

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE FARM MUTUAL)
AUTOMOBILE INSURANCE)
COMPANY,)
)
Plaintiff)
)
v.) Civil No. 03-283-P-H
)
MARCUS ELLIOT SHOREY,)
)
Defendant)

**RECOMMENDED DECISION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
(DOCKET NO. 16)**

State Farm Mutual Automobile Insurance Co., the plaintiff in this insurance declaratory judgment action, has moved for summary judgment against Marcus Shorey, the operator of a vehicle owned by a State Farm insured, and Alan C. McCann, a party-in-interest who was injured by Shorey's operation of the motor vehicle. Marcus Shorey, currently imprisoned at the Maine State Prison, did not originally respond to plaintiff's motion.¹ Party-in-interest Alan C. McCann has responded fully. Based upon the record now before the court I recommend that the court **GRANT** summary judgment to the plaintiff and issue a declaratory judgment finding that State Farm has no duty to defend nor indemnify Shorey in the civil action instituted by McCann against him.

¹ Counsel for State Farm sent a letter to the court explaining that she was contacted by Shorey the first week of July. He informed counsel that he had not received a copy of the original motion for summary judgment but he had received McCann's counsel's response to the motion. Counsel for State Farm immediately sent a copy of the original motion to Shorey and indicated that if he needed additional time to respond to the motion she would not object to his request. On August 2, 2004, Shorey filed a motion for extension of time to respond, indicating that he had actually received the motion on July 12. His twenty-one days from actual receipt expired on August 2. However, I granted him a brief extension to respond until August 9, 2004. He has now filed his response and State Farm replied to it.

Statement of Facts

In the present case there are no disputed material facts. Party-in-interest Alan McCann and defendant Marcus Shorey have admitted all material facts set forth in State Farm's Local Rule 56 statement of material facts. Both Shorey and McCann noted their objections to one or two paragraphs of the twenty-seven paragraph plaintiff's statement of facts. To the extent I agree with those objections relating to the materiality of the disputed facts, I have deleted the disputed paragraphs in my recitation of the facts. Specifically I agree that ¶ 21 regarding the significance of the criminal jury's verdict is a legal conclusion not a statement of fact. Unfortunately for McCann and Shorey, I have independently reached the same legal conclusion.

On September 29, 2003, Alan McCann commenced a civil action against Marcus Shorey in the Penobscot County Superior Court. (Pl.'s St. of Mat. Facts, Docket No. 17, ¶ 1.) The underlying complaint in that action alleges, among other things, that on or about September 15, 2002, in Bangor, Maine, Shorey "negligently and carelessly operated his motor vehicle in such a manner as to strike" McCann, causing serious personal injury. (Id., ¶ 2.) Shorey and McCann admit that the facts giving rise to the underlying complaint are the same facts as those that were at issue in the criminal proceedings against Shorey, which proceeding ultimately resulted in his conviction of Elevated Aggravated Assault. (Id., ¶ 4.) Those criminal proceedings commenced against Shorey on October 7, 2002, when the Penobscot County Grand Jury indicted Shorey alleging, among other things, that "[o]n or about September 15, 2002, in Bangor, Penobscot County, Maine Shorey did intentionally or knowingly cause serious bodily injury to McCann with the use of a dangerous weapon, a vehicle." (Id., ¶ 5.) The charge was elevated aggravated assault, 17-A M.R.S.A. § 208-B(1).² (Id., ¶ 6.)

² Title 17-A M.R.S.A. § 208-B, "elevated aggravated assault," provides as follows:

On February 12 and 13, 2003, the criminal trial against Shorey for Elevated Aggravated Assault was held at the Penobscot County Superior Court. (Id., ¶ 8.) Marcus Shorey was present during the criminal trial and was represented by counsel. Shorey testified at the trial. (Id., ¶ 10.) Alan McCann also testified at Shorey’s criminal trial. (Id., ¶ 11.) Shorey’s defense was that he did not intentionally or knowingly cause harm to McCann. Defense counsel argued in his closing that when McCann was injured, Shorey was trying to get away from McCann. The defense theory was that McCann, a bouncer, was injured when McCann dove onto the car Shorey was operating: “[McCann] was struck but he was on the car, it wasn’t because the car had come to him as much as he had come to the car.” Shorey testified that “[McCann] wouldn’t move out of the way; he was standing there. He had a look on his face like he wanted to kill somebody. Yes, I believe he posed a threat to me, yes . . . I didn’t hit [McCann]. I approached him, he jumped on to the car . . .” McCann, during the same trial, denied that he “jumped on to the vehicle.” McCann testified at the criminal trial that there was nothing to “prevent the operator of the vehicle from seeing” him and the vehicle kept accelerating” to “25, 30 miles an hour” before it struck him. (Id., ¶¶ 10-17.)

