

IN THE DISTRICT COURT OF CASS COUNTY, NEBRASKA

STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Plaintiff,)
)
vs.)
)
TRAVIS MEISINGER, JODI)
MEISINGER, ROBERT MEISINGER,)
JOSHUA HAUSCHILD, DUSTIN)
HAUSCHILD, ANTHONY HOUCHIN,)
DEBORAH HOUCHIN, KATIE JO)
NASH, ALEXIS HAYNES, ANTHONY)
PREMO and TRACEY PREMO,)
)
Defendants.)

CASE NO. CI09-199

ORDER

DELLA P. SULLIVAN
CLERK

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FILED
DISTRICT COURT
CASS COUNTY, NEBR.

Now on this 26th day of October, 2009, this matter is before the court on the plaintiff's motion for summary judgment and motion for default as to specified defendants. The plaintiff, State Farm Fire and Casualty Company, is represented by its attorneys, David J. Stubstad and Patrick S. Cooper. Shayla M. Reed appears representing Anthony Premo and Tracey Premo. Defendant Jodi Meisinger is also present. There are no other appearances. The motion for default is granted and counsel for the plaintiff directed to prepare and submit a separate order regarding the default of said defendants. The motion for



summary judgment proceeds as to the remaining defendants. Evidence is adduced and counsel and parties are heard. The matter is submitted to the court for ruling. The court being duly advised in the premises now finds and holds all as hereinafter set forth with regard to the plaintiff's motion for summary judgment.

In this action, plaintiff State Farm Fire and Casualty Company seeks a declaratory judgment that a homeowner's policy of insurance issued by State Farm to defendants Jodi and Robert Meisinger does not provide coverage for bodily injuries or property damage that Anthony Premo, hereinafter referred to as Premo, claims to have sustained when Travis Meisinger and other defendants attacked Premo on September 8, 2007.

The evidence presented includes a trial transcript from a criminal prosecution involving the defendant, Travis Meisinger, who is the son of defendants Jodi Meisinger and Robert Meisinger. On September 8, 2007, Travis Meisinger was in Weeping Water, Nebraska, with several friends including Joshua Hauschild, Dustin Hauschild, Anthony Houchin, Katie Jo Nash, and Alexis Haynes, all named defendants in this action. For the sake of brevity, Travis Meisinger and the friends as hereinbefore listed will be referred to as the "Weeping Water group." According to the trial transcript, after members of the Weeping Water group had a telephone confrontation with some

people from Plattsmouth, the Weeping Water group proceeded to Plattsmouth. The purpose of the trip was that Joshua Hauschild had agreed to fight one of the people from Plattsmouth, namely Justin Johnson. A fight took place at or near the home of Anthony Premo.

Prior to the time that the Weeping Water group arrived in Plattsmouth, baseball bats were placed in the trunk of the vehicle occupied by the Weeping Water group. Upon arrival in Plattsmouth, there was a confrontation between the Weeping Water group and a group of kids from Plattsmouth, hereinafter referred to as the "Plattsmouth group." Travis Meisinger claims that the Plattsmouth group used baseball bats and golf clubs as weapons during the confrontation that took place in the backyard of the Premo property. After the initial confrontation in the backyard, the Weeping Water group met back at Travis Meisinger's vehicle on the street. At that time Travis Meisinger opened the trunk and grabbed a baseball bat. Travis Meisinger also handed a bat to Joshua Hauschild. Travis Meisinger, Joshua Hauschild, and Anthony Houchin then left their place of safety and approached the Premo residence again. When they got to the Premo residence, the Plattsmouth group was no longer outside. Travis Meisinger was very angry. When Travis Meisinger went to the backyard, there was nobody present. He then proceeded to the front yard. On the way to the front yard, Travis Meisinger

was screaming and calling the Plattsmouth group "chickenshits." Travis Meisinger struck the baseball bat on the side of the house and the Premos' fence. Travis Meisinger went to the front porch and could see the Plattsmouth group inside through the picture window. Travis Meisinger then struck the screen door with the baseball bat and the screen fell out. Travis Meisinger continued to yell at Justin Johnson and the other kids in the Plattsmouth group. At some point, the Plattsmouth group gathered in the living room and began moving towards the front door. The front door opened and people began to emerge from the house. Mr. Premo had been sleeping inside and was awakened by the ruckus on the front porch, and he was among the people who were exiting the house onto the front porch. Travis Meisinger "saw arms flying out of the door" and proceeded to swing the baseball bat. According to Travis Meisinger, he did not initially know who he was swinging at, but he took a level swing. He struck Mr. Premo in the face. Mr. Premo in his lawsuit alleges that he suffered severe injuries to his face as a result of Travis Meisinger's actions.

