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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VINCENT SUTTON, Plaintiff and Appellant, v. INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B198855 (Los Angeles County Super. Ct. No. BC341289)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Reversed.

Golob, Bragin & Sassoe and Albert L. Sassoe, Jr., for Plaintiff and Appellant.

Inglis, Ledbetter & Gower, Richard S. Gower and Gregory J. Bramlage for Defendant and Respondent.

The question on this appeal is whether an intentional act by an insured, taken in self-defense, may qualify as an "accident" for purposes of an insurance policy written to provide defense and indemnification for the insured. The answer is yes; the trial court erred in ruling that it cannot. Consequently, the ensuing judgment for the insurer, based on its successful motion for summary judgment, must be reversed.[1]

The appellant in this case, Vincent Sutton (Sutton), was insured under a homeowners policy issued by respondent Insurance Exchange of the Automobile Club of Southern California (Auto Club). The appeal arises from Auto Club's successful motion for summary judgment against Sutton in his suit for breach of the insurance contract and the implied covenant of good faith and fair dealing.

FACTUAL AND PROCEDURAL SUMMARY

Most of the factual background in this case is undisputed, and resolution of the issue does not depend on the facts that are disputed. The undisputed facts show that on December 31, 2004, Vincent Sutton and his wife attended a New Year's Eve party at the home of their longtime friends, Sherrill and Judy Sipes. While at the party Sutton made a joke at which some other guests took offense. Angry words were exchanged between them and Sutton. Richard Skinner, one of the offended guests, was among those who made insulting remarks to Sutton. Sutton and his wife left the Sipes home, but Sutton soon decided to return. According to him, he did so because he had not said goodbye to the hosts. According to Auto Club, Sutton returned because he resented being thrown out of the party by Skinner. The two men encountered each other inside the house. Skinner is a large man, 6 feet 7 inches tall and weighing close to 300 pounds, and was "imposing." According to Sutton, as he entered the kitchen, Skinner approached and grabbed for Sutton's throat. A witness said Sutton made an insulting remark to Skinner, who then lunged with his right hand toward Sutton's throat. As this was happening,

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[1] The issue presented is before the California Supreme Court in two cases, *Delgado v. Interinsurance Exchange, etc.* (S155129), and *Jafari v. EMC Insurance Co.* (S157924).

Sutton punched Skinner in the face. In an earlier version, Sutton accepted Mr. Sipes's recounting of the encounter in which Mr. Sipes said Sutton struck Skinner with an outstretched arm. Sutton later repeated that version to several others, including an Auto Club person who questioned him. A later version by Sutton, supported by some witnesses, is that Skinner struck him in the chest, after which he hit Skinner. Skinner fell to the floor, striking his head on cabinets and hardware as he fell. Sutton's final version is that he reacted instinctively in striking Skinner to keep Skinner away.

From the first to the last, Sutton maintained that he acted instantaneously and in self-defense. Sutton received a letter from Skinner's attorneys, threatening suit. He proffered the letter to Auto Club. Skinner and his wife then filed suit against Sutton, asserting causes of action for negligence and intentional tort. Sutton tendered the lawsuit to Auto Club for defense and indemnification under his homeowners policy. Auto Club investigated the claim, determined that Sutton's act in striking Skinner was not accidental, and declined to defend or indemnify. Sutton financed the defense of the Skinner suit with his own funds and eventually settled that litigation.

Sutton's suit against Auto Club for breach of contract and breach of the implied covenant of good faith and fair dealing was met by Auto Club's motion for summary judgment. Auto Club argued that Sutton's act in striking Skinner was deliberate, hence not accidental, and not covered by the policy. In its ruling, the trial court recounted the factual assertions of the parties and concluded that there was no potential for coverage under the policy, and hence no duty to defend. It explained:

"The policy language has specific limitations on coverage for bodily injury by each occurrence. 'Occurrence means by accident . . . which results in bodily injury.' Defendant takes the position that the altercation between the parties was an intentional act and not an accident and thus outside the coverage.

". . . . . .

"The court finds there are no disputed issues of material facts and the Motion for Summary Judgment is granted as a matter of law.

