20170088

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20170088
District Court No. 18-10-C-1291

Carol Forsman,
Creditor and Appellee,

v.

Blues Brews and Bar-B-Ques, Inc.,
Dba Muddy Rivers,
Debtors,

and

United Fire & Casualty Company,
Garnishee and Appellant.

APPELLANT UNITED FIRE & CASUALTY COMPANY'S REPLY BRIEF

APPEAL OF A DENIAL OF A MOTION FOR SUMMARY JUDGMENT FOLLOWING THE JANUARY 31, 2017 ENTRY OF JUDGMENT BY THE DISTRICT COURT NORTHEAST CENTRAL JUDICIAL DISTRICT GRAND FORKS COUNTY, NORTH DAKOTA THE HONORABLE DONALD HAGER

PEMBERTON, SORLIE, RUFER
& KERSHNER, P.L.L.P.
H. Morrison Kershner, No. 04128
Kendra E. Olson, No. 08491
110 North Mill Street
Fergus Falls, Minnesota 56537
Telephone: 218-736-5493
m.kershner@pemlaw.com
k.olson@pemlaw.com
Attorneys for United Fire
& Casualty Company

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REPLY ARGUMENT

I. INSURANCE COVERAGE IS DETERMINED BASED ON THE ALLEGATIONS IN THE COMPLAINT AT THE TIME THE COMPLAINT IS TENDERED TO THE INSURER.

[¶1] Appellee Forsman confuses the well-established standards by which an insurance coverage is evaluated. This is most apparent in paragraphs 22 and 23 of the Appellee's brief:

> [¶22] United Fire cites only two theoretical forms of "evidence" in its statement of facts to support its contention that the exclusion applies because Forsman was assaulted. The first was an allegation contained in Forsman's Complaint. Appellant App. 12. The second is a comment made by Forsman's trial counsel in her opening statement. Appellant App. 157.
>
> [¶23] It is an elementary principle of litigation, and logic, that allegations contained in a pleading are not evidence, and neither are comments of counsel. If such allegations were evidence, there would be no need to have a trial, call a witness, etc.

[¶2] Appellant United Fire agrees that the statements of counsel are not "evidence" for the purposes of a trial. Appellant United Fire also agrees that the contents of pleadings are not "evidence" when presented to a jury or judge. However, the long-established standard for an insurance company evaluating its duty to defend and its duty to indemnify *does* depend on the allegations in the complaint and the information available to it, potentially including counsel's representations regarding what the plaintiff's claims are:

> The duty to defend, however, arises as soon as the insured is sued, and accordingly is determined on the basis of the allegations in the injured claimant's complaint. Because the duty to defend is determined by the allegations in the complaint examined as of the time the complaint was served and the defense was tendered to the insurer, the ultimate result in the case does not affect the duty to defend.

Tibert v. Nodak Mut. Ins. Co., 2012 ND 81, ¶34, 816 N.W.2d 31 (emphasis added). Insurance companies rely on information in the complaint to determine what the Plaintiff's claim is in order to evaluate coverage for the claim. An insurance company can also "look to facts outside the complaint to determine whether coverage exists." *Haarstad v. Graff*, 517 N.W.2d 582, 584 (Minn. 1994). In this case, all indications, both from the Complaint and from the claims as they were presented by Appellee Forsman's attorney, were that the claim relied on injuries caused by an assault perpetrated by an obviously intoxicated person. Accordingly, there is no possibility of coverage for the claim.

II. APPELLEE FORSMAN'S COMPLAINT ALLEGES SHE WAS ASSAULTED, INTENTIONALLY INJURED, BY AN OBVIOUSLY INTOXICATED PERSON.

[¶3] Ms. Forsman brought her lawsuit against Muddy Rivers by a Complaint dated June 7, 2010. Appellant's App. 15. The case proceeded all the way to trial on the claims in the Complaint. Among the allegations in the Complaint were the following statements, excerpted for the sake of brevity:

