
IN THE
Supreme Court of Virginia

RECORD NO. 090345

ADAM CHARLES COPP,

Appellant,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY
and
GREGORY M. JACOBSON,

Appellees.

OPENING BRIEF OF APPELLANT

Frank K. Friedman (VSB #25079)
friedman@woodsrogers.com
Mark D. Loftis (VSB #30285)
loftis@woodsrogers.com
WOODS ROGERS PLC
10 South Jefferson Street, Suite 1400
Post Office Box 14125
Roanoke, Virginia 24038-4125
(540) 983-7600
(540) 983-7711 (Facsimile)

Counsel for Appellant

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	i-iii
OPENING BRIEF OF APPELLANT	1
ASSIGNMENTS OF ERROR	1
1. The Circuit Court Erred in Failing to Consider and Apply the Exception in Nationwide’s Personal Umbrella Policy, Which Provides That the Exclusion Relied on by Nationwide “does not apply to bodily injury or property damage caused by an insured trying to protect person or property.”	1
A. The Circuit Court Erred in Failing to Consider the Witness Testimony Which Conclusively Established That Copp Was “trying to protect person or property.”	1
B. The Circuit Court Erred in Failing to Place the Burden on Nationwide to Prove That Copp Was Not “trying to protect person or property.”	1
2. The Circuit Court Erred in Refusing to Consider Facts Outside the Pleadings That Were Known to Nationwide, and That Were Placed Into Evidence by Nationwide, Which Supported Coverage and Obligated Nationwide to Provide a Defense.....	1
3. The Circuit Court Erred in Holding There Was No Theory of Recovery in the Underlying Tort Action That Would be Covered Under Either of Nationwide’s Insurance Policies, and That Nationwide Therefore Owed No Duty to Defend.	1
STATEMENT OF THE CASE	1
ISSUES PRESENTED	6

I.	Whether the Circuit Court Erred in Failing to Consider and Apply the Exception in Nationwide’s Personal Umbrella Policy Which Provides That the Intentional Acts Exclusion “does not apply to bodily injury... caused by an insured trying to protect person or property”? ..	6
II.	Even if There is No General Exception to the “Eight Corners” Rule Where the Insurance Policy Expressly Provides Coverage for Intentional Acts Taken in Self-Defense, Whether the Circuit Court Erred in Refusing to Consider Facts Outside the Pleadings That Were Known to Nationwide and Placed Into Evidence By Nationwide and Which Supported Coverage? ..	6
III.	Whether the Circuit Court Erred in Holding There Was No Theory of Recovery in the Underlying Tort Action That Would Be Covered Under Either of Nationwide’s Insurance Policies, and That Nationwide Accordingly Owed No Duty to Defend? ..	6
	STATEMENT OF FACTS ..	7
A.	Underlying Facts Of Incident.	7
B.	The Resulting Charges.....	11
C.	The Exclusions in Nationwide’s Policies.....	11
D.	Exception to Exclusion in Personal Umbrella Policy For Acts Taken In Self-Defense.....	13
	ARGUMENTS AND AUTHORITIES.....	14
I.	THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER AND APPLY THE EXCEPTION IN NATIONWIDE’S PERSONAL UMBRELLA POLICY, WHICH PROVIDES THAT THE EXCLUSION RELIED ON BY NATIONWIDE “DOES NOT APPLY TO BODILY INJURY OR PROPERTY DAMAGE CAUSED BY AN INSURED TRYING TO PROTECT PERSON OR PROPERTY.” ..	14
A.	The Circuit Court Was Required to Look Outside the Motion for Judgment to Determine Whether Copp Had a Viable Claim	

of Self-Defense, and the Uncontradicted Evidence Established that a Jury Could Find That He Was Acting in Self-Defense.....	16
B. The Circuit Court Improperly Relieved Nationwide of Its Burden to Prove the Applicability of the Exclusion in its Personal Umbrella Policy.	21
II. EVEN IF THE COURT DOES NOT RECOGNIZE A GENERAL EXCEPTION TO THE “EIGHT CORNERS” RULE WHERE THE POLICY EXPRESSLY PROVIDES COVERAGE FOR INTENTIONAL ACTS TAKEN IN SELF-DEFENSE, THE CIRCUIT COURT NONETHELESS ERRED IN REFUSING TO CONSIDER FACTS OUTSIDE THE MOTION FOR JUDGMENT THAT WERE KNOWN TO NATIONWIDE, AND THAT WERE PLACED INTO EVIDENCE BY NATIONWIDE, WHICH SUPPORTED COVERAGE AND OBLIGATED NATIONWIDE TO PROVIDE A DEFENSE.....	24
III. THE CIRCUIT COURT ERRED IN HOLDING THERE WAS NO THEORY OF RECOVERY IN THE UNDERLYING TORT ACTION THAT WOULD BE COVERED UNDER EITHER OF NATIONWIDE’S INSURANCE POLICIES, AND THAT NATIONWIDE THEREFORE OWED NO DUTY TO DEFEND.....	26
CONCLUSION.....	30
CERTIFICATE OF SERVICE.....	31

TABLE OF AUTHORITIES

VIRGINIA CASES

<i>Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C.</i> , 269 Va. 315, 609 S.E.2d 49 (2005)	14
<i>Bituminous Cas. Corp. v. Sheets</i> , 239 Va. 332, 389 S.E.2d 696 (1990)	21
<i>Brenner v. Lawyers Title Ins. Corp.</i> , 240 Va. 185, 397 S.E.2d 100 (1990)	17
<i>Chodorov v. Eley</i> , 239 Va. 528, 391 S.E.2d 68 (1990)	20
<i>Citizens Home Ins. Co. v. Nelson</i> , 218 Va. 216, 237 S.E.2d 100 (1977)	28
<i>Economopoulos v. Kolaitis</i> , 259 Va. 806, 528 S.E.2d 714 (2000)	25
<i>Eure v. Norfolk Shipbuilding & Drydock Corp.</i> , 263 Va. 624, 561 S.E.2d 663 (2002)	14
<i>Floyd v. Northern Neck Ins. Co.</i> , 245 Va. 153, 427 S.E.2d 193 (1993)	15, 21
<i>Granite State Ins. Co. v. Bottoms</i> , 243 Va. 228, 415 S.E.2d 131 (1992)	23
<i>Heron v. Transportation Cas. Ins. Co.</i> , 274 Va. 534, 650 S.E.2d 699 (2007)	16, 22
<i>Infant C v. Boy Scouts of America, Inc.</i> , 239 Va. 572, 391 S.E.2d 322 (1990)	28
<i>Johnson v. Insurance Co. of North America</i> , 232 Va. 340, 350 S.E.2d 616 (1986)	17-18, 28

<i>Norman v. Insurance Co. of America</i> , 218 Va. 718, 239 S.E.2d 902 (1978)	28-29
<i>PMA Capital Ins. Co. v. U.S. Airways, Inc.</i> , 271 Va. 352, 626 S.E.2d 369 (2006)	7, 14, 22
<i>Selected Risks Ins. Co. v. Dean</i> , 233 Va. 260, 355 S.E.2d 579 (1987)	20
<i>Smith v. New Dixie Lines</i> , 201 Va. 466, 111 S.E.2d 434 (1959)	20
<i>Transcontinental Insurance Co. v. RBMW, Inc.</i> , 262 Va. 502, 551 S.E.2d 313 (2001)	21
<i>Travelers Indemnity Co. v. Obenshain</i> , 219 Va. 44, 245 S.E.2d 247 (1978)	28
<i>Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.</i> , 270 Va. 566, 621 S.E.2d 114 (2005)	14
<i>Wilson v. Holyfield</i> , 227 Va. 184, 313 S.E.2d 396 (1984)	14

OTHER CASES

<i>Acceptance Ins. Co. v. Brown</i> , 832 So.2d 1 (Ala. 2001)	22
<i>Allstate Ins. Co. v. Novak</i> , 210 Neb 184, 313 N.W.2d 636 (1981)	27
<i>Allstate Ins. Co. v. Justice</i> , 229 Ga. App. 137, 493 S.E.2d 532 (1997)	27
<i>Atlantic Permanent Fed. Sav. & Loan v. Amer. Cas. Co.</i> , 839 F.2d 212 (4th Cir. 1988), <i>cert. denied</i> , 486 U.S. 1056 (1988)	28
<i>Capital Environmental Services, Inc. v. North River Ins. Co.</i> , 536 F. Supp. 2d 633 (E.D. Va. 2008)	25

<i>Clarendon Amer. Ins. Co. v. Embers, Inc.</i> , 273 F.3d 1107 (5th Cir. 2001)	22
<i>Cochran v. Aetna Cas. & Surety Co.</i> , 637 A.2d 509 (Md. App. 1994), <i>aff'd</i> , 651 A.2d 859 (Md. 1995).....	16, 18
<i>Deakyne v. Selective Ins. Co. of America</i> , 728 A.2d 569 (Del. Super. Ct. 1997)	27
<i>Esi-corp, Inc. v. Liberty Mut. Ins. Co.</i> , 193 F.3d 966 (8th Cir. 1999)	25
<i>Fire Ins. Exchange v. Berray</i> , 143 Ariz. 361, 694 P.2d 191 (1984).....	27
<i>Marshall's U.S. Auto Supply v. Maryland Cas. Co.</i> , 354 Mo. 455, 189 S.W.2d 529 (1945).....	25
<i>Metcalf Bros., Inc. v. American Mutual Liability Ins. Co.</i> , 484 F. Supp. 826 (W.D. Va. 1980)	25
<i>Mullen v. Glens Falls Ins. Co.</i> , 73 Cal. App. 3d 163, 140 Cal. Rptr. 605 (5th Dist. 1977).....	27
<i>State Farm Fire and Cas. Co. v. Marshall</i> , 554 So. 2d 504 (Fla. 1989).....	27
<i>Stoebner v. South Dakota Farm Bureau Mut. Ins. Co.</i> , 1999 S.D. 106, 598 N.W.2d 557 (S.D. 1999).....	27
<i>Vermont Mut. Ins. Co. v. Singleton By & Through Singleton</i> , 316 S.C. 5, 446 S.E.2d 417 (1994).....	27

STATUTES, RULES & REGULATIONS

Rule 5:26(d).....	31
Va. Code § 8.01-681	20
Va. Code § 18.2-57	11

OPENING BRIEF OF APPELLANT

ASSIGNMENTS OF ERROR

1. The Circuit Court Erred in Failing to Consider and Apply the Exception in Nationwide's Personal Umbrella Policy, Which Provides That the Exclusion Relied on by Nationwide "does not apply to bodily injury or property damage caused by an insured trying to protect person or property."
 - A. The Circuit Court Erred in Failing to Consider the Witness Testimony Which Conclusively Established That Copp Was "trying to protect person or property."
 - B. The Circuit Court Erred in Failing to Place the Burden on Nationwide to Prove That Copp Was Not "trying to protect person or property."
2. The Circuit Court Erred in Refusing to Consider Facts Outside the Pleadings That Were Known to Nationwide, and That Were Placed Into Evidence by Nationwide, Which Supported Coverage and Obligated Nationwide to Provide a Defense.
3. The Circuit Court Erred in Holding There Was No Theory of Recovery in the Underlying Tort Action That Would be Covered Under Either of Nationwide's Insurance Policies, and That Nationwide Therefore Owed No Duty to Defend.

STATEMENT OF THE CASE

Nationwide Mutual Insurance Company ("Nationwide") filed this declaratory judgment action seeking a declaration that it owed no duty to defend or indemnify Adam Charles Copp ("Copp") in a tort action filed against him by Gregory M. Jacobson ("Jacobson").

The case involves application of the “eight corners” rule under which a court generally looks to the four corners of both the applicable insurance policy and the plaintiff’s complaint to determine whether the claims asserted fall within the policy’s coverage – and, therefore, whether the insurer has a duty to defend against the claims. However, where (as here) a plaintiff alleges an assault, and the defendant claims to have acted in self-defense, the plaintiff’s complaint cannot be expected to set forth allegations that would establish the defendant’s affirmative defense of self-protection. Thus, in the context of an insurance policy that provides coverage for acts taken in self-defense (as one of the policies at issue here expressly does), it is imperative that the court look beyond the “eight corners” to determine whether there is a valid claim of self-defense entitling the insured to coverage. Here, despite Copp’s assertion that the Circuit Court must consider evidence demonstrating that self-defense was validly at issue (J.A. 71, 258-63), the Circuit Court refused to do so. It accordingly ruled that, because the underlying suit alleged an “intentional act” by Copp, there was no coverage available and that Nationwide thus had no duty to defend. (J.A. 68.)

The underlying tort action arose out of an altercation that developed outside Copp’s apartment following Copp’s request that certain individuals

leave the apartment. Jacobson – who was not initially involved in the dispute but approached after it began – claims to have been injured in the altercation. Copp asserted self-defense as an affirmative defense to Jacobson's legal claims (J.A. 260-61) and at all times asserted that any injury occurred accidentally and as a result of his efforts to free himself from two individuals who were accosting him. (*Id.*, see *infra* at pp. 8-10.)

One of the Nationwide insurance policies covering Copp contained a provision expressly extending coverage to him for intentional acts taken in self-defense. The policy excludes “intentional acts” from coverage *unless* the insured is protecting person or property:

Excess liability and additional coverages do not apply to:

1. bodily injury or property damage intended or expected by the insured. ***This does not apply to bodily injury or property damage caused by an insured trying to protect person or property.***

(J.A. 50, emphasis added.)

