

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001300-MR

AMERICAN NATIONAL PROPERTY AND
CASUALTY COMPANY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 01-CI-006600

HARTFORD INSURANCE COMPANY
OF THE MIDWEST

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

BAKER, JUDGE: Appellant, American National Property and Casualty Company ("ANPAC"), brings this appeal from a judgment of the Jefferson Circuit Court entered May 14, 2002. For the following reasons, we affirm.

The facts of this case are straightforward and not the subject of any significant dispute. Willis Stark and Arletta Parr were involved in a motor vehicle accident in Jefferson County on October 2, 1998. Stark brought suit against Parr in

the Jefferson Circuit Court on July 8, 1999, seeking damages for personal injuries sustained in this accident. Parr was insured under a policy providing coverage to her motor vehicle by ANPAC, which undertook her defense in this personal injury litigation.

By an amended complaint, Stark alleged that Parr was within the scope of her employment at the time of the accident and, therefore, joined CT Associates as a party defendant to the personal injury litigation. CT Associates, Parr's employer, was insured by appellee, Hartford Insurance Company of the Midwest ("Hartford"). Hartford retained separate counsel and filed responsive pleadings on behalf of CT Associates denying that Parr was within the scope of her employment on the date, time and place of the accident.

ANPAC, through counsel, actively provided a defense to Parr in the underlying litigation pursuant to the terms and conditions of its policy, maintaining that Parr was in the course of her employment at the time of the accident. Likewise, separate counsel for CT Associates also actively participated in the defense of the personal injury litigation, said defense having the effect of protecting the interests of Hartford's insured, and, as previously stated, taking the position that Parr was not in the course of her employment at the time of the accident.

Ultimately, the personal injury action proceeded through trial with a verdict which assigned fifty percent of the fault to each of the drivers. The trial court ruled as a matter of law that Parr was within the course and scope of her employment at the time of the accident. ANPAC has satisfied the money judgment in favor of the plaintiff, Willis Stark, in full.

Hartford subsequently brought suit against ANPAC, claiming that it is entitled to be reimbursed for its defense costs incurred in the underlying litigation. Both parties filed cross-motions for summary judgment in the Jefferson Circuit Court, with the trial court ultimately awarding Hartford in excess of \$19,000.00 in defense costs, plus interest. ANPAC appeals from this judgment.

Every policy of insurance imposes two basic duties: (1) the duty to provide a defense to the insured; and (2) the duty to indemnify the claims made against the insured pursuant to the terms and conditions of the policy. Thompson v. West American Insurance Co., Ky. App., 839 S.W.2d 579 (1992); Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., Ky., 814 S.W.2d 273 (1991). These duties are separate and distinct from each other. When two or more insureds under the same policy have conflicting interests in the litigation, the insurer must provide separate counsel to each of the insureds. See 14 Couch on Insurance §§ 202:24, 204:25 (3d ed. 1999).

Thus, as an insured under the ANPAC policy, Parr was clearly entitled to a defense in the personal injury litigation which Stark brought against her in the Jefferson Circuit Court. ANPAC provided this defense at its own cost. Stark further alleged that Parr was in the course and scope of her employment at the time of the accident in issue, this allegation having been made by way of an amended pleading which effectively joined CT Associates to the litigation. This allegation triggered the duty to defend provision in the ANPAC policy under the omnibus provision to provide a defense for qualified parties, such as CT Associates, Parr's employer. The duty to defend is implicated when there is made "any allegation which potentially, possibly, or might come within the coverage of the policy. The insurance company must defend any suit in which the language of the complaint would bring it within the policy coverage regardless of the merit of the action." Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., Ky., 814 S.W.2d 273, 279 (1991). It also triggered the duty to defend under the Hartford policy, regardless of the position maintained by CT Associates and Hartford, as its insurer, that Parr was not within the scope of her employment at the time of the accident. It is undisputed that Hartford tendered this defense to ANPAC and that ANPAC rejected the tender.

The trial court correctly noted that whether or not Parr was in the scope of her employment of CT Associates at the time of the accident did not relieve ANPAC of its obligation to provide a defense for CT Associates. Circuit Court Opinion and Order at 4. While ANPAC, through counsel, provided a defense to Parr and subsequently satisfied the entirety of the judgment, the inquiry does not end here. The ultimate issue is whether or not ANPAC must provide separate -- or alternative -- defenses to CT Associates, one of which, if successful, would necessarily result in a finding that CT Associates, the employer, was not an "insured person" under the policy.

The quandary presented in this case is that the omnibus provision of the ANPAC policy requires that it provide a defense to "any other person or organization which does not own or hire your insured vehicle but is liable for its use by an insured person." CT Associates is only liable for the use of Parr's vehicle if Parr was in the course and scope of her employment at the time of the accident. Parr, through her ANPAC counsel, maintained that she was, and the defense provided by ANPAC was consistent with this position. CT Associates, however, maintained through trial that Parr was not in the course and scope of her employment; yet, it insists that ANPAC provide a separate defense to CT Associates at ANPAC's cost.

The trial court resolved this conflict as a matter of law in favor of Parr.

We hold that ANPAC is required to provide two separate, alternative defenses at its cost, even one of which, if successful, would ultimately result as being beneficial to a "person or organization" which is found not to be an "insured person" under the terms and conditions of the policy, as it is not the resolution of this issue which governs the duty to defend, but the allegation in the complaint which triggers the contractual obligation. The defense that ANPAC did provide was clearly for the benefit of Parr, but it did not protect the interests of CT Associates, Parr's employer, as an insured under the omnibus clause of the policy, as was alleged in Starks' amended complaint. Given Hartford's tender and ANPAC's rejection, Hartford was well within its rights to seek reimbursement of the defense costs expended on behalf of its insured, CT Associates. Because ANPAC would not assume the defense of CT Associates, Hartford, as the excess insurer, has a right to reimbursement for costs as a result of assuming the defense. See Truck Insurance Exchange v. Century Indemnity Co., 76 Wn. App. 527, 887 P.2d 455, 458 (Wash. App. 1995). A separate jurisdiction has held that "an excess or secondary carrier is entitled to reimbursement for its defense expenses from the primary carrier who 'has wrongfully refused to defend

the assured.' This rule accords with the great weight of authority." Rooney v. Township of West Orange, 200 N.J. Super. 201, 491 A.2d 23, 25-26 (N.J. App. 1985). We view this decision as persuasive.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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