

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**NATIONWIDE MUTUAL FIRE)
INSURANCE COMPANY,)
)
 PLAINTIFF)
)
v.)
)
ROBERT CHARLES,)
)
 DEFENDANT)**

Civil No. 95-365-P-H

ORDER

The defendant Robert Charles’s motion for summary judgment is **GRANTED** as follows:

Nationwide Mutual Fire Insurance Company brought this declaratory judgment action to determine whether it had any obligation to defend a lawsuit brought against its insured Robert Charles. The underlying lawsuit, Baker, et al. v. Charles, Civil No. 95-183-P-H, has been settled. The defendant Charles has now moved for summary judgment on Nationwide Mutual’s claim that it had no obligation to defend him, and requests attorney fees on grounds that Nationwide Mutual brought this action in bad faith.

Contrary to Charles’s argument, I conclude that Connecticut, not Maine, law applies. Charles was a Connecticut homeowner when he took out the policy in question. He continues to own that dwelling, although he now rents it, and he continues to carry this insurance on that Connecticut real

estate. Although the incident over which Charles was sued in the underlying lawsuit by Bill Baker and Amy Melenbacker occurred in Maine, Maine has no connection to the interpretation and enforcement of this Connecticut insurance policy concerning a Connecticut home and someone who is not a resident of Maine. Under the principles of Baybutt Constr. Corp. v. Commercial Union Ins. Co., 455 A.2d 914, 918 (Me. 1983), adopting the rule of section 188 of Restatement (Second) of Conflicts of Law, I conclude that Connecticut law applies.

Under Connecticut law, the duty to defend is determined by comparing the allegations of the complaint with the terms of the insurance policy. See Town of Andover v. Hartford Accident & Indem. Co., 217 A.2d 60, 61 (Conn. 1966). The Baker and Melenbacker lawsuit against Charles alleged libel and slander, interference with economic relations, abuse of process and intentional infliction of emotional distress. The claims for interference with economic relations and intentional infliction of emotional distress both specifically allege emotional distress damages. Under the Nationwide Mutual policy, the insurance company agrees to pay “damages the insured is legally obligated to pay due to an occurrence.” Decl. of Robert Charles, Ex. A, at 12. “Occurrence” is defined to mean either “bodily injury” or “property damage.” Id. at 3, Definitions ¶ 9. The policy defines “bodily injury” as “bodily harm, sickness or disease, including resulting care, loss of services and death.” Id. at 2, Definitions ¶ 1. I conclude that emotional distress damages are included within Nationwide Mutual’s broad definition of “bodily injury.” Any ambiguity should be construed against the drafting insurance company. Stephan v. Pennsylvania Gen. Ins. Co., 621 A.2d 258, 261 (Conn. 1993). The parties have not referred me to any Connecticut case on point, but Maine cases construing similar language consistently have found bodily injury to include emotional distress. Maine Bonding & Casualty Co. v. Douglas Dynamics, Inc., 594 A.2d 1079, 1081 (Me. 1991); see

also Burns v. Middlesex Ins. Co., 558 A.2d 701, 702 (Me. 1989); City of Old Town v. American Employers Ins. Co., 858 F. Supp. 264, 268 (D. Me. 1994).¹

The policy also contains an exclusion for bodily injury “which is expected or intended by the insured.” Decl. of Robert Charles, Ex. A, at 13, Exclusions ¶ 1(a). The parties have cited no Connecticut cases interpreting such language, but Maine’s Law Court has spoken directly on the subject. In Burns, 558 A.2d at 702, the Court reaffirmed its holding in Patrons-Oxford Mutual Ins. Co. v. Dodge, 426 A.2d 888, 892 (Me. 1981), that such language excludes coverage only for bodily injury that the insured subjectively wanted or subjectively foresaw as practically certain. Under the Burns/Patrons-Oxford analysis, there is no coverage here for the count charging the insured with intentional infliction of emotional distress, because in that count Baker and Melenbacker assert that Charles intended to cause them emotional distress. The count charging interference with economic relations, on the other hand, claims damages for “pain and suffering, disability, and emotional distress,” but does not assert that the insured subjectively wanted or subjectively foresaw these harms as practically certain. Instead, that count alleges only that the insured intended to “cause harm” to Baker and Melenbacker; it does not otherwise specify intent to cause specific bodily injury. Likewise, the libel and slander count charges that the insured intended to cause harm to the plaintiffs