"The court finds there is no potential for coverage under the policy for an intentional act. The reading of the policy and the undisputed facts show no possibility for coverage. Sutton's striking of Skinner whether as an aggressor or in self defense was an intentional act and under the policy is not an accident. An accident being an unintended act.

". . . . . .

"The provisions of the insurance policy are not ambiguous. The contact between Sutton and Skinner was clearly intentional."

Judgment was entered in favor of the Auto Club and against Sutton, and Sutton filed a timely notice of appeal.

DISCUSSION

Auto Club is entitled to summary judgment if there are no issues of material fact which, if established, would support a cause of action in favor of Sutton. (Code Civ. Proc, § 437c, subds. (c), (p)(2), *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) It is not disputed that there is a triable issue of material fact whether Sutton's actions were taken in self-defense, out of concern over an actual or impending attack by Skinner. Auto Club's position, which was accepted by the trial court and is advanced here, is that even if Sutton was acting in self-defense, his act in striking Skinner was deliberate and intentional, and hence could not be accidental. And since it was not, it was not an "occurrence" under the insuring provision of the policy.

That clause promises to pay damages for which the insured is legally liable, and to defend the insured against claims for damages, for "bodily injury or property damage caused by an occurrence to which this coverage applies." An "occurrence" "means an accident." The latter term is not defined. The policy excludes coverage for acts of the insured that are taken with the intent to produce bodily injury, or which could reasonably be expected to do so, and criminal acts of the insured.

We begin with a fundamental principle of insurance law: the duty to defend is broader than the duty to indemnify; the latter is broad but the former is "broader still."

(*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 958; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1080; see generally, Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2007) ¶ 7:500.) In this case, Skinner's lawsuit alleged not only an intentional battery by Sutton but also negligent infliction of injury by him. The most obvious, if not the only, basis for negligence in this case is that Sutton's actions, in self-defense, were unnecessary or excessive. In either case, they fall within the insuring clause as accidental.

The leading authority on the duty of an insured to defend, *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275 (itself a case arising out of an insured's act in self-defense), holds that the carrier must defend a suit which even potentially seeks damages within the coverage of the policy, including cases where the third party's complaint might be amended to give rise to a covered liability. And "[a]ny doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 299, 300.)

While it is true, as Auto Club points out, that the Skinner lawsuit did not allege that Sutton was acting in self-defense, the insurer-defendant "cannot construct a formal fortress of the third party's pleadings and retreat behind its walls." (*Gray v. Zurich Insurance Co.*, *supra*, 65 Cal.2d at p. 276.) This duty "should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources. An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." (*Ibid.*)

Here, Sutton's claim is that the actions he took with respect to Skinner were taken in self-defense, not for the purpose of harming Skinner or out of malice. The circumstance that a partygoer would take offense at some remark by Sutton and act in such a way as to actually or apparently threaten violence to Sutton was "accidental" as to Sutton. As the *Gray* court described a similar situation, the plaintiff in that case "might have been able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit willful and intended injury, but

engaged only in nonintentional tortious conduct." (*Gray v. Zurich Insurance Co., supra,* 65 Cal.2d at p. 277.) And as pointed out in a later case, "It is now settled that injuries resulting from acts committed by an insured in self-defense are not 'intended' or 'expected' within the meaning of those terms as customarily used in an exclusionary clause . . . ." (*Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 170.)

The term "accident," where, as here, it is not defined in the policy, should be given a common-sense meaning: an "unintentional, unexpected, chance occurrence." (*St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 161 Cal.App.3d 1199, 1202.) "[A]n 'accident' exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity." (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50.)

Thus, under the facts claimed by Sutton, his claim of conduct taken in self-defense, was within the common understanding of "accident." The situation is unlike cases in which the insured's acts were so inherently harmful that coverage was precluded by Insurance Code section 533, such as child molestation and sexual harassment. (See Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra*, ¶ 7:546.) A potential for coverage was established and, since it was, Auto Club was obliged to defend the Skinner lawsuit. Summary judgment should not have been granted against Sutton.

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings. Appellant to have his costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.