Following this incident at the Premo residence, Travis Meisinger resided with his parents, was a minor, and was criminally charged for attacking Mr. Premo. Travis Meisinger was charged with felony assault. Third degree assault is a lesser-included offense of felony assault. At the criminal

trial, the court instructed the jury that to convict Travis Meisinger of third degree assault, the State was required to prove beyond a reasonable doubt:

1. That the defendant intentionally or knowingly caused bodily injury to Anthony R. Premo;
2. That the alleged offense occurred on or about the 9th day of September, 2007;
3. That the alleged offense occurred in Cass County, Nebraska; and
4. That the defendant was not acting in self-defense of himself.

On August 7, 2008, the jury returned a verdict against Travis Meisinger of "not guilty of first degree assault and guilty of assault in the third degree." Travis Meisinger was thereafter sentenced to 1 year in jail and was also required to pay restitution to Anthony Premo in the amount of \$9,000 (\$150 per month for 60 months). There was no appeal of the jury verdict.

On September 9, 2008, Anthony Premo filed suit in Cass County District Court against Travis Meisinger, Jodi Meisinger and Robert Meisinger, and other members of the Weeping Water group (and their parents). In his complaint, Anthony Premo asserts three causes of action against Travis Meisinger:

1. Assault;
2. Battery; and
3. Civil conspiracy.

In addition to the claim for bodily injury, Anthony Premo also seeks the cost of repairing the property damage to the Premo house on the night of the incident. According to the complaint, Anthony Premo's past medical expenses are in excess of \$458,000. On February 23, 2009, Jodi and Robert Meisinger were dismissed from the underlying lawsuit with prejudice by stipulation of the parties.

At the time of the incident, Jodi and Robert Meisinger were the named insureds under a homeowner's policy of insurance (Policy No. 27-00-5064-9) issued by State Farm, herein referred to as "the Policy". The Policy provides coverage for damages that the insured is legally obligated to pay for a "loss." The Policy contains the following definitions, provisions, and exclusions:

Definitions

Pursuant to the endorsements, "loss" is defined as:

- a. an accident, including injuries exposure to conditions, which results in bodily injury or property damage during the policy period. Repeated or continued exposure to the same general conditions is considered to be one loss.

- b. The commission of an offense, or series of similar or related offenses, which result in personal injury during the policy period.

Exclusions

Exclusion 2 precludes coverage for:

- a. bodily injury or property damage:
 - 1. which is either expected or intended by you; or
 - 2. to any person or property which is the result of your willful and malicious act, no matter at whom the act was directed.

State Farm is currently defending the underlying lawsuit under a Reservation of Rights. (Reservation of Rights letter.) Through the plaintiff's declaratory judgment action, the plaintiff seeks an order declaring the rights and obligations of the parties under the policy of insurance.

According to the plain language of the Policy, Meisingers are only entitled to coverage for claims arising from a "loss," which is defined in the pertinent part of the Policy as an "accident." In the underlying lawsuit, Premo brought suit for assault, battery, and civil conspiracy. Each of those causes of action is an intentional tort. According to Nebraska case law, intentional torts are not accidents. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697 (2001). The court in *Austin* held that an "accident" does not cover intentional torts.

Additionally, the Policy in question specifically excludes willful and malicious acts.

Received into evidence was Travis Meisinger's affidavit. It appears, according to Travis Meisinger's affidavit, that Travis Meisinger is claiming self-defense with regard to his actions involving his striking Premo. As above noted, Travis Meisinger was charged criminally for his actions. Travis Meisinger had a jury trial and was found guilty of third degree assault. As part of his defense in the criminal action, the defendant claimed self-defense. The jury was instructed on self-defense, but clearly rejected the defense in that it (the jury) found Travis Meisinger guilty of the assault charge.

The jury's finding acts as res judicata and bars Meisinger from arguing that he did not intentionally cause bodily injury or that he acted in self-defense. Under Nebraska law:

The doctrine of res judicata dictates that any right, fact, or matter which has been expressly or directly adjudicated on the merits in a previous action before a court acting within its jurisdiction, or which was necessarily included in the determination of the previous action, is conclusively settled by the judgment in the previous action and may not be relitigated by the parties to the previous action, whether the claim, demand, purpose, or subject matter in subsequent litigation would or would not be the same as that in the previous litigation.

Kerndt v. Ronan, 236 Neb. 26, 458 N.W.2d 466 (1990).