Nationwide's Bill of Complaint alleged that it owed Copp no coverage under this policy, asserting that Jacobson's tort claim against Copp fell within the language excluding coverage for “bodily injury or property

damage intended or expected by the insured.” (J.A. 4; J.A. 256-57.)¹

Nationwide also asserted that there was no coverage for Jacobson’s tort claim under a second policy it issued which contained a standard intentional acts exclusion. (J.A. 4.) It therefore sought a declaration that it had no coverage for the claim, and that it thus owed no duty to defend Copp.

Nationwide presented evidence outside the pleadings in an effort to establish the applicability of the referenced exclusions, including transcripts of sworn testimony from Copp and Jacobson. (J.A. 268.) Nationwide argued inferences from prior events in an effort to convince the Circuit Court that Copp’s conduct was “intentional” – and therefore (it argued) not covered under the policies. (J.A. 250-57.)

Copp contended none of the exclusions applied and that he was defending himself from an attack by several individuals when Jacobson was injured. (J.A. 258-63.) He argued that the Court was required to look outside the motion for judgment and the four corners of the policy in order

¹ Nationwide’s Bill of Complaint also pointed to an exclusion in its Personal Umbrella Policy for bodily injury arising out of “a willful violation of a law by...the insured.” (J.A. 4-5.) The Circuit Court noted this exclusion (J.A. 67) but it did not rely upon it.

to determine whether Copp presented a viable claim of self-defense that would entitle him to coverage. (*Id.*)

The Circuit Court of Montgomery County, however, ruled that it would not consider the evidence presented at trial by Nationwide. (J.A. 67-68.) Rather, the Circuit Court looked solely to the allegations in Jacobson’s Motion for Judgment and held that based on these allegations the action sought recovery “for an intentional act” and that Jacobson could only prevail “by proving [Copp] intentionally inflicted this injury upon him.” (J.A. 68.)² Ignoring the policy language extending coverage for intentional acts where an insured is trying to “protect person,” the Circuit Court stated that “Based upon the language in the insurance contract and the pleadings as

² According to the Circuit Court:

Paragraph 7 of Count I specifically states, “the defendant willfully and intentionally hit the Plaintiff which caused him to lose consciousness”. Count II, paragraphs 3 and 9 of the plaintiff’s motion for judgment specifically states “the defendant willfully and intentionally hit the Plaintiff which caused him to lose consciousness”, “that as a result of the Defendant’s willful, malicious and intentional actions, punitive damages are required.” These are the allegations and the claims set forth by [Jacobson] against [Copp] in the underlying tort action.

(J.A. 68.)

set forth, the court finds that Nationwide is not obligated to defend [Copp] in the underlying tort claim.” (J.A. 68.)

This appeal followed. As of this date, the underlying personal injury action against Copp has not yet been tried.

ISSUES PRESENTED

- I. Whether the Circuit Court Erred in Failing to Consider and Apply the Exception in Nationwide’s Personal Umbrella Policy Which Provides That the Intentional Acts Exclusion “does not apply to bodily injury...caused by an insured trying to protect person or property”? (Relating to Assignments of Error 1, 1A and 1B)
- II. Even if There is No General Exception to the “Eight Corners” Rule Where the Insurance Policy Expressly Provides Coverage for Intentional Acts Taken in Self-Defense, Whether the Circuit Court Erred in Refusing to Consider Facts Outside the Pleadings That Were Known to Nationwide and Placed Into Evidence By Nationwide and Which Supported Coverage? (Relating to Assignment of Error 2)
- III. Whether the Circuit Court Erred in Holding There Was No Theory of Recovery in the Underlying Tort Action That Would Be Covered Under Either of Nationwide’s Insurance Policies, and That Nationwide Accordingly Owed No Duty to Defend? (Relating to Assignment of Error 3)

STATEMENT OF FACTS

The Circuit Court did not make any factual findings or rely on any of the evidence presented by Nationwide. (J.A. 67-68.) Rather, it based its ruling solely on its reading of the language of Nationwide's policies and certain allegations contained in Jacobson's Motion for Judgment. (*Id.*)³ Its ruling is therefore subject to *de novo* review. *PMA Capital Ins. Co. v. U.S. Airways, Inc.*, 271 Va. 352, 357-358, 626 S.E.2d 369, 372 (2006). As explained *infra* at pp. 8-10, however, the relevant facts are undisputed because only Copp was able to describe the incident.

