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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 Appellees,
and Amanda Espinoza,
and

United Fire & Casualty Company, Garnishee and Appellant.

APPELLANT UNITED FIRE & CASUALTY COMPANY'S 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

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STATEMENT OF THE ISSUES

[¶1] I Whether the trial court erred in granting Judgment Creditor's motion for partial summary judgment and denying Garnishee's Motion for summary judgment, determining that the commercial general liability policy issued by Garnishee United Fire & Casualty Company to Judgment Debtor Blues Brews and Bar-B-Ques, Inc., dba Muddy Rivers provided coverage to Judgment Debtor for the claims of Judgment Creditor Forsman against Judgment Debtor arising out of the assault of Judgment Creditor Forsman by a fellow patron on Judgment Debtor's premises.

[¶2] II Whether the trial court erred in granting Judgment Creditor's motion for partial summary judgment, determining that United Fire & Casualty had a duty to defend its insured Blues Brews and Bar-B-Ques, Inc., dba Muddy Rivers in a suit brought by Judgment Creditor Forsman against Judgment Debtor for claims arising out of the assault of Judgment Creditor Forsman by a fellow patron on Judgment Debtor's premises.

STATEMENT OF THE CASE

[¶3] Carol Forsman initiated an action against Blues Brews & Bar-B-Ques, Inc., doing business as Muddy Rivers (hereinafter "Muddy Rivers"), in District Court, County of Grand Forks, by service of a Summons and Complaint on June 8, 2010. Appellant's Appendix (hereinafter "App.") 11. Muddy Rivers timely answered the Complaint. See generally App. 1. The case proceeded to a trial on the merits commencing on September 27, 2011. See generally App. 3. After Forsman rested her case, Muddy Rivers made a motion for judgment as a matter of law. See generally, App. 19-20. The motion was granted and Forsman appealed. App. 20 and 22. On appeal, this Court reversed the decision of the lower court, finding Forsman had presented sufficient evidence to defeat a motion for judgment as a matter of law on her dram shop claim and a claim for premises liability. App. 23-33.

[¶4] Prior to trial on Forsman's two claims against Muddy Rivers (dram shop and premises liability), Forsman and Muddy Rivers entered into a Miller-Shugart agreement. App. 34. Also see *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982). Muddy Rivers admitted liability for Forsman's claims, but the agreement limited collection on the judgment to Muddy Rivers' insurer, United Fire and Casualty Company (hereinafter "United Fire"). Forsman made a motion to bring a supplemental complaint against United Fire and the motion was granted. App. 53 and 57. Forsman brought a motion for partial summary judgment on the issue of whether there was coverage under the United Fire policy for Forsman's claim for premises liability. App. 61-78. United Fire brought a cross motion for summary judgment on its duty to defend and indemnify. App. 111-28. The court issued

its Order Granting Creditor's Motion for Partial Summary Judgment on February 2, 2016. App. 174.

[¶5] The Garnishment proceeding concluded in a court trial on the issue of the reasonableness of the Miller-Shugart settlement resulting in Findings of Fact, Conclusions of Law, Order for Judgment and Judgment. App. 178. Final Judgment was entered on January 31, 2017. App. 185. This Appeal was taken from the final entry of judgment. App. 188.

STATEMENT OF THE FACTS

[¶6] On February 15, 2010, Carol Forsman claims she sustained an injury to her left knee while a guest at a Christmas party at Blues Brews and Bar-B-Ques Inc., dba Muddy Rivers in Grand Forks, North Dakota. See App. 11.

[¶7] At the time, Muddy Rivers was a licensed liquor establishment engaged in the business of selling intoxicating beverages at retail at its business premises located at 710 First Avenue North in Grand Forks.

[¶8] On February 15, 2010, Muddy Rivers was an insured under a commercial general liability policy issued by United Fire & Casualty Company, policy number xxx3412 (hereinafter referred to as the Policy or the CGL policy). App. 131-154.

[¶9] The Policy contained the following exclusions:

> **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.

. . .