¹ Nationwide Mutual’s major argument is that Charles declined to purchase extra coverage, Option M, that expanded the definition of bodily injury to include “personal injury” resulting from such things as defamation. The fact that additional coverage was available for an extra premium under Option M, however, does not limit the policy’s definition of bodily injury. Defamation damages are available even when there is no emotional distress, see Lester v. Powers, 596 A.2d 65, 69 (Me. 1991), and thus an insured might well decide to purchase the extra coverage for just such instances. The same is true for many of the other coverages in Option M, such as false arrest, wrongful detention and invasion of rights of privacy. Thus, there is good reason to provide broader coverage for these kinds of lawsuits for an extra premium, because damages might be recovered and attorney fees accrued in defending against lawsuits, even though no bodily injury, including emotional distress, had been suffered by the plaintiff.

and to cause embarrassment and humiliation but does not charge that he intended to cause bodily injury. Given the language of these two counts, I conclude that there was a duty to defend.² I therefore do not reach the issue whether the alleged statements by a claim representative or a customer relations specialist are binding on Nationwide Mutual.

I conclude, on the other hand, that Nationwide Mutual's decision to bring this declaratory judgment action was not in bad faith. No Connecticut cases directly on point have been cited to me, and it was therefore a legitimate question for the insurance company to raise. As a result, attorney fees incurred by the defendant Charles in this lawsuit are **DENIED**.

Nationwide Mutual asks me to allow depositions or other discovery on the measure of the attorney fees incurred in the underlying lawsuit by Charles. Nationwide Mutual, however, never objected to the Scheduling Order entered in this matter; the time for discovery has long since passed under that order; and Nationwide Mutual has provided no basis for now extending discovery on a subject it could have investigated long ago. (The underlying lawsuit settled on March 11, 1996, almost a month before discovery in this matter closed on April 1, 1996, and no motion was ever

² Although the interference with economic relations count incorporates by reference the intentional infliction of emotional distress count, that incorporation would not require Baker and Melenbacker to prove in the interference count all the elements of the intentional emotional distress count. The duty to defend, therefore, remains.

I note that the insured obtained summary judgment on all claims but the defamation count as of February 16, 1996. Nationwide Mutual, however, has not argued that there was an initial duty to defend that terminated at some point prior to settlement. In any event, in light of my ruling that there was a duty to defend on the defamation count, the duty to defend extended up through final settlement. (Neither party to this case has dealt with the fact that the libel and slander count does not specifically assert actual emotional distress damages. I take judicial notice from the record of the underlying lawsuit in this court that the parties, in their final pretrial preparations, treated the emotional distress allegedly suffered by Amy Melenbacker as being covered by the defamation count.)

made to extend discovery.) The state of the summary judgment record is that the defendant's affidavits asserting the reasonableness of the attorney fees and their causation are undisputed.

Accordingly, on the issue of duty to defend the Clerk shall enter judgment in favor of the defendant and against the plaintiff. The defendant's summary judgment motion seeks recovery of amounts against the plaintiff, but the defendant has never filed a counterclaim. Consequently, the only request for relief before the court is the plaintiff insurance company's request for declaratory judgment that it has no duty to defend Robert Charles. The parties nevertheless have argued the case as if there were a counterclaim for recovery of amounts under the policy. In accordance with my reasoning above I would grant that relief to Robert Charles in the amount of Fifty-two Thousand Eleven Dollars and Seventy-eight Cents (\$52,011.78) representing legal fees and costs of \$36,387.28; transcript costs of \$624.50; and the \$15,000 paid in settlement. It may be that this ruling will suffice for the parties' purposes. If more is needed, the parties shall notify the court within ten (10) days.

SO ORDERED.

DATED THIS 26TH DAY OF JUNE, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE