
IN THE SUPREME COURT OF MISSOURI

Appeal No. SC93502

KEN AND JANET ALLEN
AND
FRANKLIN QUICK CASH

Plaintiffs/Respondents,

v.

CONTINENTAL WESTERN INSURANCE COMPANY,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, STATE OF MISSOURI
THE HONORABLE JOHN B. BERKEMEYER, JUDGE PRESIDING

APPELLANT'S SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

ARGUMENT

A. Continental Western has no duty to defend an action seeking to recover damages for the anticipated consequences of intentional conduct.

The insureds' Reply is premised on an inaccurate statement of Missouri law. The duty to defend is not, as the insureds contend, based on the factual allegations that could be made, but on the factual allegations that are made.

"The duty to defend is determined by comparing the language of the insurance policy with the allegations in the complaint." Brand v. Kansas City Gastroenterology & Hepatology, LLC, 2013 WL 5183659 at *5 (Mo. Ct. App. Sept. 17, 2013). "If the complaint ... alleges facts that give rise to a claim potentially within the policy's coverage, the insurer has a duty to defend." Id.

In support of the Negligence Counts added to the Amended Petition, Ms. Whipple expressly alleged that the insureds acted *intentionally* in repossessing the vehicle. (158-164, ¶¶ 8b, 12, 22b, 26). The "negligence claims" "merely incorporate the facts alleged in the conversion claims and make a conclusory assertion that "Defendants' aforesaid conduct was negligent.'" Whipple v. Allen, 324 S.W.3d 447, 451 (Mo. Ct. App. 2010). These conclusory allegations were found to be insufficient in the Underlying Action and are insufficient to trigger Continental Western's duty to defend.

The insureds concede that Continental Western had no duty to defend when the Petition included only causes of action labelled "Conversion". (See Respondents' Substitute Brief, p. 12). The insureds claim that Continental Western's duty to defend "arose when the underlying claimant attempted to add two counts for negligent acts."

(Id.). The insureds have not and cannot point to a single allegation in the Amended Complaint that could be characterized as a "negligent act" that resulted in the harm Ms. Whipple complains of. In support of the negligence claims (Counts II and IV), Ms. Whipple restated, realleged and incorporated by reference the allegations in support of the conversion claims, including the allegation that "defendants *intended* to exercise control over the said vehicle." (158-164, ¶¶ 8b, 12, 22b, 26).

Missouri is a fact-pleading state. Jones v. St. Charles County, 181 S.W.3d 197, 202 (Mo. Ct. App. 2005). The overall purpose of fact pleading is "to enable a person of common understanding to know what is intended." M & H Enters. v. Tri-State Delta Chemicals, Inc., 984 S.W.2d 175, 181 (Mo. Ct. App. 1998) (internal citation omitted). No facts were pled to support the Negligence Counts as evidenced by the order in the Underlying Action dismissing both counts. See Whipple, 324 S.W.3d at 451.

To state a claim for negligence, a plaintiff must plead facts that support each of the following elements: (1) the defendant had a duty to protect the plaintiff from injury; (2) the defendant breached that duty; and (3) the breach was the proximate cause of the plaintiff's injury. Stein v. Novus Equities Co., 284 S.W.3d 597, 604-05 (Mo. Ct. App. 2009). As the Court of Appeals observed in affirming the trial court's determination in the Underlying Action:

> In Counts II and IV, the Petition merely incorporates the facts alleged in the conversion claims and makes a conclusory assertion that "Defendants' aforesaid conduct was negligent." The "aforesaid conduct" referenced by Whipple are the same facts that Whipple alleges in her conversion claims.

> However, negligence and conversion are fundamentally different causes of action, which require a plaintiff to plead different facts in order to sufficiently state a claim. Whipple fails to plead any facts that establish a duty or a breach of duty on the part of Allen. Whipple's failure to plead these essential elements renders Counts II and IV of the Petition deficient.

Whipple, 324 S.W.3d at 451. Although the Underlying Action is still pending Whipple did not attempt to amend the Petition to include the allegations suggested by the insureds.

1. Continental Western's duty to defend is determined by the factual allegations in Ms. Whipple's Amended Petition – not the label applied.