ASSAULT, BATTERY AND NEGLIGENT SUPERVISION EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to "bodily injury," "property damage," or "personal and advertising injury" caused by or arising out of:

1. Actual, attempted or threatened assault, battery or abuse of any person; or

2. Vicarious liability for the actual, attempted or threatened assault, battery or abuse of any person;

3. The negligent hiring, retention, supervision, or employment of any "employees" or volunteers of the insured who engages in the actual, attempted or threatened assault, battery or abuse of any person; or

4. Any act or omission caused by or arising out of the actual or attempted suppression or prevention of any actual, attempted or threatened assault, battery or abuse of any person

by or as a result of the direction or instigation of any:

1. Insured;
2. "Employees" of the insured;
3. Guests or patrons of the insured;
4. Volunteers working for or on behalf of the insured or any guest or patron of the insured.

App. 152 and App. 153, respectively.

[¶10] Defendant Amanda Espinoza was one of the guests at the Christmas party. She attended the party with Rose Christianson, an employee of Muddy Rivers. App. 155.

[¶11] Forsman commenced suit against Muddy Rivers and Amanda Espinoza claiming Defendants were liable for damages to Plaintiff for bodily injuries received at Muddy Rivers on February 15, 2010, when Amanda Espinoza assaulted Forsman while she was obviously intoxicated, alleging:

III. That on or about February 15, 2010, ... Defendant, Blues Brews and Bar-b-ques, Inc., and its servants, employees, or agents, on February 15, 2010, sold, dispensed, or gave away certain intoxicating beverages to Defendant Amanda Espinoza, and Defendant Amanda Espinoza became intoxicated, in whole or in part, from drinking the intoxicating beverages ...

IV. ... **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 Forsman, numerous serious injuries to her leg.**

V. That on February 15, 2010, and prior to that date, there 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 against Defendants who knowingly served alcohol to an obviously intoxicated individual.

VI. That on February 15, 2010, and prior to that date, there was in full force and in effect in the state of North Dakota the following statute: N.D.C.C. § 9-10-06. That N.D.C.C. § 9-10-06 allows the Plaintiff to hold Defendants responsible for the Plaintiff's injury, occasioned by the Defendants' want of ordinary care or skill in the management of the Defendants' property.

. . . .

XI. That the Defendant, Amanda Espinoza, lunged at the Plaintiff causing her to fall to the ground while she was helping another patron, and **the Plaintiff suffered serious injuries as a result of the Plaintiff being assaulted by the Defendant, Amanda Espinoza**, at Muddy Rivers.

App. A, 11-16 (**emphasis added**).

[¶12] At the time of the February 15, 2010 incident giving rise to this dispute Muddy Rivers did not have liquor liability insurance coverage.

[¶13] Muddy Rivers tendered defense of the action to United Fire. United Fire denied coverage citing the liquor liability and assault and battery exclusions in the Policy. App. 159-65.

[¶14] Muddy Rivers retained the law firm of Pearson, Christensen & Clapp, PLLP privately to defend the Forsman suit. Defendant Espinoza was served but made no appearance.

[¶15] In her opening statement at trial counsel for Plaintiff told the jury that the highly intoxicated Amanda Espinoza assaulted Plaintiff: "Amanda Espinoza was agitated, bothering other guests, and severely intoxicated . . . she was sitting in the booth and pushed Carol over . . . ." App. 157.

[¶16] The trial resulted in a directed verdict in favor of Defendant Muddy Rivers. App. 19-20. Forsman appealed the entry of judgment to the Supreme Court. App. 22.

[¶17] The Supreme Court reversed and remanded to the trial court, *Carol Forsman v Blues, Brews and Bar-B-Ques, Inc., dba Muddy Rivers, and Amanda Espinoza, Docket*, 2012 ND 184, 820 N.W.2d 748. The Supreme Court found that the trial court erred in finding that Forsman had not presented sufficient evidence to support her dram shop claim and premises liability claim against Muddy Rivers.

[¶18] The case was set for a second trial, but before the trial date arrived, United Fire was advised of settlement negotiations between Forsman and Muddy Rivers; United Fire declined to participate.

[¶19] Forsman and Muddy Rivers entered into a *Miller v Shugart* agreement. App. 102-110. Included in the *Miller v Shugart* agreement was an assignment by Muddy Rivers to

Plaintiff of Muddy Rivers' claim against United Fire for attorney's fees and expenses incurred in the defense of the Forsman suit. *Id.*

[¶20] Pursuant to the Order of this court dated June 2, 2015, (App. 57) Plaintiff served upon United Fire a supplemental complaint with the following allegations:

> [¶4] That on or about February 15, 2010, Forsman attended a Christmas party at Debtor's place of business in Grand Forks, North Dakota.
>
> [¶5] That during the evening, Forsman was injured as a result of the failure of Debtor to exercise ordinary care and skill in the management of its place of business.
>
> [¶8] That Forsman filed suit against Debtor to recover damages for the injuries resulting from Debtor's negligence.
>
> [¶11] That the North Dakota Supreme Court held that Forsman could pursue her claim for premises liability.
>
> [¶12] That Garnishee, United Fire & Casualty Company, wrongfully denied coverage and a defense of said claim to Debtor.
>
> [¶13] That said denial by Garnishee was a breach of its obligation both to defend and indemnify under the policy.
>
> [¶15] That Garnishee, United Fire & Casualty Company, was advised of the settlement negotiations and refused to participate.
>
> [¶20] That Debtor's commercial insurance policy, numbered xxx3412, issued by Garnishee, was valid and enforceable at all times relevant and material to this matter.

App. 53.

[¶21] Forsman brought a motion for partial summary judgment on the issue of Garnishee's duty to defend and Muddy Rivers' attorney's fees. App. 61-65. Forsman's brief in support of her motion for summary judgment states that "Amanda Espinoza caused Forsman to fall from her seat to the floor." App. 65. Forsman's brief did not dispute the validity of the liquor liability exclusion and the assault and battery exclusion, but claimed they did not apply to Forsman's premises liability claim. App. 65-77.

[¶22] United Fire brought a cross motion for summary judgment also on its duty to defend Muddy Rivers. App. 111-113. In its brief in support of its motion for summary judgment, United Fire's position was that, because the premises liability claim arises out of an assault and battery, the assault and battery exclusion applies regardless of the type of claim brought by Forsman. App. 113-128.

[¶23] The trial court granted Forsman's motion for partial summary judgment. App. 174. In its Order granting Forsman's motion, the district court erred in finding that "even if liability for the assault action falls outside of United Fire's insurance coverage under the liquor liability and assault and battery exclusions, the North Dakota Supreme Court already found sufficient evidence exists in this case to proceed on the theory of premise liability. Premise liability coverage is not excluded under the commercial general liability policy." App. 176.

[¶24] The case proceeded to a court trial the reasonableness of the settlement agreement. The district court entered judgment in favor of Forsman on January 31, 2017. App. 185.

[¶25] United Fire filed a Notice of Appeal from the Final Judgment of the district court on March 10, 2017. App. 188. This appeal follows.

STANDARD OF REVIEW

[¶26] On appeal, this Court reviews the District Court's denial of United Fire's motion for summary judgment and its granting of Forsman's partial motion for summary judgment. The decision to grant or deny motions for summary judgment is a question of law that is reviewed *de novo* upon the entire record. *Tibert v. Nodak Mut. Ins. Co.*, 2012 ND 81, ¶ 8, 816 N.W.2d 31.

LAW AND ARGUMENT

I. INTRODUCTION

[¶27] It is undisputed that United Fire's CGL policy excludes coverage for claims arising out of illegal liquor sales or assaults. The trial court erred in finding that United Fire was required to defend and provide coverage for insured Blues Brews and Bar-B-Ques, Inc. in the suit brought by Creditor Carol Forsman on a claim of negligence arising out of an assault by the allegedly obviously intoxicated Amanda Espinoza.

[¶28] The district court's error arises from the distinction between Forsman having leave to pursue a premises liability claim against Blues, Brews & Bar-B-Ques, Inc. and the question of whether there is insurance coverage for such a claim. This Court found in *Forsman v. Blues, Brews & Bar-B-Ques, Inc.* that, as a matter of law, Forsman had pleaded a claim for premises liability, 2012 ND 184, ¶¶13-14. However, granting leave to pursue the claim does not create insurance coverage where there is none. The district court, in its Order Granting Creditor's Motion for Partial Summary Judgment on the issue of insurance coverage, stated:

> ¶5. This Court does not need to address the question of whether Forsman admitted her damages were the result of an assault, because the North Dakota Supreme Court already held this action is both a dram shop action and an action based upon premise liability. In *Forsman v. Blues Brews and Bar-B-ques, Inc.*, 2012 ND 184, ¶7, 820 N.W.2d 748, the Court held that this action is based on two separate legal theories: Forsman's injuries resulted from Muddy Rivers knowingly providing alcoholic beverages to an obviously intoxicated guest, and Muddy Rivers providing an unsafe environment for its guests. In North Dakota, a person is required to exercise ordinary care of skill in the management of the person's property. N.D.C.C. § 9-10-06. The negligence theory is a separate theory from dram shop liability with different elements of proof. *Stewart v. Ryan*, 520 N.W.2d 39, 43 (N.D. 1994) (quoting *Born v. Mayers*, 514 N.W.2d 687, 689 (N.D. 1994). Consequently, even if liability for the assault action falls outside of United Fire's insurance coverage under the liquor liability and assault and battery exclusions, the North Dakota Supreme Court already

> found sufficient evidence exists in this case to proceed on the theory of premise liability. Premise liability coverage is not excluded under the commercial general liability policy.

App. 175-76. The district court, therefore, erred in concluding there was coverage on the bare fact that the policy did not exclude coverage for premise liability claims. However, the premise liability claim would not have existed "but for" the underlying occurrence for which there is no coverage, namely, an assault by an allegedly obviously intoxicated person.

[¶29] As reflected in the recitation of law below, when a claim for premises liability rests on an underlying assault, i.e. when the "but for" causation for the premises liability claim is an assault, the policy exclusion applies and there is no coverage. Similarly, when a premises liability claim is caused by the service of alcoholic beverages, and the premises liability claim would not exist but for the alcoholic beverages, the liquor exclusion applies and there is no coverage for the claim.

II. LEGAL STANDARDS

[¶30] This appeal is taken from the Order of the District Court denying United Fire's motion for summary judgment and granting Forsman's motion for partial summary judgment. The subject matter of both motions was the interpretation of the GCL policy issued by United Fire.

A. Summary Judgment Standard

[¶31] The standards for Summary Judgment are well established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment

> as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Tibert v. Nodak Mut. Ins. Co., 2012 N.D. 81, ¶8, 816 N.W.2d 31 (quoting *Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21, ¶9, 812 N.W.2d 345).

B. Interpretation of an Insurance Contract

[¶32] When a court reviews a lower court's interpretation of an insurance contract to determine issues related to coverage, the court must "independently examine and construe the insurance contract to determine whether there is coverage." *Id.* at ¶9. "Determining the legal effect of an insurance contract, as with any contract, is generally a question of law for a court to decide." *Continental W. Ins. Co. v. The Dam Bar*, 478 N.W.2d 373, 374 (N.D. 1991). If the language of the policy is clear, "it should not be strained to impose liability on the insurer." *Cormier v. National Farmers Union Property & Casualty Company*, 445 N.W.2d 644, 646 (N.D. 1989).

[¶33] The CGL policy issued by United Fire contains two exclusions germane this case: an assault and battery exclusion and a liquor liability exclusion. "Exclusions from coverage in an insurance policy must be clear and explicit and are strictly construed against the insurer." *Farmers Union Mut. Ins. Co. v. Decker*, 2005 ND 173, ¶5, 704 N.W.2d 857 (citations omitted). If the court finds an exclusion to be clear and explicit, the court must not "rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage." *Id.* "In interpreting a contract the court looks first to its language

and, if the intent is apparent from its face, there is no room for construction." *Stuhlmiller v. Nodak Mut. Ins. Co.*, 475 N.W.2d 136 (N.D. 1991).

C. An Insurance Company's Duty to Defend and Indemnify

[¶34] An insurer's duty to defend is triggered "if the allegations pleaded in the complaint viewed at the time of tender include any potential liability or possibility of coverage under the policy[.]" *Tibert*, 2012 ND at ¶36. "The insurer's duty to defend is set by the pleadings and must be determined as of the time the defense it tendered; it is not affected by 'the course and outcome of the litigation.'" *Id.* "In addition to looking at the complaint, the insurer can look to facts outside the complaint to determine whether coverage exists." *Haarstad v. Graff*, 517 N.W.2d 582, 584 (Minn. 1994).

III. THE UNDERLYING "BUT FOR" CAUSE OF THE PREMISES LIABILITY CLAIM IS EXCLUDED FROM COVERAGE UNDER THE GCL POLICY

[¶35] The plain language of the CGL policy excludes coverage for assault, including claims that "arise out of" an assault. Forsman's claim for premises liability is based on the assault perpetrated by Amanda Espinoza. If there had been no assault by Amanda Espinoza, Forsman would not have a claim for premises liability. By the plain language of the policy, there is no coverage for Forsman's premises liability claim because it arises out of an assault. This Court need not look beyond the plain language of the policy to determine that there is no coverage for Forsman's claim. However, it is instructive to consider how other jurisdictions have ruled on this issue. The vast majority of foreign jurisdictions considering the question of whether a premises liability claim based upon an assault is excluded from coverage through the application of an assault and battery exclusion have determined that the claim is excluded.

A. United Fire had no duty to defend or indemnify its insured because the assault and battery exclusion clearly and unambiguously excludes coverage for bodily injury arising out of an assault by a guest or patron.

[¶36] Forsman's Complaint, at the time the suit was tendered to United Fire contained the following allegations:

- 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 Forsman, numerous serious injuries to her leg. App. 12.

- That N.D.C.C. § 9-10-06 allows the Plaintiff to hold Defendants responsible for the Plaintiff's injury, occasioned by the Defendants' want of ordinary care or skill in the management of the Defendants' property. App. 13.

- That the Defendant, Amanda Espinoza, lunged at the Plaintiff causing her to fall to the ground . . . and the Plaintiff suffered serious injuries as a result of the Plaintiff being assaulted by the Defendant . . . . App. 14.

- That as a direct and proximate cause of the Defendants' serving alcohol to an obviously intoxicated individual, the Plaintiff suffered broken bones and extensive tissue damage . . . . App. 14.

It was not alleged that Forsman suffered any injuries other than those caused by Amanda Espinoza. The Complaint plainly states that Amanda Espinoza assaulted Forsman and it remains undisputed that the CGL policy contains a valid exclusion for assault and battery. The operative language of the exclusion is as follows: "This insurance does not apply to 'bodily injury,' . . . caused by or arising out of: . . . 1. . . . assault . . . of any person; . . . by . . . any . . . 4. Guests or patrons of the insured." App. 153. The phrase "arising out of" is of great importance. It is immaterial that Forsman claims it was negligent management of the premises that resulted in an assault, because the plain language of the exclusion applies

regardless of the method of pleading. Her bodily injuries arose out of an assault, and are therefore excluded from coverage.

[¶37] "An insurer does not have a duty to defend an insured if there is no possibility of coverage under the policy." *Farmers Union Mut. Ins. Co. v. Decker*, 2005 N.D. 173, ¶14, 704 N.W.2d 857. Forsman's Complaint makes it clear that this was an assault. Forsman "testified she was 'one hundred percent sure' Espinoza pushed her off her chair to the ground, resulting in a leg fracture." Forsman, 2012 ND at ¶5. Forsman may claim that it has long been permitted to plead conflicting legal theories, but, in this case, Forsman has never given United Fire any indication to support the notion that Amanda Espinoza did not assault her. "In addition to looking at the complaint, the insurer can 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, Forsman has no injuries that were not caused by an assault. "The insurer's duty to defend is set by the pleadings and must be determined as of the time the defense it tendered[.]" *Tibert*, 2012 ND at ¶36. Based on the allegations in the complaint, the testimony at trial, and all evidence available to United Fire, this was an assault that excluded coverage and United Fire, accordingly, had no duty to defend.

B. Assault is excluded from coverage under the policy even when couched in premises liability

[¶38] The district court erred by denying United Fire's motion for summary judgment because it presumed there was coverage for premises liability. As a result, the district court interpreted the "arising out of" language of the assault and battery exclusion too narrowly. Jurisdictions that have considered the application of the "arising out of" language of assault and battery exclusions have determined that when the "but for" cause of the premises

liability claim is, itself, excluded from coverage, (as an assault is excluded from coverage) there is also no coverage for the premises liability claim.

[¶39] Because North Dakota has not addressed this issue specifically, it is useful to consider the decisions of other jurisdictions. Minnesota has considered this issue. In *Ross v. Minneapolis*, 408 N.W.2d 910 (Minn. Ct. App. 1987), the Minnesota Court of Appeals considered a case with analogous facts. Ross attended boxing and wrestling matches at an auditorium owned by the city of Minneapolis. *Id.* at 912. As he was leaving the auditorium, Ross was assaulted and incurred severe injuries. *Id.* Ross sued Minneapolis "asserting that his injuries were caused by their failure to take proper safety precautions for the health, welfare, and safety of their patrons." *Id.* Minneapolis cross-claimed against the boxing and wrestling club that had sponsored the event. *Id.* The club tendered the defense to its general liability insurer. *Id.* The insurer refused to defend citing the "Assault and Battery Exclusion" in its policy. *Id.*

[¶40] Ross entered into a Miller-Shugart agreement and initiated garnishment proceedings against the insurance company. The insurance company moved for summary judgment on the issue of coverage and the trial court found that "the exclusion did not apply because the underlying action was founded on negligence rather than assault and battery." *Id.* The Minnesota Court of Appeals reversed concluding "Ross' claim clearly was causally connected to an assault or battery. Therefore, under the unambiguous terms of the insurance policy, the claim was excluded from coverage." *Id.*

[¶41] The *Ross* case was one of the earlier decisions on this subject matter and it remains good law to date. The case has been used as guidance by foreign jurisdictions encountering similar fact patterns for the first time:

- *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080 (D. Nav. 1999)
    - The fact pattern is nearly identical to the facts presented by Forsman. *See id.* at 1082. While at a bar, two individuals assaulted Shaw, resulting in serious bodily injuries; Shaw brought claims sounding in both intentional tort and negligence against the individuals who assaulted him, the bar, and the bartender. The bar's insurance company denied coverage and did not defend. The Court, citing the *Ross* decision, found the assault and battery exclusion applied and the insurance company, therefore, had no duty to defend or indemnify: "Therefore, the Assault and Battery Exclusion applies and Capitol Indemnity has no duty to defend or indemnify [the bar] with respect to any of the claims in the underlying action as a matter of law." *Id.* at 1088.

- *Mount Vernon Fire Ins. Co. v. Creative Hous.*, 93 F.3d 63 (2d Cir. 1996)
    - The Second Circuit Court of Appeals considered a case where "Linnette Hunter was assaulted in her apartment building, which was owned and managed by Creative Housing. Hunter sued Creative Housing, alleging negligent supervision, management, and control of the premises." *Id.* at 64. Again, the question was whether there was insurance coverage under these circumstances. The Second Circuit certified questions to the New York Court of Appeals regarding the application of an assault and battery exclusion clause in insurance contracts. The New York Court of Appeals, citing the *Ross* decision, concluded:

> "while the theory pleaded may be the insureds negligent failure to maintain safe premises, the operative act giving rise to any recovery is the assault. While the insured's negligence may have been a proximate cause of the plaintiff's injuries, that only resolves its liability; it does not resolve the insured's right to coverage based on the language of the contract between him and the insurer."

Mount Vernon Fire Ins. Co. v. Creative Hous., 979 F. Supp. 176 (E.D.N.Y. 1992). The Second Circuit accordingly concluded "[b]ecause Hunter would be unable to maintain claims for negligent supervision, maintenance, and control 'but for' the assault upon her, under New York law her claims are 'based on' assault and battery and therefore excluded from coverage under the insurance policy.

[¶42] There are additional decisions on this issue of law that do not cite the *Ross* case, but, nonetheless, reach the same conclusion. For example, *Essex Ins. Co. v. Fieldhouse, Inc.*, 506 N.W.2d 772 (Iowa 1993), again under the same fact pattern that seems to repeat throughout this area of law: (i) individual is assaulted at a bar, (ii) individual brings claims

of premises liability, negligent supervision, etc. against the bar, (iii) insurance company denies coverage and declines to defend. Once again, the conclusion is that "[t]he [Bar]'s principal argument is that [Plaintiff]'s claims are based on negligence rather than on an assault and battery. To be sure [Plainitff]'s injuries may have been caused by the [Bar]'s negligent acts, but it does not follow that these injuries did not 'arise out of' the assault and battery. We believe [Plaintiff]'s real contention is that her injuries arose out of an assault which in turn, arose out of the [Bar]'s negligence." *Id.* at 775.

[¶43] The aforementioned decisions are not outliers. The Essex court went on to note: "Our conclusion is consistent with the overwhelming weight of authority in jurisdictions that have interpreted substantially similar assault and battery exclusions involving assault and battery committed by a third party." *Id.* at 776 (citing *Essex Ins. Co. v. Yi*, 795 F. Supp. 319, 323-24 (N.D. Cal. 1992); *Stiglich v. Tracks, D.C., Inc.*, 721 F. Supp. 1386, 1387 (D. D.C. 1989); *St. Paul Surplus Lines v. 1401 Dixon's, Inc.*, 582 F. Supp. 865, 868-69 (E.D. P.A. 1984); *Gregory v. Western World Ins. Co., Inc.*, 481 So. 2d 878, 881 (Ala. 1985); *Kelly v. Figueiredo*, 223 Conn. 31, 610 A.2d 1296, 1299 (Conn. 1992); *Britamco Underwriter's, Inc. v. Zuma Corp.*, 576 So. 2d 965 (Fla. Dist. Ct. App. 1991); *Hernandez v. First Fin. Ins. Co.*, 106 Nev. 900, 802 P.2d 1278, 1280 (Nev. 1990)).

[¶44] These decisions are not binding precedent on this Court, but they are indicative of the soundness of the conclusion that the plain language of the assault and battery exclusion precludes an insurer's duty to defend under fact patters that are similar to the facts presented by Forsman.

C. The Liquor Liability Exclusion independently excludes coverage, eliminating any potential for a claim, and eliminating United Fire's duty to defend.

[¶45] The "but for" causation question in the assault and battery exclusion applies in the same fashion to the liquor exclusion. In *Capitol Indem. Corp. v. Blazer*, 51 F.Supp. 2d 1080 (D. Nev. 1999), the district court considered the application of a liquor liability exclusion in an insurance policy. The facts of this case are enumerated above under the analysis of the assault and battery exclusion. In brief, they mirror the facts of our case; there was a patron at a bar who was injured after being assaulted. The question presented was whether the insurer had a duty to defend and indemnify the bar. The district court concluded that, although the assault and battery exclusion would already be a complete bar to any duty to defend or indemnify, the liquor liability exclusion would independently serve to eliminate the insurer's duty to defend or indemnify.

