

CASE NO. A04-1713

State of Minnesota
In Supreme Court

Jose Padilla individually and as assignee of
Bloomington Steel and Supply Co.,

Appellant.

vs.

The Travelers Indemnity Company and
The Charter Oak Fire Insurance Company,

Respondents.

**BRIEF OF AMICUS CURIAE
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STATEMENT OF THE ISSUE

Whether the “expected or intended” exclusion, when considered from the standpoint of the corporate insured in a policy with a separation of insureds provision, has reference (1) to the occurrence alleged against the corporation in the underlying complaint or (2) to the act of an employee/owner insured that directly causes injury to the victim?

Both the trial court and the Court of Appeals concluded that the intentional act exclusion is determined from the standpoint of the insured corporation as it relates to the act of assault at the time it was committed. See A 144-45 (trial court ruling) and COA 2 (Court of Appeals ruling).

Most apposite cases:

King v. Dallas Fire Ins. Co., 85 S.W.3d 185 (Tex. 2002);

Meadowbrook, Inc. v. Tower Ins. Co., 559 N.W.2d 411, 420 (Minn. 1997);

Continental Western Ins. v. Toal, 309 Minn. 169, 177, 244 N.W.2d 121, 125 (1976);

American Nat’l Fire Ins. Co. v. Estate of Fournelle, 472 N.W.2d 292, 294 (Minn. 1991)

INTRODUCTION

Minnesota Trial Lawyers Association (MTLA) submits this brief in order to clarify the methodology the courts must utilize as it relates to the important issue of insurance coverage where there are multiple insureds and there is a separation of insureds provision in the insurance policy. In particular, this brief addresses the

imputation of knowledge of one insured to another insured in the context of the “expected or intended” exclusion in a commercial general liability (CGL) policy.¹

MTLA believes that the analysis of the Court of Appeals is erroneous in that it confuses the issue of imputation of knowledge regarding (1) the insurance coverage of a corporation for an *assault* committed by an employee with (2) the entirely different issue of coverage for the *negligence* of a corporation in hiring, retaining or supervising an employee of the corporation who commits an assault.

Based upon case law in this and other jurisdictions, MTLA contends that the proper methodology to determine coverage in such cases is to first identify the “occurrence” in the underlying lawsuit that triggers coverage, and then to assess the applicability of the “expected or intended” exclusion as to those occurrences from the standpoint of the insured seeking coverage. This determination is made as of the time of the occurrences alleged in the underlying complaint.

ARGUMENT

1. Corporations are liable for intentional acts committed by employees in the course and scope of their employment.

Minnesota has long held that corporations are liable for the acts of employees that are committed within the course and scope of their employment.

Fahrendorff v. North Homes, 597 N.W.2d 905, 910. (Minn. 1999) (under the “well-established principle” of *respondeat superior*, an employer is vicariously

¹ This writer certifies that he has authored this brief in its entirety and without assistance from any source. This writer has received no monetary contributions from any source in connection with the preparation or submission of this brief. This certification is made to comply with Minn. R. Civ. App. P. 129.03.

liable for the torts of an employee committed within the course and scope of employment). This liability extends to intentional acts. *Id.* Corporations can only act through their employees and agents. Thomas Oil, Inc. v. Onsgaard, 298 Minn. 465, 469, 215 N.W.2d 793, 796 (Minn. 1973). The Minnesota Legislature has spoken on this issue as well, declaring that, in certain situations, corporations may be held liable for punitive damages when acts are committed by employees. Minn. Stat. § 549.20. This case presents no occasion for changing this well settled precedent. Answering the liability question with respect to an assault does not, however, answer the question of insurance coverage for the corporation under the terms of a CGL policy for negligent acts.

- 2. Post-1986 CGL policies require that an “occurrence” be identified in the underlying complaint and that the “expected or intended” exclusion be examined from the standpoint of the insured claiming coverage with reference to those occurrences at the time they were committed.**

The Court of Appeals decision erroneously stated the issue as being:

Whether “the *assault* was an expected *act* from the standpoint of the insured and thus excluded under the insurance policy?” Travelers Indemnity Co. v.

Bloomington Steel and Supply Co., 695 N.W.2d 408, 409 (Minn. Ct. App. 2005)

(italics added). Having framed the issue in that manner, the result that the Court of Appeals reached necessarily followed. With all due respect to the Court of Appeals, the issue is not whether the *assault* was an expected or intended *act* from the standpoint of Bloomington Steel, but instead whether from the standpoint of Bloomington Steel, it was expected or intended that the *occurrence* alleged in the

underlying complaint would cause *injury* to Padilla. The record in this case, to the knowledge of this writer, has not been developed to answer that question definitively at his juncture.

The Travelers' policy is a typical post-1986 CGL policy that requires an occurrence in order to be triggered. Appellant's Brief at 6. "Occurrence" means an accident. *Id.* Intentional assaults are, by definition, not accidents and do not trigger coverage under such policies.

Padilla never alleged intentional conduct on the part of Bloomington Steel giving rise to liability. The complaint in the underlying action alleged the intentional tort of assault against Cecil Reiners. A-148. As to that act, there is clearly no coverage for Reiners, one of the insureds under the Travelers' policy. There is no coverage because there is no occurrence as to Reiners to trigger coverage, but Reiners nevertheless has liability to Padilla for the assault. As to the act of assault, unless Reiners was acting in the course and scope of his employment, Bloomington Steel would have no liability. Fahrendorff v. North Homes, *supra*. As to the claim of *respondeat superior* made by Padilla against Bloomington Steel (*id.* at 149), Bloomington Steel has liability but Travelers is not compelled to either defend or indemnify under the policy of insurance. This is true because the liability alleged is based upon agency principles (vicarious liability for the assault) and is not an accident and thus there is no occurrence to trigger coverage.

The occurrence alleged directly against Bloomington Steel, however, is not based upon the assault. Instead, it was alleged that Bloomington Steel was negligent in hiring, retaining and supervising Reiners. *Id.* at 149-50.² It was alleged that damages flowed from those negligent acts. *Id.* at 150, paragraph XIII. The injury triggering event as to that occurrence is not the assault, but instead is the negligence of the corporation in hiring, supervising and retaining Reiners. As to that occurrence, clearly a coverage triggering event, the issue for this Court is whether the intentional act exclusion precludes coverage for Bloomington Steel.

This is a case of first impression in this Court. Here, the Court confronts squarely for the first time the issue of the effect of a severability clause on insurance coverage of a corporation for injuries proximately caused by *negligent* acts of the corporation where the employee's conduct was intentional. As to this issue, other jurisdictions have reached different results, but the better reasoned authorities support the grant of coverage in this instance.

King v. Dallas Fire Ins. Co., 85 S.W.3d 185 (Tex. 2002) and Silverball Amusement, Inc. v. Utah Home Fire Ins. Co., 842 F. Supp. 1151 (WD Tex 1994) are the leading cases supporting coverage in this situation. These cases reject the analysis of the courts that have found no coverage, particularly the Fifth Circuit, such as American Nat'l Gen. Ins. Co. v. Ryan, 274 F.3d 319, 325, (5th Cir. 2001). The Fifth Circuit rule applies a "related and interdependent" rule, which reasons that there can be no cause of action against the employer but for the employee's

² Padilla later apparently withdrew the negligent hiring claim. A 158.

intentional acts and therefore there is no “occurrence” to justify coverage.

American States Ins. Co. v. Bailey, 133 F.3d 363, 371-73; American Guaranty & Liab. Ins. Co. v. 1906 Co., 129 F.3d 802 810 (5th Cir. 1997), citing Old Republic Ins. Co. v. Comprehensive Health Care Ass’n, Inc., 786 F. Supp 629, 632 (N.D. Tex. 1992), aff’d on other grounds, 2 F.3d 105. Silverball and King also reject the notion that the test to be applied is one of “reasonable foreseeability” of harm to the victim based upon the actions of the employee who caused the injuries. King, 85 S.W.3d at 190;

The Supreme Court of Texas in King focused on the occurrence alleged against the corporation in the underlying complaint (negligent hiring, training and supervision (85 S.W.3d at 186)), and rejected the idea that the intent of the employee in causing the damages is imputed in such circumstances. King, 85 S.W.3d at 191-92 (“whether one who contributes to an injury is negligent is an inquiry independent from whether another who directly causes the injury acted intentionally”). The Court in King held that the actor’s intent is not imputed to the corporation in determining whether there was an occurrence (id. at 192), carefully considering the history of the various commercial general liability (CGL) policy forms and language. Id. The Texas court traced the versions of the definition of “occurrence” in CGL policy forms, noting that the most recent formulation of that definition removed any reference to expectation of injury and instead created an express exclusion for intentional acts. Id. This is the same definition of

occurrence that applies in this case. Compare the “occurrence” definition in King, 85 S.W.3d at 192, with the definition in this case. Appellant’s Brief at 6.