The insureds contend that Continental Western's duty to defend was triggered when Ms. Whipple amended the Petition by using the label Negligence to describe their act of intentionally asserting control over the vehicle. Negligent Conversion is an oxymoron. Even if Missouri recognized a cause of action for Negligent Conversion the resulting damages would not be covered under an accident based liability policy like those issued by Continental Western.

A duty to defend does not arise based on an "attempt" to plead a covered claim. Affixing the label "negligence" to describe intentional conduct resulting in an intended injury does not trigger the duty to defend.

In Brand, 2013 WL 5183659 at *5, the insureds sought reimbursement of defense expenses incurred in a lawsuit filed by Dr. Brand. Id. at *1. The petition sought damages for disability discrimination; wrongful discharge; breach of the implied covenant of good

faith and fair dealing; wrongful failure to renew contract; civil conspiracy; and negligence per se. Id.

Travelers disclaimed coverage on the grounds that the injury sustained by Dr. Brand was not the result of a "negligent act, error, or omission" as required by the insuring agreement. Id. Travelers' coverage determination was challenged based on the cause of action labelled "Negligence Per Se." Id.

In the coverage litigation the circuit court concluded that Travelers had no obligation to defend because all of the claims were based on conduct that was intentional and deliberate. Id. The circuit court's determination was affirmed on appeal. In reaching its decision, the Court of Appeals observed:

> [a] petition's mere mention of the word, 'negligence,' does not trigger a duty to defend where the factual allegations forming the 'negligence' claim demonstrate intentional conduct.

Id. (citing Allen v. Continental W. Ins. Co., No. ED99111, 2013 WL 1803476 at *6 (Mo. Ct. App. Apr. 30, 2013) (finding that insurer had no duty to defend under liability policy where petition against insured alleged negligence premised upon intentional conduct)).

"Missouri courts have consistently held that an insured's intentional infliction of damage ... cannot be covered by liability insurance." Id. (citing Easley v. Am. Family Mut. Ins. Co., 847 S.W.2d 811, 812 (Mo. Ct. App. 1992); Katz Drug Co. v. Commercial Standard Ins. Co., 647 S.W.2d 831, 837 (Mo. Ct. App. 1983) (noting that intentional acts are "obviously not covered by [an] errors and omissions policy")). "Moreover, intentional conduct cannot later be characterized as negligence merely because the

damage resulting was greater than or different from that intended by the insured." Id. (citing Metropolitan Prop. & Cas. Ins. Co. v. Ham, 930 S.W.2d 5, 6–7 (Mo. Ct. App. 1996)).

In Custom Hardware Engineering & Consulting, Inc. v. Assurance Co. of America, 295 S.W.3d 557, 559 (Mo. Ct. App. 2009), Custom Hardware was sued for unfair competition and tortious interference with business relations. Id. The underlying original and amended complaints incorporated allegations of intentional conduct. Id. Custom Storage requested defense and indemnity coverage from its liability insurer, Assurance. Id. Assurance denied coverage relying on an exclusion for "personal and advertising injury" "[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" Id. The Court of Appeals found that the denial was warranted based on allegations of knowing and deliberate conduct that were incorporated by reference in support of each count of the complaint. Id.

Characterizing conduct as "negligent" does not make it so and does not transform the intentional act of asserting control over a vehicle into a fortuitous event. "Implied claims that are not specifically alleged can be ignored." Del Monte Fresh Produce N.A., Inc. v. Transportation Ins. Co., 500 F.3d 640, 644 (7th Cir. 2007). "Legal labels in complaints are often incomplete…'[w]hat is important is not the legal label that the plaintiff attaches to the defendant's (that is, the insured's) conduct, but whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers.'" Id.