The presiding justice instructed the jury on the elements of the crime of elevated aggravated assault as follows:

A person is guilty of elevated aggravated assault if the person intentionally or knowingly causes serious bodily injury to another person with the use of a

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1. A person is guilty of elevated aggravated assault if that person:
 - A. Intentionally or knowingly causes serious bodily injury to another person with the use of a dangerous weapon;
 - B. Engages in conduct that manifests a depraved indifference to the value of human life and that in fact causes serious bodily injury to another person with the use of a dangerous weapon; or
 - C. With terroristic intent engages in conduct that in fact causes serious bodily injury to another person.
 2. Elevated aggravated assault is a Class A crime.

dangerous weapon. Therefore, for the defendant to be convicted of elevated aggravated assault the State must prove the following things beyond a reasonable doubt. Number one, that this defendant, number two, intentionally or knowingly, number three, caused serious bodily injury to another person, here alleged to be Alan McCann, and number four, with the use of a dangerous weapon, here alleged to be a vehicle.

The judge also instructed the jury as to the meaning of “intentionally” or “knowingly” with respect to the elements of the crime of elevated aggravated assault as follows:

A person acts intentionally with respect to the result of his conduct, which here would be serious bodily injury to another person, when it is his conscious object to cause such a result. A person acts knowingly with respect to the result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

(Id., ¶¶ 18-19.) After deliberations, on February 13, 2003, the Penobscot County Jury rendered a verdict that Shorey was guilty of the offense of elevated aggravated assault pursuant to 17-A M.R.S.A. § 208-B. (Id., ¶ 20.) On May 28, 2003, a judgment and commitment was entered against Shorey for the conviction of the crime of elevated aggravated assault. (Id., ¶ 22.)

By letter dated January 24, 2003, Marvin Glazier, an attorney for McCann, communicated with State Farm's insured, Robert Thomas, alleging that Mr. Thomas was the owner of the automobile driven by Shorey, which struck McCann on September 15, 2002. (Id., ¶ 24.) After McCann filed the Underlying Complaint against Shorey in the Penobscot Superior Court, Mr. Glazier provided a copy of the Underlying Complaint to State Farm. (Id., ¶ 25.) State Farm is providing a defense to Shorey from the complaint of Alan McCann under a reservation of rights. (Id., ¶ 26.) A true and accurate copy of the automobile insurance policy that State Farm issued to Robert Thomas is attached to the Affidavit of Michael Gately as Exhibit 4. (Id., ¶ 27.) Both sides agree the insuring clause at issue provides that State Farm “will pay damages which an insured becomes legally liable to pay” because of injury “caused by accident resulting from the ownership, maintenance or use of” the insured vehicle.

Discussion

The plaintiff is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would affect the outcome of the suit, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to the non-movants and I indulge all reasonable inferences in their favor. See Savard v. Rhode Island, 338 F.3d 23, 25-26 (1st Cir. 2003).

For purposes of this motion, Marcus Shorey is the putative insured under the policy issued by State Farm to Robert Thomas. As a general rule under the law of the State of Maine, the pleading comparison test is used to determine if there is a duty to defend an insured. The court resolves as a question of law whether there is a duty to defend by comparing the civil complaint with the terms of the insurance contract. Elliott v. Hanover Ins. Co., 711 A.2d 1310, 1312 (Me. 1998). Generally, insurers cannot avoid their duty to defend by establishing, prior to the conclusion of the underlying action, that ultimately there will be no duty to indemnify. Penney v. Capitol City Transfer, Inc., 707 A.2d 387, 388-89 (Me.1998).

Maine law does recognize limited exceptions to the pleading comparison test. N. Sec. Ins. Co., Inc. v. Dolley, 669 A.2d 1320, 1322-23 & n.3 (Me. 1996). In certain circumstances, the Law Court has considered an insured's criminal conviction in determining whether a duty to defend exists, even though the fact of the conviction lay outside the facts alleged in the complaint. In State Mutual Insurance Company v. Bragg, 589 A.2d 35 (Me.1991), the insured under a tenant's insurance policy pleaded guilty to and was convicted of murder and attempted

murder after a civil negligence suit was filed on behalf of the victims. Following a non-jury hearing, the trial court concluded that neither the insured nor the plaintiff could relitigate the issue of the insured's intent, which had been established by the guilty plea, and that the insurer had no duty to defend or indemnify the insured because the insurance policy excluded coverage for bodily injury expected or intended by the insured. Id. at 38. The Law Court affirmed, observing that the use of "offensive, nonmutual collateral estoppel" is permitted "on a case by case basis if it serves the ends of justice." Id. at 37. So long as "the identical issue necessarily was determined by a prior final judgment, and . . . the party estopped had a fair opportunity and incentive to litigate the issue in the prior proceeding," the court held, "the comparison test for an insurer's duty to defend may include facts established against an insured in a prior proceeding." Id. Thus, the insured's conviction of murder and attempted murder precluded a "finding of injury other than that excluded by [the] policy." Id.