In *Ohio Casualty Ins. Co. v. Clark*, 583 N.W.2d 377 (N.D. 1998), an insured shot a man after finding him in the insured's

wife's bedroom. The insured was charged with murder, and he argued self-defense at his trial. The jury found the insured not guilty of murder, but guilty of manslaughter. Clark's insurance carrier subsequently brought a declaratory judgment action seeking a declaration that its insured's homeowner's policy provided no coverage for negligence claims arising out of the shooting incident. The North Dakota Supreme Court determined that the jury's verdict in the criminal case acted as res judicata, and precluded the insured from arguing in the declaratory judgment action that he had acted in self-defense:

Daniel Clark raised self defense as a defense in his criminal trial. He had a full and fair opportunity, and an adequate incentive, to litigate the issue of his guilt in the criminal trial. The jury found, beyond a reasonable doubt, he was not acting in self defense when he shot and killed George Girodengo. . . . We conclude the jury's determination Daniel Clark was not acting in self defense when he shot and killed George Girodengo is res judicata, and the appellants may not now relitigate that issue.

Id. at 384. See also 7 Russ, Couch on Insurance, 103:35 (3d ed. 1997) ("modern rule . . . is to accord judgments in criminal proceedings collateral estoppel effect, i.e., to preclude relitigation of any issues necessarily and actually decided therein in later civil proceedings"); 47 Am.Jur.2d Judgments § 732 (1995) ("the higher standard of proof and numerous safeguards in criminal proceedings are given as rationale for

the rule allowing judgments in criminal proceedings to have a preclusive effect in subsequent civil actions").

Travis Meisinger was found guilty of intentionally or knowingly causing bodily injury to Mr. Premo. Meisinger also raised self-defense as a defense in his criminal trial, which was rejected by the jury. He had a full and fair opportunity, and adequate incentive, to litigate these issues at his criminal trial. The jury found beyond a reasonable doubt that Travis Meisinger intentionally or knowingly caused bodily injury to Mr. Premo and that Travis Meisinger did not act in self-defense when he struck Mr. Premo with a baseball bat. Accordingly, the jury verdict from the criminal case acts as *res judicata* and precludes Travis Meisinger from arguing that he did not intentionally or knowingly injure Mr. Premo or that he acted in self-defense.

There is some suggestion in the evidence, including the affidavit of Travis Meisinger, that he did not intend to cause the bodily injury to Premo. It has been held that it makes no difference if the actual injury is more severe or of a different nature than the injury intended. See *Jones v. Norval*, 203 Neb. 549 (1979). Likewise, the fact that Travis Meisinger may have intended to hit someone other than Premo makes no difference. His act of swinging the bat was intentional, and it was his intent to hit the person coming through the door.

In conclusion, there is no material issue of fact with regard to the fact that the defendant, Travis Meisinger, intentionally swung the baseball bat at and hit Premo. A Cass County District Court jury concluded that Travis Meisinger intentionally and knowingly caused bodily injury and did not act in self-defense. The Policy issued by the plaintiff does not provide coverage for bodily injury caused to Premo as a result of Travis Meisinger's intentional act and where the only causes of action alleged against Travis Meisinger are intentional torts. In that there are no material issues of fact, the court finds that the plaintiff is entitled to judgment as a matter of law, declaring that the policy of insurance issued by the plaintiff does not provide coverage because the injury and property damage did not arise from an "accident" and was a result of the malicious and intentional acts of Travis Meisinger. The claims of Premo are outside the scope of the coverage.

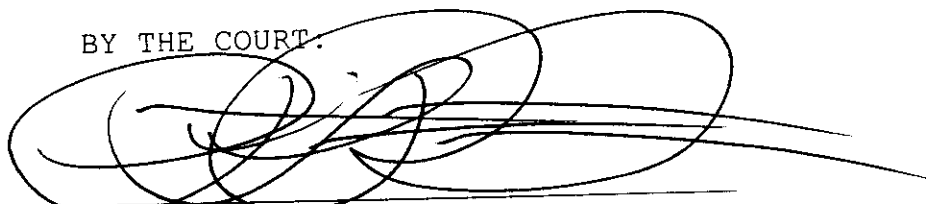
IT IS THEREFORE ORDERED, ADJUDGED AND DECLARED as to the remaining defendants (Travis Meisinger, Jodi Meisinger, Robert Meisinger, Anthony Houchin, Deborah Houchin, Anthony Premo and Tracey Premo), that State Farm Fire and Casualty Company does not owe any obligation to provide coverage under the Policy (Policy No. 27-00-5064-9) wherein Jodi and Robert Meisinger were named insureds under said homeowner's policy of insurance

because the bodily injury and property damage at issue did not arise from an "accident" and further that the intentional acts of Meisinger (Travis Meisinger) were specifically excluded through the terms of the Policy.

IT IS FURTHER ORDERED AND ADJUDGED that each party shall be responsible for the payment of their own attorney fees and/or costs.

DATED this 16th day of December, 2009.

BY THE COURT.



District Judge

