLOYD, Defendants/Appellees.	Appellate Case No. 20060538 CA District Court Civil No. 050908816

BRIEF OF APPELLEE

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE STANTON TAYLOR, PRESIDING

D. SCOTT CROOK
J. CRAIG SMITH
SMITH HARTVIGSEN, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Telephone: (801) 413-1600
Facsimile: (801) 413-1620
Attorneys for Appellants Thomas and Kathyln Thatcher

TIM DALTON DUNN #0936
KATHLEEN M. LIUZZI #7924
DUNN & DUNN, P.C.
505 East 200 South, 2nd Floor
Salt Lake City, Utah 84102
Telephone: (801) 521-6677
Facsimile: (801) 521-9998
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 Appellees Richard Grow and Todd Lloyd

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES AND STANDARD OF REVIEW 1

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2
- Nature of the Case 2
- Course of Proceedings 3
- Disposition 3

STATEMENT OF RELEVANT FACTS 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

CONCLUSION 12

ADDENDUM .....

TABLE OF AUTHORITIES

CASES

Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, 140 P.3d 1210 ..... 7, 10, 11

Deseret Federal Savings & Loan Assoc. v. United States Fidelity & Guar. Co., 714 P.2d 1143 (Utah 1986) 7, 8

Fire Insurance Exchange v. Estate of Therkelsen, 2001 UT 48, 27 P.3d 555 2

Fire Insurance Exchange v. Rosenberg, 930 P.2d 1202 (Utah App. 1997) 7, 10

Green v. State Farm Fire & Casualty Company, 2005 UT App 564, 127 P.3d 1279 ..... 8, 12

Millard Warehouse Inc. v. Hartford Fire Insurance Co., 283 N.W.2d 56 (Neb. 1979) 8

Nova Casualty Company v. Able Construction, Inc., 1999 UT 69, 983 P.2d 575 2

Pixton v. State Farm Mutual Automobile Ins. Co.,
809 P.2d 746 (Utah App. 1991) 6

Rosas v. Eyre, 2003 UT App 414, 82 P.3d 185 .....10, 11

Sharon Steel Corp. v. Aetna Casualty and Surety Co.,
931 P.2d 127 (Utah 1997) 6

STATUTES

Utah Code Ann. § 78-2-2(3)(j) 1

Utah Code Ann. § 78-2a-3(2)(j) 1

IN THE COURT OF APPEALS OF THE STATE OF UTAH

ALLSTATE INDEMNITY COMPANY, Plaintiff/Appellee, **v.** THOMAS F. THATCHER, KATHLYN J. THATCHER, Defendants/Appellants, and RICHARD GROW and TODD LLOYD, Defendants/Appellees.	Appellate Case No. 20060538 CA District Court Civil No. 050908816

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

This action is within the original jurisdiction of the Utah Supreme Court, pursuant to *Utah Code Ann.* § 78-2-2(3)(j). The Utah Supreme Court assigned this case to the Court of Appeals on June 13, 2006, as authorized by *Utah Code Ann.* § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue: Was the district court correct in ruling that Allstate Indemnity Company ("Allstate") had no duty to defend the Thatchers in the lawsuit filed by Richard Grow and Todd Lloyd because the allegations in the complaint, if proven, were not covered under the Thatchers' homeowners' policy?

Standard of Review: Rulings on summary judgment motions are reviewed for correctness. *Fire Insurance Exchange v. Estate of Therkelsen*, 2001 UT 48, ¶ 11, 27 P.3d 555. "Interpretation of the terms of a contract is a question of law; thus, the Court of Appeals accords the trial court's legal conclusions regarding the contract no deference and reviews them for correctness." *Nova Casualty Company v. Able Construction, Inc.*, 1999 UT 69, ¶ 6, 983 P.2d 575.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

None.

STATEMENT OF THE CASE

Nature of the Case.