- In paragraph III:
  - Defendant Amanda Espinoza became intoxicated, in whole or in part, from drinking the intoxicating beverages.
- In paragraph IV:
  - [I]t is alleged that [Amanda Espinoza] drank at the premises and became intoxicated while a guest of Muddy Rivers. It was the duty of Defendant Amanda Espinoza to refrain from behaving in a willful and wanton manner and attacking other persons while under the influence of intoxicating beverages. Notwithstanding that duty, Defendant Amanda Espinoza, while intoxicated and under the influence of intoxicating beverages, consumed on the premises of the tavern or bar operated by Defendant Blues Brews and Bar-b-ques, Inc., doing business as Muddy rivers, did, as a direct and proximate result of the intoxicated condition and without cause or provocation, did assault Plaintiff, Carol Forsman, with force, by physically attacking and inflicting on Plaintiff Carol Forman, numerous serious injureis to her leg.
- In paragraph V:

- [T]here was in full force and in effect in the state of North Dakota the following statute: N.D.C.C. § 5-01-06.1. That N.D.C.C. § -5-01-06.1 allows the Plaintiff, who was injured by an obviously intoxicated person, a claim for relief . . .

- In paragraph VIII:
  - That at the time the Plaintiff was assaulted . . .
- In pargraph IX:
  - That on the evening the Plaintiff was assaulted . . .
- In paragraph XI:
  - That the Defendant, Amanda Espinoza, lunged at the Plaintiff causing her to fall to the ground . . .

Appellant's App. 11-14. The Complaint was never amended.

[¶4] Appellee Forsman suggests that United Fire had a duty to defend and a duty to indemnify its insured against the allegations in the Complaint. However, the plain language of both the assault and battery exclusion (Appellant's App. 153) and the liquor liability exclusion[1] (Appellant's App. 152) exclude coverage under these circumstances. An insurer's duty to defend "is determined on the basis of the allegations in the injured claimant's complaint." *Tibert*, 2012 ND at ¶34. Appellee Forsman herself pleaded that her injuries were "a result of the Plaintiff being assaulted by the Defendant." Appellant's App. 14. Her injuries are not attributed to any proximate cause other than the assault. There cannot be a second determination of proximate cause via a premises liability claim resulting in a second determination of the proximate cause of Appellee Forsman's injuries that is not the assault, as alleged by Appellee Forsman. By either the liquor liability exclusion or the assault and battery exclusion, there is no insurance coverage for the claim. "An insurer does not have a duty to defend an insured if there is no possibility of coverage

[1] Appellee has disputed the application of the liquor liability exclusion. This issue is addressed in greater detail in section III of this Brief.

under the policy." *Farmers Union Mut. Ins. Co. v. Decker*, 2005 N.D. 173, ¶14, 704 N.W.2d 857.

III. THE PLAIN LANGUGAE OF THE LIQUOR LIABILITY EXCLUSION EXCLUDES COVERAGE

[¶5] All parties agree that "[t]he policy itself is unambiguous." Appellant's brief ¶13. However, United Fire and Appellee Forsman disagree on the interpretation of the language in the liquor liability exclusion. The full text of the exclusion states:

> **AMENDMENT OF LIQUOR LIABILITY EXCLUSION**
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> Exclusion c. of COVERAGE A (Section I) is replaced by the following:
>
> c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person;
>
> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
>
> This exclusion applies only if you:
>
> (1) Manufacture, sell or distribute alcoholic beverages;
>
> (2) Serve or furnish alcoholic beverages for a charge whether or not such activity:
>
> (a) Requires a license;
>
> (b) Is for the purpose of financial gain or livelihood; or
>
> (3) Serve or furnish alcoholic beverages without a charge, if license is required for such activity.

Appellant's App. 152. "Construction of a written contract of insurance is a question of law[.]" *Cormier v. National Farmer Union Property Casualty Co.*, 445 N.W.2d 644, 646 (N.D. 1989). "[W]hen the language of an insurance policy is unambiguous, it should not be strained to impose liability on the insurer." *Id.*

[¶6] Appellee Forsman has interpreted the above language (specifically "This exclusion applies only if you: (1) Manufacture, sell . . . (2) Serve or furnish alcoholic beverages for a charge . . . or (3) Serve or furnish alcoholic beverages without a charge . . . ") as requiring the insured to be engaged in one of those three activities at the time of the occurrence in order to exclude coverage. That is to say, Appellee Forsman's position is that unless Muddy Rivers was engaged in either (1) the manufacturing or selling . . . (2) the Serving or furnishing of alcoholic beverages for a charge . . . or (3) the serving or furnishing of alcoholic beverages without a charge, *at the time of her alleged injury*, that the liquor liability exclusion does not exclude coverage.