2. The duty to defend is not based on factual allegations that were never made.

The insureds contend that they were entitled to a defense because Ms. Whipple could have made another amendment to the Petition that would support a claim for damages that would be covered by the policy. (Respondents' Substitute Br., pp. 12-16). The courts have refused to impose an obligation on an insurer to base its coverage determination on speculation concerning the allegations that could have been made. See Lagestee-Mulder, Inc. v. Consolidated Ins. Co., 682 F.3d 1054, 1059 (7th Cir. 2012) ("it is the actual complaint, and not a hypothetical version that must be considered when determining whether an insurer's duty to defend was triggered."); The Upper Deck Co., LLC v. Federal Ins. Co., 358 F.3d 608, 616 (9th Cir. 2004) ("Mere speculation that the plaintiffs could or will allege [covered] facts does not give rise to a duty to defend. The possibility of an amendment does not require the insurer to speculate about any conceivable claim that a plaintiff might bring against the insured or to spin out wild theories of recovery for every conceivable damage. Liability under the policies can only be characterized as speculative and hypothetical."); Chicago Ins. Co. v. Center for Counseling and Health Resources, 2011 WL 1221019 at *2 (W.D. Wash. March 31, 2011) ("[h]ypothetical unpleaded claims that would arguably be within coverage ... do not create 'potential coverage' entitling the insured to a defense.") (citing 44 Am.Jur.2d. *Insurance* § 1400 (Westlaw 2010)); Allstate Ins. Co. v. Naai, 684 F. Supp. 2d 1220, 1226 (D. Hawai'i 2010) ("An insurer's duty to defend is not triggered by an insured's speculation about the facts or claims that a plaintiff might plead."); Donnelly Brothers

Const. Co., Inc. v. State Auto Property and Cas. Ins. Co., 759 N.W.2d 651, 661 (Minn. Ct. App. 2009) (a complaint's "general reference to future claims does not provide information sufficient to fairly notify respondent [insurer] of the duty to defend.").

The duty to defend is not unlimited. An insurer is not required to imagine factual allegations that could have been made to support a claim for covered damages.

B. The Amended Petition does not seek to recover damages for "property damage" caused by an "occurrence".

Under Missouri law, the insured "must bring itself within the terms of the policy and must carry the burden of offering substantial evidence that the underlying claim is covered by the policy." Trans World Airlines, Inc. v. Associated Aviation Underwriters, 58 S.W.3d 609, 618-19 (Mo. Ct. App. 2001); see also Southeast Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635, 638 (Mo. Ct. App. 1998) ("Under Missouri law the insured has the burden of showing by substantial evidence that its claim falls within the coverage provided by the insurance contract"). The insureds have not satisfied their burden of establishing that any damages awarded to Ms. Whipple in the Underlying Action would be covered by the policies.

No damages were sought for "property damage," a term defined in the Continental Western policies as "physical injury to tangible property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured." (127). The injury sustained by Ms. Whipple was not the result of an "occurrence" a term defined as "*an accident*, including continuous or repeated exposure to substantially the same general harmful conditions." (126) (emphasis added).

Damages resulting from the insured's intentional act of exercising dominion and control over Ms. Whipple's vehicle are not potentially covered under Continental Western's "accident" based liability policy. In addition, under Missouri law, a claim for conversion does not present a claim for "property damage" covered by a general liability policy. Ms. Whipple does not seek to recover compensation for "property damage" caused by an "occurrence" as required by the insuring agreement to the Continental Western policies.

1. No damages could be awarded for "property damage."

The insureds cite no support for their contention that Ms. Whipple seeks damages for covered "property damage." (See Respondents' Substitute Br.). The term "property damage" is defined to include physical damage to tangible property and the loss of use of tangible property. (19). There was no allegation in the Amended Petition that there was any physical damage to Ms. Whipple's vehicle. (See generally 148-153; 158-164). There was no allegation in the Amended Petition that Ms. Whipple sustained an economic loss because she was required to lease a substitute vehicle. (See id.).

Ms. Whipple's Amended Petition sought damages solely attributable to the insureds' assumption of control over the vehicle. (Id.). Under Missouri law, a claim for conversion does not present a claim for "property damage" covered by a general liability policy. See Madden Oil Co., Inc., 734 S.W.2d at 263 ("conversion did not constitute 'property damage'" under a liability policy); Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787 (Ca. Ct. App. 1994) (conversion is not "property damage" and noting that "[v]irtually every court to consider the question has agreed that 'conversion' of property is

not 'property damage.'"); Westport Ins. Corp. v. Cotten Schmidt, LLP, 605 F. Supp. 2d 796, 809 (N.D. Tex. 2009) ("where insureds have argued that 'loss of use' includes coverage for claims based on the taking of property, such as conversion, courts have denied coverage."); Maryland Cas. Co. v. Texas Commerce Bancshares, Inc., 878 F. Supp. 939, 943 (N.D. Tex. 1995); General Ins. Co. of America v. Palmetto Bank, 268 S.C. 355, 360, 233 S.E.2d 699, 701 (S.C. 1977) (same); Inland Const. Corp. v. Continental Cas. Co., 258 N.W.2d 881, 884 (Minn. 1977) (same); B & L Furniture Co. v. Transamerica Ins. Co., 257 Or. 548, 550, 480 P.2d 711, 712 (Or. 1971) (same).