In May 2003, the Thatchers hired a company named Sport Court to build a sports court and fence on their property. After the sports court was constructed, it was discovered that a portion of the sports court and fence encroached upon a portion of the adjoining property owned by Richard Grow and Todd Lloyd ("Grow and Lloyd"). In addition, Grow and Lloyd discovered that fill from the construction had been dumped on their property. Grow and Lloyd filed a lawsuit (the "Lawsuit") against the Thatchers, stating that the Thatchers had refused to remove the structures from their property and bring it into compliance with applicable zoning laws. As a result, Grow and Lloyd suffered damages because they were unable to sell the lot and the home they had built on it for a prospective buyer. Initially, the Thatchers personally hired an attorney to defend them in the lawsuit but on April 14, 2005, they tendered their defense to Allstate under their homeowners' policy (the "Policy").

After investigation, Allstate determined that the Policy did not provide coverage for the claimed losses in the Lawsuit and therefore, Allstate was not obligated to pay for a defense or indemnification losses claimed in the Lawsuit. This information was conveyed to the Thatchers in a letter dated May 5, 2005. Allstate then filed a declaratory judgment action, which is the subject of this appeal, to determine whether the Thatchers had any right to a defense or indemnification under the Policy. In the meantime, Allstate agreed to defend the Thatchers in the Lawsuit under a reservation of rights until the court ruled as to whether or not the Thatchers' losses were covered under the Policy, thus triggering Allstate's duty to defend.

It is important to note that since this appeal was filed, the Lawsuit was dismissed, *sua sponte*, on October 30, 2006. (See Addendum.) Upon learning of the dismissal, Allstate's counsel spoke to counsel for Grow and Lloyd who was unaware of the dismissal and indicated that he would try to get the dismissal set aside. As it stands today, even though Allstate has been providing a defense in the Lawsuit since the defense was tendered to them by the Thatchers, any continuing duty to defend, as well as this appeal, may rendered moot by the dismissal of the Lawsuit.

Course of Proceedings.

Allstate filed a Complaint for a Declaratory Judgment on May 13, 2005 and then filed a Motion for Summary Judgment on September 12, 2005. The Thatchers responded with their own Motion for Partial Summary Judgment on October 25, 2005. A hearing was held on March 13, 2006, before Judge Stanton Taylor, who was filling in for Judge Stephen Roth. Judge Taylor ruled from the bench in favor of Allstate. The

Thatchers filed a Motion for New Trial on March 24, 2006, which was denied by the court in an order entered on May 9, 2006. This appeal followed.

Disposition.

The trial court granted Allstate's Motion for Summary Judgment and declared that Allstate has no duty to defend or indemnify under the Policy. The trial court also denied the Thatchers' Motion for Partial Summary Judgment.

STATEMENT OF RELEVANT FACTS

On January 31, 2003, Allstate and the Thatchers entered into an agreement whereby Allstate agreed to provide homeowners' insurance to the Thatchers for their residential property. (R. 12) On or about November 26, 2003, Grow and Lloyd, owners of a parcel of property adjacent to the Thatchers' property, filed the Lawsuit against the Thatchers. (R. 49-52) In the Lawsuit, Grow and Lloyd allege that the Thatchers, without a permit, built a sports court and fence that encroached on their property. (R. 50) Grow and Lloyd also allege that the Thatchers unlawfully deposited fill on their property. (R. 50) The encroachment occurred while Grow and Lloyd were building a custom home under contract for a specific buyer. (R. 50) They demanded that the Thatchers move the encroachment but the Thatchers refused. (R. 50) Grow and Lloyd also allege that the Thatchers knew they were in danger of losing the contract and that their continued refusal to remove the encroachment would likely result in the loss of the sale. (R. 50) As a result of the encroachment and the refusal by the Thatchers to remove the encroachment, Grow and Lloyd lost the sale. (R. 50).