In addition to murder and attempted murder convictions, the Law Court has held that convictions for either robbery involving the use of a dangerous weapon or sexual abuse also relieve an insurer of its duty to defend because the likelihood of physical injury is so great that any resulting injury is to be deemed as intended or expected. Landry v. Leonard, 1998 ME 241, ¶ 9, 720 A.2d 907, 909 (Me.1998) (affirming summary judgment and holding that there is no duty to defend where insured was convicted of robbery involving the use of a dangerous weapon); Perreault v. Me. Bonding & Cas., 568 A.2d 1100, 1101 (Me.1990) (affirming summary judgment and holding that there is no duty to defend where insured was convicted of unlawful sexual contact committed against a child). However, the Law Court has concluded that a conviction for aggravated assault, an offense that can be committed by acting "recklessly," does not necessarily preclude coverage in a companion civil action. Patrons-Oxford Mut. Ins. Co. v.

Dodge, 426 A.2d 888, 892 (Me. 1981). The policy in question in Dodge also contained an exclusion for bodily injury that is expected or intended by the insured. Id. at 889.

This case presents two novel issues under the line of cases referenced above. The first issue is whether the insuring clause at issue in this case, which provides coverage only for injuries “caused by accident resulting from the ownership, maintenance or use of” the insured vehicle, extends to injuries cause by the intentional or knowing acts of the insured. The second issue is whether a conviction by the insured for elevated aggravated assault, involving use of the insured vehicle as a weapon, bars relitigation of the insured’s state of mind. As McCann points out, this case differs from Bragg, Landry, Perreault and Dodge³ in that the policy in each of those cases contained specific language excluding intentional conduct from coverage. In the present case the policy does not contain an exclusion for bodily injury expected or intended by the insured. Rather, the policy only provides coverage for injuries caused by “accident.”

The Maine Law Court has defined the word “accident” in the context of a liability insurance policy as meaning “an unanticipated event.” Me. Mut. Fire Ins. Co. v. Gervais, 1998 ME 197, ¶ 10, 715 A.2d 938, 941 (quoting Vigna v. Allstate Ins. Co., 686 A.2d 598, 600 (Me. 1996)). If an insured acts intentionally or knowingly to cause a result, by definition the result cannot be deemed an unanticipated event. In my view the insuring clause in dispute here has the same effect as the exclusion discussed in the other Maine cases and the outcome of this case should be guided by Bragg and its progeny.

As a result of the jury finding Shorey guilty of elevated aggravated assault, he is collaterally estopped from relitigating whether of not the injury to McCann occurred as the result

³ The same sort of exclusion was in play in Mutual Fire Ins. Co. v. Hancock, 634 A.2d 1312, 1312, 1313 (Me. 1993) (vacating judgment that insurer owed a duty to indemnify and remanding for entry of a contrary declaration where the insured, “while in a state of alcoholic blackout, beat and raped” the plaintiff, on the ground that the court’s findings regarding the particulars of the crime “compelled” a finding that the insured intended or expected harm to come to the plaintiff).

of an accident. Elevated aggravated assault, unlike assault or even aggravated assault, can only be committed if the defendant acted intentionally or knowingly. 17-A M.R.S.A. § 208-B(1)(A) (see, supra, footnote 2). In this case the jury found Shorey guilty beyond a reasonable doubt of elevated aggravated assault after the presiding justice had instructed them that an intentional or knowing state of mind was required for a guilty verdict. Moreover, pursuant to Landry, the intentional use of a motor vehicle as a weapon makes the likelihood of physical injury so great that any resulting injury is to be deemed as intended or expected. Because Shorey has already litigated the issue of his intent in the context of a criminal prosecution and the issue was determined by a final judgment against him, the use of offensive, nonmutual collateral estoppel is proper here and Shorey cannot claim in this litigation that the injury occurred by accident. Therefore, State Farm is entitled to declaratory judgment in its favor.

Conclusion

Based upon the foregoing I recommend that the court **GRANT** State Farm's Motion for Summary Judgment and declare that it has no duty to defend or indemnify Shorey in the action brought against him by McCann in the Maine Superior Court.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: August 9, 2004

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY et al v. SHOREY

Assigned to: JUDGE D. BROCK HORNBY

Referred to:

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1332 Diversity-Declaratory Judgement

Date Filed: 12/09/03

Jury Demand: Plaintiff

Nature of Suit: 110 Insurance

Jurisdiction: Diversity

Plaintiff

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