Because of the severability clause, the question in King then became whether the corporation (Tiedown Construction Company), as a separate insured *at the times of the occurrences alleged*, expected or intended injury to befall the victim of the assault, Greg Jankwoniak. 85 S.W.3d at 188 (because of the separation of insureds provision “we are instructed to determine whether there has been an occurrence as if King were the only insured”). Coverage was defined in terms of the corporation’s view of the occurrence – not the assault but instead the negligence in hiring, training and supervising the employee that assaulted the plaintiff/victim. Id. at 189-90. Stated otherwise, the inquiry was whether Tiedown Construction “expected or intended” injury to Jankwoniak at the time it hired, trained and supervised King.

This view of the law is explained in even greater detail in Silverball. In Silverball, an employee (Emerson) of the corporation sexually assaulted a 9 year old girl while engaged in his work for Silverball. 842 F. Supp. at 1152. The underlying complaint alleged negligent hiring of Emerson, but did not allege intentional conduct against Silverball. Id. at 1153. That complaint alleged that the proximate cause of the injuries was negligence in hiring Emerson, causing the court to observe that there were two events involved: Silverball’s hiring, which was negligent; and Emerson’s molestation, which was intentional. Id. at 1154. The court noted that because of the separation of insureds provision, Silverball’s

acts – not Emerson’s – determined whether there was a duty to defend or provide coverage; and the only wrongful acts alleged were negligent hiring and supervision. Id. at 1155. The court noted that there would only be coverage for sums the insured was legally obligated to pay caused by an occurrence, which in that case was negligent hiring and supervision. Id. at 1156. As to those occurrences the court observed: “It would require a tortured interpretation of this case to decide that when Silverball hired Emerson it intended or expected that he would molest children.” Id. at 1158.

Important to the analysis in Silverball is the realization that the “expected or intended” exclusion only modifies coverage as to occurrences (accidents) that trigger coverage. Since the assault is not an accident from anyone’s point of view, there can be no coverage arising directly out of the assault. There is no point excluding coverage where there is no insurance coverage in the first place. Thus, the phrase “from the standpoint of the insured” only has relationship to an occurrence that triggers coverage under the policy – not the sexual assault in Silverball, but instead the negligent hiring and supervision of Emerson. The question in Silverball therefore was: Did Silverball intend injury to the girl when it hired or supervised Emerson? The court acknowledged the split in authorities on this issue, but in a careful and complete review of the cases and the law, adopted the view that there is no coverage for intentional assault but there can be coverage for negligent hiring that is a proximate cause of the assault. Id. at 1162-63.

Applying these principles to the case at bar, the question is *not* as framed by the Court of Appeals: Whether the assault was an expected act from the standpoint of the insured and thus excluded under the insurance policy? Instead, the proper issue is: Whether, at the time of the hiring, supervising or retention of Reiners, Bloomington Steel expected or intended injury to Padilla? The test is not one of foreseeability of injury to Padilla at the time he was assaulted, as characterized by the Court of Appeals, but instead whether or not Bloomington Steel expected or intended harm to come to Padilla when Reiners was hired, supervised and retained as an on-the-work-site manager. This view of appropriate methodology is supported by precedent in this Court.

In determining whether a policy arguably provides coverage, an appellate court must "compare the allegations in the complaint in the underlying action with the relevant language in the insurance policy." Meadowbrook, Inc. v. Tower Ins. Co., 559 N.W.2d 411, 420 (Minn. 1997). This Court stated in Continental Western Ins. v. Toal, 309 Minn. 169, 177, 244 N.W.2d 121, 125 (1976) that "an injury is 'expected or intended' from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury *or* 'when the character of the act is such than an intention to inflict an injury can be inferred' as a matter of law," citing Casperson v. Webber, 298 Minn. 93, 99, 213 N.W.2d 327, 330 (1993).