Grow's and Lloyd's cause of action is intentional trespass resulting from the Thatchers knowingly and intentionally encroaching on their property in the first place and then intentionally refusing to remove the encroachment and bring the structure into compliance with applicable zoning laws. (R. 51)

The Thatchers contacted Allstate regarding the Lawsuit and tendered their defense to Allstate on or about April 14, 2005. Allstate reviewed the allegations in the Lawsuit to determine whether the Policy provided coverage for the claims and on May 5, 2005, Allstate sent the Thatchers a letter (the "Letter") explaining why the Policy does not provide coverage for the claimed losses in the Lawsuit and therefore, that Allstate is not obligated to pay for a defense in that Lawsuit or to pay indemnification losses claimed in the Lawsuit. (R. 53-7) In that Letter, Allstate agreed to defend the Thatchers in the Lawsuit under a reservation of rights until the court ruled, in this declaratory judgment action, as to whether or not the Thatchers are entitled to a defense and indemnification under the Policy. (R. 53-7)

SUMMARY OF ARGUMENT

Under any construction of the facts alleged in the underlying complaint, Allstate does not have a duty to defend. The Thatchers do not dispute that property damage occurred nor do they dispute that building the sports court and fence were intentional acts. The crux of the case boils down to two issues: (1) Whether the property damage caused by the Thatchers, as alleged in the underlying complaint, can be construed as an "accident" and therefore, covered under the Policy; and (2) whether the results of the Thatchers' actions fall under the exclusions for covered losses.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ALLSTATE HAS NO DUTY TO DEFEND BECAUSE THE UNDERLYING CLAIMS, IF PROVEN, WOULD NOT BE COVERED UNDER THE POLICY.

The district court was correct in ruling that Allstate had no duty to defend the Thatchers in the Lawsuit initiated against them by Grow and Lloyd because the claims in the Lawsuit, if proven, would not fall under the terms of the Policy. An insurer's duty to defend is based on the language of the policy and the nature of the claim against the insured; a defense duty arises when the insurer ascertains facts giving rise to potential liability under the insurance policy. *Sharon Steel Corp. v. Aetna Casualty and Surety Co.*, 931 P.2d 127, 133 (Utah 1997) (citing *Deseret Federal Savings & Loan Assoc. v. United States Fidelity & Guar. Co.*, 714 P.2d 1143, 1146 (Utah 1986)). This potential obligation is determined by referring to the allegations in the underlying complaint. *Id.* When those allegations, if proved, could result in liability under the policy, then the insurer has a duty to defend. *Id.*

An insurer denying a duty to defend must establish that the claims fall outside the coverage of the policy or the claims are exempted from coverage. *Id.* (citations omitted). **The duty to defend is determined by comparing the language of the policy with the allegations in the complaint and is determined by the terms of the policy, not by the expectations of the insured.** *Id.* (emphasis added). *See also Pixton v. State Farm Mutual Automobile Ins. Co.*, 809 P.2d 746 (Utah App. 1991). As shown below, there are several reasons why Allstate does not have a duty to defend based on the terms of the

Policy.

A. The Allegations in the Underlying Complaint Do Not Constitute An Accident And Therefore, Are Not An Occurrence Covered by the Policy.

In order for the Thatcher's encroachment, or trespass, to be covered under the Policy, it must be considered an occurrence. "Occurrence" is defined in paragraph 9 of Definitions Used In This Policy as:

> "Occurrence" – **means an accident**, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage.

(R. 107) (emphasis added). To fall within the policy's definition of occurrence, and thus within the scope of coverage, the property damage must have resulted from an "accident." Under this analysis, the question then becomes whether the focus should be on the intentional act of building the sports court or as the Thatchers argue, the unintended result of encroaching on their neighbor's property.

In determining whether an act was sudden and accidental, it is the nature of the act itself, and not the result, that must be analyzed. *Fire Insurance Exchange v. Rosenberg*, 930 P.2d 1202, 1204 (Utah App 1997), *overruled in part by Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 23, n.3, 140 P.3d 1210. The Thatchers rely on a variety of cases from other jurisdictions to support their position that negligent trespassing is covered by the Policy but the Court is not obligated to follow those cases.