[¶46] The district court's analysis was again based on but-for causation. The crucial question is whether there is a "nexus between the allegations and the consumption of alcohol." *Id.* at 1089. As the court explained in greater detail:

> The theory behind the plaintiff's claims against the bar necessarily depended up on the patron's intoxicated state; therefore, the claim was logically barred from coverage under the plain language of the exclusion. In contract, the intoxicated patron in J.A.J left the bar, whereupon he was assaulted. The plaintiff's claims against the bar did not depend upon the patron's intoxicated state because they could have been based on the theory that the bar negligently allowed the patron to leave the bar, despite knowing of the antagonistic attitudes of the parties waiting for him outside the premises. In essence, one claim could only be brought upon an establishment serving or selling alcohol and the other could be brought against any establishment on general negligence grounds.

Id. (citing *Paradigm Ins. Co. v. Texas Richmond Corp.*, 942 S.W.2d 645, 651 (Tex. App. 1997, writ denied)).

[¶47] In the instant case, the allegations in Forsman's Complaint reflect the nexus described above between the service of alcohol and the assault on Forsman. The policy excludes coverage for "bodily injury . . . for which any insured may be held liable by reason of: (1) Causing or contributing to the intoxication of any person[.]" App. 152. Forsman's Complaint states "[t]hat as a direct and proximate cause of the Defendants' serving alcohol to an obviously intoxicated individual, the Plaintiff suffered broken bones and extensive tissue damage[.]" App. 14. The plain language of the liquor liability exclusion in Blues Brews & Bar-B-Ques, Inc.'s policy does not provide coverage under this set of facts.

[¶48] North Dakota has already applied the above logic to find that an insurer does not have a duty to defend or indemnify. In *Continental W. Ins. Co. v. The Dam Bar*, 478 N.W.2d 373 (N.D. 1991), David Frier, despite being underage, was served alcoholic beverages and became intoxicated. *Id.* at 374. Mr. Frier left the bar in his own vehicle and thereafter died in a motor vehicle accident. *Id.* Mr. Frier's family brought a lawsuit against the bar and the bar's insurer initiated a declaratory judgment action to determine its obligation to defend and indemnify. The insurance policy in question excluded "dram shop" coverage. While the focus of the *Continental* decision was on whether there was ambiguity in the contract, this Court seemed to take it for granted that, however the Complaint may have pleaded the action, the issue was unquestionably arising out of the service of alcoholic beverages. This Court acknowledged the plaintiffs' attempt to avoid the dram-shop exclusion:

> In the underlying action, the Friers amended their initial complaint and substituted the words "goods or products" in place of the previous words "alcoholic beverages." This was apparently done to conform to the language of the endorsement on which they sought to premise coverage. Regardless of the change in language, the complaint alleges that David Frier was served alcohol, and as a result was killed in an automobile accident.

Id. at 374, n. 1. This Court affirmed the district court, finding that there was no duty to defend or indemnify because "in the underlying action, the [plaintiffs] have alleged no basis for liability separate from liability based on the furnishing of alcoholic beverages." *Id.* at 376. The same result must happen in this case. Forsman's claim, though presented as an action based in negligence, nonetheless is a claim for "bodily injury" resulting from Muddy Rivers' "[c]ausing or contributing to the intoxication of any person." App. 152. Accordingly, there was no possibility that the claim would be coverage and there was no duty by United Fire to defend.

CONCLUSION

[¶49] For the forgoing reasons, Appellant United Fire respectfully asks this Court to conclude as a matter of law that United Fire had no duty to defend or indemnify and to reverse the Order of the District Court granting Forsman's motion for partial summary judgment.

Dated: April 19, 2017

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CERTIFICATE OF COMPLIANCE

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 6,185 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 8,000 words

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Carol Forsman, Respondent,

v.

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

And

United Fire & Casualty Company, Appellant.

CERTIFICATE OF SERVICE

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

I hereby certify that on April 24, 2017, I cause to be electronically filed **Appellant United Fire & Casualty Company's Brief, Appellant United Fire & Casualty Company's Appendix** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

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

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