2016 IL App (2d) 151135-U
No. 2-15-1135
Order filed August 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FOUNDERS INSURANCE COMPANY, Plaintiff-Appellant, v. THE TANK, PIAGENTINI TAVERNS, INC., d/b/a The Tank, RAFAEL AGUILAR, HECTOR GARCIA, and TARA TONYAN Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 11-MR-132 Honorable Diane E. Winter, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying plaintiff summary judgment and granting it to defendants: plaintiff had no duty to defend defendants in the underlying suit, as the underlying plaintiff alleged that defendants were liable for a battery, and batteries were specifically excluded from coverage.

¶ 2 Plaintiff, Founders Insurance Company, sought a declaratory judgment that it had no duty to defend defendants The Tank and Piagentini Taverns, Inc. (hereafter collectively "Tank") in a lawsuit filed against Tank by defendant Rafael Aguilar. Aguilar alleged that he was the victim of a battery committed by defendant Hector Garcia, which Tank's employees negligently failed

to prevent. The trial court ruled that plaintiff's policy potentially covered the underlying complaint's allegations that Tank negligently trained its employees. Plaintiff appeals, contending that the policy does not cover claims of assault and battery regardless of the precise legal theory pursued. We reverse.

¶ 3 The underlying complaint alleged that on October 5, 2008, Garcia struck Aguilar while they were on Tank's premises. Count I was brought under the Dramshop Act (235 ILCS 5/6-21 (West 2008)). Count II alleged negligence. Specifically, it alleged that, within two hours of Garcia's attack on Aguilar, Garcia had threatened and accosted a number of people, including Aguilar, and that multiple fights had occurred on Tank's premises. In fact, as Aguilar and others were leaving, Tank's bouncer was restraining Garcia from leaving the premises. However, the bouncer learned that a fight was occurring in another portion of the tavern, so he turned his attention from Garcia to the other fight, allowing Garcia to follow Aguilar outside the bar and attack him. The complaint further alleged that Garcia pleaded guilty to aggravated battery as a result of the incident.

¶ 4 Aguilar alleged in relevant part that Tank was negligent for (1) failing to take reasonable steps to ensure the safety of its patrons; (2) failing to remove Garcia from the premises; (3) failing to employ an adequate number of security staff; and (4) failing to properly train its security staff.

¶ 5 Plaintiff filed a complaint seeking a declaration that its policy did not cover the battery on Aguilar. The complaint included a copy of plaintiff's policy, which provides that it does not apply to " '[b]odily injury' or 'property damage' expected or intended from the stand point of the insured." Further, an endorsement to the policy excludes coverage for:

"8. Assault and/or Battery/Negligent Hiring

> 'Bodily injury', 'property damage', or 'personal and advertising injury' arising from:
>
> (a) assault and/or battery committed by any insured, any 'employee' of an insured, or any other person;
>
> (b) The failure to suppress or prevent assault and/or battery by any person in subparagraph 8(a) above;
>
> (c) The selling, serving or furnishing of alcoholic beverages which result [*sic*] in an assault and/or battery; or
>
> (d) The negligent:
>
> (1) Employment;
>
> (2) Investigation;
>
> (3) Supervision;
>
> (4) Reporting to the proper authorities, or failure to so report; or
>
> (5) Retention
>
> by a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by subparagraphs 8.(a) through 8.(c) above."

¶ 6 Plaintiff moved for summary judgment, arguing that the exclusions for "expected or intended" injuries; assault and battery; and negligent employment, investigation, and supervision precluded coverage. Aguilar responded that his complaint included allegations that Tank negligently failed to train its employees and that the exclusions in subparagraph 8(d) did not mention training. The trial court denied the motion, holding that the exclusions for negligence did not explicitly mention training.

¶ 7 Plaintiff moved to reconsider, arguing that Illinois law does not recognize a general duty to train employees. The trial court denied the motion to reconsider.