In *Deseret Savings*, the court relied on a Nebraska case in which an insured constructed a warehouse in the flood plain of a creek. In a suit brought by a nearby

property owner to declare the warehouse a nuisance and remove it, the court held that the insurer could have no liability under the policy since any resulting damage would be intended and thus not an "occurrence," **even though its owner had no intention of causing harm to nearby properties.** *Deseret Federal Savings & Loan Assoc. v. United States Fidelity & Guar. Co.*, 714 P.2d 1143, 1146 (Utah 1986)(citing *Millard Warehouse Inc. v. Hartford Fire Insurance Co.*, 283 N.W.2d 56 (Neb. 1979) (emphasis added). More importantly, the *Millard* court noted that **"where acts are voluntary and intentional and injury is the natural result, the result was not caused by an "accident" even though the result might have been unexpected, unforeseen, and unintended."** *Millard*, 283 N.W.2d at 62-63 (citations omitted) (emphasis added). The *Millard* court further reasoned that "**the lack of intent to do harm on the part of the actor does not by itself compel conclusion that result was caused by "accident" for purposes of liability policy**" and added that "**[a]n effect which is the natural and probably consequence of an intentional act or of a course of action is not an "'accident.'"** *Id.* (emphasis added).

At issue in *Green v. State Farm Fire & Casualty Company*, 2005 UT App 564, 127 P.3d 1279 was whether a subdivision developers' failure to disclose the risk of a landslide to a subdivision lot purchaser was covered under the developer's insurance policy. The court held that the failure to disclose the risk, whether intentional or negligent, was not an "occurrence" within the meaning of the policy, and thus the insurer owed no duty to defend. *Id.* An insurer's duty to defend is measured by the nature and kinds of risks covered by the policy and arises whenever the insurer ascertains facts

which give rise to potential liability under the policy. *Id.* at ¶ 32.

However, it is irrelevant whether the Thatchers were negligent or intentional in their encroachment. The Thatchers' alleged lack of intent still does not qualify their actions as accidental and therefore, an occurrence, requiring a defense or insurance coverage.

B. The Thatchers' Intentional Acts Are Excluded From Coverage Even If the Results of Their Actions Are Unintended or Unforeseeable.

Although Allstate asserts that it has no obligation to defend the Thatchers in the Lawsuit because the underlying allegations, if proven, would not result in liability under the Policy, the Thatchers argue that their actions constitute negligence and therefore, an "accident" covered under the Policy. Even if the Thatchers' trespass was negligent, the consequences of their actions are still not covered under the Policy.

The Policy excludes coverage for intentional acts even if the damage is different than reasonably expected:

> 9. Intentional or criminal acts of or at the direction of any insured person, if the loss that occurs:
> a) may be reasonably expected to result from such acts; or
> b) is the intended result of such acts.

(R. 110) The Policy also states the following regarding intentional acts:

> Losses We Do Not Cover Under Coverage X:
> 1. **We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:**
> a) such insured person lacks the mental capacity to govern his or her conduct;

> b) **such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or**
> **c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.**

(R. 123) (emphasis addedd). 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 by the Thatchers.

The Thatchers argue that even though their actions in building the sports court was intentional, the resulting damage to the adjoining property was unintentional. The Thatchers also argue that unforeseen consequences of intentional acts qualify as accidents. The Thatchers rely on *Fire Insurance Exchange v. Rosenberg*. Their reliance is misplaced.

In *Rosenberg*, the court concluded that all unintentional or accidental acts resulting in injury are considered accidents constituting occurrences under liability insurance policies. *Id.* at 1204-05. The court further explained that an injury caused by an intentional act may also be considered an accident constituting an occurrence under a liability insurance policy if the injury could not be "reasonably anticipated or expected" from the deliberate act. *Id.* at 1205-06.

However in *Benjamin,* which overruled *Rosenberg* in part, the court, examined *Rosas v. Eyre*, 2003 UT App 414, 82 P.3d 185 (*overruled in part by Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 23, n.3, 140 P.3d 1210) with regard to the duty to defend. In *Rosas*, the court held that an insurer had no duty to defend an assault claim brought against its insured because "the facts alleged in the complaint clearly demonstrate that a

cause of action based solely on an intentional tort was intended." *Id.* at ¶ 23. (citations omitted). The *Benjamin* court emphasized that "the appropriate inquiry is whether the complaint alleges claims sounding in negligence. To the extent that the underlying facts in any given case do not satisfy the elements of a claim for negligence, the negligence claim will be subject to dismissal." *Id.* at ¶ 23, n.3. In *Benjamin* and *Rosas*, the complaint asserted alternative claims sounding in both intentional tort and negligence. That is not the situation here.