[¶7] Appellee Forsman's interpretation of the plain language of the exclusion imposes a requirement that is not in the language of the policy. The plain language says that "[t]his exclusion applies only if you:" it does not say "[t]his exclusion applies only if you are engaged in one of the following activities at the time of the occurrence."

[¶8] It is not disputed, as Appellee Forsman notes in paragraph 17 of her brief, that Muddy Rivers is a bar that is regularly engaged in the business of "serv[ing] or furnish[ing] alcoholic beverages for a charge." Accordingly, the liquor liability exclusion does apply. To read the policy otherwise, adds a condition to coverage that is not present in the plain language of the policy.

IV. COSTS ON APPEAL

[¶9] North Dakota Rule of Appellate Procedure 39 provides guidance for the awarding of costs on appeal, however, this Court has wide discretion to determine whether an award of costs is appropriate. Appellant United Fire has denied coverage for a claim that arises under two exclusions in the policy. The denial of coverage was justified.

CONCLUSION

[¶10] Appellant United Fire respectfully asks this Court for a determination that the trial court erred in finding that the GCL Policy affords coverage for Appellee Forsman's claims because the but-for cause of injury was an assault by an intoxicated person, as pleaded by Appellee Forsman and, accordingly, insurance coverage is excluded under both the Liquor Liability Exclusion and the Assault and Battery Exclusion.

Dated: May 31, 2017

PEMBERTON, SORLIE, RUFER
& KERSHNER, P.L.L.P.

H. Morrison Kershner, ND No. 04128
Kendra E. Olson, ND No. 08491
110 North Mill Street
Fergus Falls, Minnesota 56537
Telephone: 218-736-5493
Email: m.kershner@pemlaw.com
k.olson@pemlaw.com
Attorneys for United Fire & Casualty Company

CERTIFICATE OF COMPLIANCE

[11] The undersigned attorney for Appellant United Fire & Casualty Company in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(1)(A), N.D.R.App.P., that the above brief contains 1590 words (excluding words contained in (1) the table of contents, (2) the table of authorities, and (3) this certificate), which is within the limit of 2,000 words

PEMBERTON, SORLIE, RUFER
& KERSHNER, P.L.L.P.

Dated: May 31, 2017

H. Morrison Kershner, ND No. 04128
Kendra E. Olson, ND No. 08491
110 North Mill Street
Fergus Falls, Minnesota 56537
Telephone: 218-736-5493
Email: m.kershner@pemlaw.com
k.olson@pemlaw.com
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And

CERTIFICATE OF SERVICE

United Fire & Casualty Company, Appellant.

STATE OF MINNESOTA)
)ss.
COUNTY OF OTTER TAIL)

I hereby certify that on May 31, 2017, I cause to be electronically filed **Appellant United Fire & Casualty Company's Reply Brief** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

Craig E. Johnson
Johnson, Mottinger & Greenwood, P.L.L.P.
15 South Ninth Street
Fargo, ND 58103

I further certify that a copy of the foregoing documents will be mailed first-class mail, postage paid, to the following:

Craig E. Johnson
Johnson, Mottinger & Greenwood, P.L.L.P.
15 South Ninth Street
Fargo, ND 58103

Blues, Brews & Bar-B-Ques, Inc.
1405 Library Cir.
Grand Forks, ND 58201-6317

Brady Martz & Associates, P.C.
1405 Library Cir.
Grand Forks, ND 58201-6317

Dated: May 31, 2017

Kendra E. Olson
ND No. 08491

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STATE OF MINNESOTA)
)ss.
COUNTY OF OTTER TAIL)

I hereby certify that on June 2, 2017, I cause to be electronically filed **Appellant United Fire & Casualty Company's Reply Brief** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

Craig E. Johnson
Johnson, Mottinger & Greenwood, P.L.L.P.
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1405 Library Cir.
Grand Forks, ND 58201-6317

Brady Martz & Associates, P.C.
1405 Library Cir.
Grand Forks, ND 58201-6317

Dated: June 2, 2017

Kendra E. Olson
ND No. 08491