The question then becomes: What is the insured's act? Here, the insured's act, viewed separately from the standpoint of Bloomington Steel is not the assault, but instead is the negligent hiring, supervision or retention. This Court has

recognized the distinction between claims against an insured who committed intentional acts and claims against another insured for negligent supervision. D.W.H. v. Steele, 512 N.W.2d 586, 588 n. 1 (Minn. 1994). By definition, an occurrence is an accident and thus precludes coverage for intentional acts, so an assault could never be an occurrence for which the intentional act exclusion would be necessary. Board of Regents v. Royal Ins. Co., 517 N.W.2d 888, 892 (1994) (stating that “accident” means unexpected or unintended). And in American Nat’l Fire Ins. Co. v. Estate of Fournelle, 472 N.W.2d 292, 294 (Minn. 1991), this Court explained that the intent of severability clause is to provide each insured with separate and distinct coverage, and that the existence of a severability clause demands that policy exclusions be construed with reference to the particular insured seeking coverage.

The Court of Appeals has recognized that the victim of an employee's sexual assault, who sued the employer for negligent hiring/retention of employee, alleged a covered "occurrence" within liability policy, which could be a separate cause of the victim's injuries. Mork Clinic v. Fireman’s Fund Ins. Co., 575 N.W.2d 598, 601-02 (Minn. Ct. App. 1998). Moreover, Mork rejected the “interdependence” argument that is at the heart of the 5th Circuit cases declining to find coverage in such cases. Id. at 601 (rejecting the insurer’s “ill-considered reliance on holdings that an immediate cause of injuries prompts application of the exclusion for injuries arising out of that kind of act”).

Admittedly, the result in this particular case is clouded by the close association between Reiners and the corporate entity that he created to run the business. But this is no excuse for a failure of reasoning in the analysis of an appellate court that declines to find coverage. The rule created here will shape future coverage decisions in the lower courts.

In the underlying case, Judge Anderson rejected the claim made by Bloomington Steel that it could not be held liable under theories of negligent supervision and retention where the alleged perpetrator is the sole shareholder and director of the company. A 161. Judge Anderson held that corporations may be held liable for negligently supervising and retaining a sole shareholder and director and astutely observed that: "As a practical matter, Reiners could have hired someone else to oversee Bloomington Steel's operations." Id. at 162.

Thus Bloomington Steel is put in a position where it has liability in negligence for what clearly is an occurrence under the policy of insurance for which it paid a premium to Travelers, but potentially has no coverage for those same negligent acts on the basis of an intentional act exclusion which it may have had no reason to foresee at the time those occurrences took place. The Court of Appeals analysis is flawed and, even if the ultimate result in this case is allowed to stand after further inquiry on remand, that analysis should be corrected.

Because MTLA is not privy to the record as it relates to the knowledge of the corporation at the time it supervised and continued to employ Reiners in his position as an on-site manager, no conclusion is reached in this brief regarding

ultimate disposition of this case. Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368, 372 (Minn. Ct. App. 1992), rev. denied Mar. 26, 1992 (whether or not “expected or intended” exclusion applies is a fact question).

CONCLUSION

The Court of Appeals and the trial court erroneously applied a rule that analyzed the “expected or intended” exclusion from the standpoint of Bloomington Steel based upon its knowledge of the assault upon Padilla at the time it occurred. Proper methodology requires that the trial court identify one or more occurrences that trigger coverage in the underlying action, and to then determine whether injury to the victim was expected or intended from the standpoint of the insured seeking coverage at the time of such occurrences.

Because of the use of improper methodology by the lower courts, this case should be remanded in order to determine the facts regarding applicability of the exclusion.

Dated this 25th day of August, 2005.

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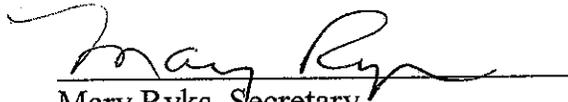
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minnesota Rules of Appellate Procedure 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of the Brief of Amicus Curiae MTLA brief is 266 lines and 3,029 words. This brief was prepared using Microsoft Word 2000.

Dated this 25th day of August, 2005.

BIRD, JACOBSEN & STEVENS

A handwritten signature in cursive script, appearing to read "Mary Ryks", written over a horizontal line.

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