The important distinction that is similar to the complaint filed by Grow and Lloyd is the allegation of the tort of intentional trespass. The allegations in the Lawsuit describe only intentional acts in that the Thatchers refused to remove the sports court and fence despite being asked to do so, both by Salt Lake City (for failing to comply with zoning regulations) and by Grow and Lloyd. Grow and Lloyd have not alleged a separate, alternative claim for relief sounding in negligence and it is not the function of the court in this declaratory judgment action to resolve the claims in the Lawsuit. The complaint in the Lawsuit must be taken at face value. Therefore, there are no negligence allegations or claims in the Lawsuit and intentional acts are clearly not covered by the Policy, either as an accident or under the intentional acts exclusion.

The Thatchers do not dispute that building the sports court was intentional. Even if the encroachment was negligent and therefore different from what was expected or reasonably foreseen, the resulting damage is still not covered under the Policy. The Thatchers also argue that they relied on Sport Court to determine the property line and get the necessary permits. This still does not bring the Thatchers' actions under Policy

coverage because the Thatchers directed the building of the sports court, even though the act of building the sports court was performed by someone else.

II. THE COURT'S DECISION WAS WELL-REASONED AND SHOULD STAND.

Finally, the Thatchers argue that the trial court relied on an isolated sentence in *Green v. State Farm Fire & Casualty Co.* to determine that the claims alleged in the Lawsuit must be construed as an intentional act and not an "occurrence." The Thatchers claim that the court erroneously applied current case law in reaching its decision. However, the *Green* case was not the deciding factor in the court's decision but merely the most recent case in a line of well-developed case law in Utah regarding the issues surrounding an insurer's duty to defend and indemnify. There is no evidence that the trial court relied exclusively on *Green* in making its decision. The court correctly ruled that the placement of the sports court and fence by the Thatchers was an intentional act, precluding coverage under the Policy.

CONCLUSION

Pursuant to the terms of the Policy, Allstate does not have a duty to defend the Thatchers in the Lawsuit. The complaint in the lawsuit alleges that the Thatchers "knowingly and intentionally" trespassed on Grow's and Lloyd's property. The complaint also alleges that this trespass occurred because of the Thatchers' intentional acts. It is important to note that the complaint alleges that the Thatchers' failure to remove the sports court and fence once they discovered it was on the adjoining property caused the damages to Grow and Lloyd. This continued intentional encroachment is

what led to devaluation of the adjoining property and potential profit from the sale of the property. These intentional acts are simply not occurrences covered under the Policy. Even though, as the Thatchers claim, these intentional acts produced unintended results, it falls under the exclusions listed in the Policy. Finally, the Lawsuit was dismissed on October 30, 2006, rendering the issue of whether Allstate has a duty to defend and this appeal moot unless counsel in the Lawsuit refiles a complaint or gets the dismissal set aside. As of today, neither event has happened. Allstate respectfully requests that this Court affirm the decision of the trial court in favor of Allstate.

Dated this 15th day of November, 2006.

DUNN & DUNN, P.C.

Tim Dalton Dunn & Dunn
Kathleen M. Liuzzi
Attorneys for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2006, two copies of the foregoing was served by U.S. mail, postage prepaid, to the following:

D. Scott Crook
J. Craig Smith
Smith Hartvigsen, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Attorneys for Appellants Thomas and Kathlyn Thatcher

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

Karen B. Jeppson
Legal Secretary

ADDENDUM

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

RICHARD GROW, Plaintiff,	:	ORDER OF DISMISSAL
vs.	:	Case No: 030926692 MI
THOMAS THATCHER, Defendant.	:	Judge: JOHN PAUL KENNEDY Date: October 30,2006

Based on the failure of the parties and/or counsel to respond to the Order to Show Cause, the Court orders this case be dismissed without prejudice.

Dated this 30 day of October, 2006.

JOHN PAUL KENNEDY
District Court Judge

By _____

STAMP USED AT DIRECTION OF JUDGE

THIRD DISTRICT COURT SALT LAKE CITY