Continental Western has no obligation to defend the insureds in the Underlying Action because no damages are sought that are potentially covered by the policies. See Northwestern Mut. Ins. Co. v. Haglund, 387 S.W.2d 230, 233 (Mo. Ct. App. 1965) (emphasis in original) (an insurer "is not obligated to defend suits for property damage *which are not covered by the terms of the policy*.").

2. A mistake of law does not transform an intentional act into a fortuitous event.

The insureds cite no support for their contention that the "occurrence" was their allegedly improper assessment of their rights as a creditor. (See Respondents' Substitute Br., pp. 19-21). See Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co., 915 F.2d 306, 311 (7th Cir. 1990). Here, the insureds' repossession of Ms. Whipple's vehicle was intentional and not the result of an "occurrence," a term defined as an accident.

Under Missouri law, the term accident means "[a]n event that takes place without one's foresight or expectation; an undersigned, sudden and unexpected event." Columbia

Mut. Ins. Co. v. Epstein, 239 S.W.3d 667, 672 (Mo. Ct. App. 2007) (quotation omitted). "An accident does not include expected or foreseeable damages." Chochorowski v. Home Depot U.S.A., 404 S.W.3d 220, 231 (Mo. 2013).

In Red Ball Leasing, Inc., 915 F.2d at 311, the insured financed the sale of four trucks to a lessee, then later repossessed the trucks based on its mistaken belief that the lessee was in default. Hartford denied coverage on the grounds that the repossession was not an accident. Id. at 308. Red Ball claimed, however, that its conduct was accidental, because it believed it had a right to repossess the trucks. Id. at 309.

After a thorough examination of cases from other jurisdictions, the court agreed, finding that the conversion, even though based upon the erroneous belief that the repossession was lawful, was a volitional act and not an accidental. Id. at 310-12. The court went on to explain:

> A volitional act does not become an accident simply because the insured's negligence prompted the act. Injury that is caused directly by negligence must be distinguished from injury that is caused by a deliberate and contemplated act initiated at least in part by the actor's negligence at some earlier point. The former injury may be an accident. However, the latter injury, because it is intended and the negligence is attenuated from the volitional act, is not an accident.

Id. at 311–12 (citations and footnotes omitted). According to the court, "[e]ven if the mistake in Red Ball's accounting procedures triggered the chain of events that ultimately

led to the repossession, the decision to take the trucks-an intentional act of Red Ball-is not an 'accident' under the terms of the insurance policy." Id. at 312.

Similarly, here, the insureds' intentional act of repossessing Ms. Whipple's vehicle – even if based on a mistaken belief that they were legally entitled to do so – does not constitute a covered "accident" under the policy. See Angelina Casualty Co. v. Pattonville-Bridgeton Terrace Fire Protection Dist., 706 S.W.2d 483 (Mo. Ct. App. 1986); Federated Mut. Ins. Co. v. Madden Oil Co., Inc., 734 S.W.2d 258, 263-64 (Mo. Ct. App. 1987) (the insured's repossession of a trailer was intentional without regard to whether or not the conduct was ultimately determined to be legal).

C. The only harm complained of was both expected and intended by the insureds.

The insureds did not specifically address the exclusion for expected or intended injury. (See Respondents' Substitute Br.). The exclusion provides an independent basis for Continental Western's determination that it has no duty to defend. (114). Ms. Whipple alleged in the Amended Petition that the insureds' repossession of the vehicle was intentional, willful, wanton, and malicious. (149, ¶ 8b.; 150, ¶ 11; 151, ¶ 19b.; 152, ¶ 22; 159, ¶ 8b.; 160, ¶ 11; 162, ¶ 22b.; 162, ¶ 25).

An applicable exclusion can apply to relieve an insurer from any duty to defend. See, e.g., Trainwreck West Inc. v. Burlington Ins. Co., 235 S.W.3d 33, 43-44 (Mo. Ct. App. 2007) (insurer had no duty to defend Underlying Action because claims were precluded from coverage by policy exclusion); Custom Hardware Engineering &

Consulting, Inc., 295 S.W.3d at 561 (insurer may "extricate itself from a duty to defend" if it demonstrates that a policy exclusion applies).