¶ 8 Aguilar then moved for summary judgment, contending that the court's ruling that the policy did not exclude coverage for failing to train employees was dispositive, that no factual issues remained, and that Aguilar was entitled to judgment as a matter of law on that issue.

¶ 9 On October 14, 2015, the trial court granted the motion. The court found that the policy covered allegations regarding the failure to train employees, but excluded coverage for all other allegations of negligence. On November 10, 2015, the court subsequently found that "Rule 304(A) is appropriate" and that there was "no just reason for the delay on appeal from this order." Founders filed a notice of appeal on November 13, 2015.

¶ 10 Founders argues that the trial court erred in holding that the policy covers Aguilar's negligent-training claim. Founders contends that subparagraph 8(b) of the endorsement unequivocally excludes coverage for the "failure to suppress or prevent assault and/or battery by any person" and that the failure specifically to include "train[ing]" in subparagraph 8(d) is thus irrelevant. We agree.

¶ 11 When interpreting an insurance policy, the court's primary goal is to effectuate the parties' intent as expressed in their agreement. *Metzger v. Country Mutual Insurance Co.*, 2013 IL App (2d) 120133, ¶ 25. If the policy is clear and unambiguous, it must be given its plain and ordinary meaning and enforced as written, unless to do so would violate public policy. *Id.* Any ambiguity in the policy's language must be resolved against the insurer, which drafted it. *Id.* In addition, any provision in a policy limiting or excluding coverage must be construed liberally in favor of the insured and against the insurer. *Id.* The construction of an insurance policy is a

question of law, which we review *de novo*. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004).

¶ 12 Here, subparagraph 8(b) states that the policy excludes coverage for the "failure to suppress or prevent assault and/or battery by any person." The plain meaning of this provision is that Founders will not cover the failure to prevent a battery. This exclusion is not limited to any particular legal theory. Aguilar's negligence count (the dramshop count is not at issue here) alleges in essence that Tank's employees failed to prevent Garcia from battering him. Thus, subparagraph 8(b) excludes coverage, regardless of the specific theory alleged.

¶ 13 Citing *Smith v. Moran*, 61 Ill. App. 2d 157 (1965), and *Grinnell Mutual Reinsurance Co. v. Frierdich*, 79 Ill. App. 3d 1146 (1979), Aguilar argues that the policy excludes coverage only for an intentional act and that, because the aggravated-battery statute (720 ILCS 5/12-3.05(a) (West 2012)) includes a mental state of "knowingly," it is possible that Garcia's act was not intentional. He cites deposition testimony that Garcia was extremely intoxicated and postulates that Garcia might not have been able to form the specific intent to batter Aguilar.

¶ 14 *Smith* and *Grinnell* are distinguishable because they relied on different policy language than that at issue here. In *Smith*, the policies excluded coverage for injuries " 'caused intentionally by or at the direction of the Insured.' " *Smith*, 61 Ill. App. 2d at 159. There, the underlying defendant shot at one person but missed and hit another. This court held that the exclusion did not apply to those facts, because the underlying defendant did not specifically intend to injure the victim. We held that "there is a distinction between an intentional act and an intentionally caused injury." *Id.* at 163. *Grinnell* followed *Smith*, holding that the intentional-act exclusion did not apply to the unintended result of an intentional act. *Grinnell*, 79 Ill. App. 3d at 1148-50.

¶ 15 Here, the policy language does not refer to an intentional act. The exclusion applies to "assault and/or battery committed by any insured *** or any other person." Application of the exclusion does not depend upon the perpetrator's mental state or whether Aguilar was the intended victim. Aguilar's complaint alleges that Garcia struck him and that Garcia later pleaded guilty to aggravated battery. Thus, Garcia committed a battery on Aguilar and the exclusion applies regardless of Garcia's mental state.

¶ 16 The judgment of the circuit court of Lake County is reversed.

¶ 17 Reversed.