The only injury complained of in the Underlying Action was the intended, foreseeable, logical and inevitable consequences of the insureds' act of repossessing Ms. Whipple's vehicle. The exclusion for expected or intended injury applies because the insureds indisputably intended to assert control over the vehicle and deprive Ms. Whipple of its possession. The only harm sustained by Ms. Whipple was the precise harm expected by the insureds. See American Family Mutual Insurance Company v. Franz, 980 S.W.2d 56, 57-58 (Mo. Ct. App. 1998); Landers Auto Group No. One, Inc. v. Continental Western Ins. Co., 621 F.3d 810, 815 (8th Cir. 2010) (Clark's claims arising out of the repossession were excluded from coverage under the CGL policy "because the loss of use was a loss Landers 'expected' would occur when it took the action of repossessing the car."); Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.3d 1116, 1125 (7th Cir. 1998) (similar exclusion precluded coverage where the insured consciously acted to repossess the automobile with both the intention and expectation that the claimant would not be able to use it). The exclusion for injury expected or intended by the insureds provides an independent basis for Continental Western's determination that it has no duty to defend.

D. The only harm complained of happened while the vehicle was in the insureds' care, custody or control.

The "care, custody or control" exclusion precludes coverage for property damage to personal property in the care, custody or control of the insured. (116). The insureds

assert that the exclusion does not apply because they were not in possession of Ms. Whipple's vehicle when they assessed their possessory rights as a creditor. (Respondents' Substitute Br., p. 22). Here, Ms. Whipple's only claim for injury is based on the insureds' alleged assertion of control over the vehicle. If, for example, the insureds had immediately released the vehicle to Ms. Whipple, Ms. Whipple would not have sustained any harm.

In addition, the insureds' position is inconsistent with their contention that Ms. Whipple sought damages for the loss of use of her vehicle. If the loss of use of the vehicle constituted property damage as they contend, this damage happened as the direct result of the insureds' assertion of control over the vehicle. See Valentine-Radford, Inc. v. American Motorists Ins. Co., 990 S.W.2d 47, 53-54 (Mo. Ct. App. 1999) (without regard to whether or not the underlying action sought to recover damages for a covered "occurrence" or whether the "intentional act" exclusion operated to exclude coverage, both the conversion and negligence claims were excluded by a "care, custody or control" exclusion that is identical to the exclusion found in the Continental Western policy). The care, custody or control exclusion provides an independent basis for Continental Western's determination that it has no duty to defend.

CONCLUSION

The circuit court erred in finding that Continental Western has a duty to defend the insureds against the Underlying Action arising out of their intentional repossession of Ms. Whipple's vehicle for the following reasons:

- no damages were sought for "property damage" covered by the Continental Western policy;
- any "property damage" that may have been sustained was not the result of an "occurrence";
- the only injury complained of in the Underlying Action was expected and intended by the insureds; and
- the "care, custody or control" exclusion precludes coverage for the claims in the Underlying Action.

Under Missouri law, "[a] duty to defend is determined by comparing *the policy language* with the allegations in the complaint." City of Lee's Summit v. Missouri Public Entity Risk Management, 2012 WL 6681961 at *3 (Mo. Ct. App. Dec. 26, 2012) (emphasis added). "An insurer does not have a duty to defend where the underlying claim is outside the coverage of the insurance policy." Id. Based on a comparison of the factual allegations in Ms. Whipple's Amended Petition and the plain, unambiguous language of the insurance policies, Continental Western had no duty to defend.

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Dated: October 2, 2013

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CERTIFICATE OF COMPLIANCE

As required by Rule 84.06(c), the undersigned certifies that this brief complies with the word or line limits of Rule 84.06(b) and the information that is required by Rule 55.03. The word count of this brief is 4,640 words. The undersigned relied on the word count feature on his firm's word processing system to arrive at that number.

/s/ Yvette Boutaugh

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Substitute Brief and Appendix was served via the e-filing system on the 2nd day of October 2013, to: Frederick H. Schwetye (#23498) and Bradley Lockenvitz (#27150), FREDERICK H. SCHWETYE LAW OFFICES, 8 South Church Street, Union, MO 63084, O: (636) 583-3800, F: (636) 583-3808, Attorneys for Respondents.

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