A. Underlying Facts Of Incident.

Jacobson's Motion for Judgment in the underlying tort action (J.A. 8-11) contains only a brief, vague description of what allegedly occurred. It alleges, in conclusory fashion, that Copp "willfully and intentionally hit the Plaintiff." (J.A. 9.) In a wholly separate paragraph, Jacobson then alleges that Copp's actions were "unjustified" and "malicious." (*Id.*) Significantly, Count I of the Motion for Judgment seeks **only** compensatory damages for

³ Nationwide's Brief in Opposition to Copp's Petition for Appeal implicitly – and erroneously – suggests that the Circuit Court made factual findings in its favor. (Brief in Opposition, pp. 7, 11.) Even though Nationwide consistently urged the Circuit Court to rule in its favor by pointing to extrinsic evidence it introduced (J.A. 250-57), the court did not do so.

injuries suffered “as a result of the hit to Plaintiff’s eye.” (J.A. 8-9.) Count II of the Motion for Judgment repeats the underlying factual allegations and then – by contrast – seeks punitive damages “as a result of the Defendant’s willful, malicious and intentional actions.” (J.A. 9-10.)

Nationwide offered evidence at trial in an effort to establish the applicability of the exclusions on which it was relying. (J.A. 268.) The sworn witness testimony offered by Nationwide establishes conclusively that Copp acted out of fear for his own personal safety and in an effort to protect his person, and that Copp did not intentionally hit or strike Jacobson or intend any harm to him.

Significantly, the sworn testimony from Copp was ***the only evidence of what occurred***. Jacobson testified that he did not see Copp take a swing at him or throw a punch at him, and did not know how he was struck. (J.A. 226-27, 237.) No other witness testimony was offered.

According to Copp, he had asked another individual, Carson Dugger, to leave his apartment and had then escorted him outside. (J.A. 88-89, 164-65, 167.) When Mr. Dugger remained outside Copp’s apartment, Copp went back outside to get Mr. Dugger to leave the area. (J.A. 90, 176-77.) When Copp came out of his apartment into the breezeway, there were three males between him and Mr. Dugger. (J.A. 90, 179.) Two of these

individuals then grabbed Copp and restrained him. (J.A. 180.) As Copp described it, they were “pushing and holding and twisting my arm” and they then “started to wrestle me against the stairwell” and in fact succeeded in pinning him there. (J.A. 181.) Copp, understandably, was trying to free himself. (*Id.*)

At this point, while his arms were pinned, someone threw a punch at Copp but he was able to duck and dodge it. (J.A. 181-82, 204.) Copp legitimately “felt threatened by the whole situation.” (J.A. 184; see J.A. 85.) He then saw another individual – who he now believes was Jacobson – coming toward him. (J.A. 182-83.) At this point, as Copp testified, “I felt threatened since I had already had a punch thrown at me and had been wrestling with these other individuals.” (J.A. 183.)

Outnumbered, fearing for his own personal safety, and realizing that he needed to free himself, Copp took action to do so:

Once I realized I was outnumbered and one of the individuals, who I couldn't identify, took a swing at me and I was able to dodge his swing, at that time I realized that my safety definitely was in jeopardy and I had to take action somehow to get myself out of the situation.

(J.A. 85.) It was in this effort to free himself that Copp – apparently – struck Jacobson.

And in the process of getting freed, I swung my arm over top of someone's head, and kind of like a swim movement in football. And with that move, that is when I believe I possibly struck Gregory Jacobson unintentionally.

(J.A. 182; see J.A. 93.) Copp's testimony is clear that he was acting out of fear for his own safety; that he was acting to free himself from the individuals who were restraining him; and that he did not intend to hit Jacobson (or anyone else). As he described it, apparently "[M]y arm flailing hit Mr. Jacobson." (J.A. 184.)

Again, Copp's testimony provides the only evidence of what occurred in the crucial moments just before, and at the time when, the incident occurred. Jacobson offered no contradictory testimony. He testified only that he remembered leaving the upstairs apartment and going down the steps, and seeing two people restraining Copp (consistent with Copp's testimony), but that, "A lot after that is very hazy to me." (J.A. 214-15, 240.) Jacobson could not offer any definitive testimony about what occurred once he got downstairs, testifying that, "[T]he next thing I remember is waking up in the ambulance." (J.A. 215.) He did not see Copp take a swing at him or throw a punch at him, and did not know how he was struck. (J.A. 226, 237.) As he testified, "I don't know how he [struck me]. I never saw the punch coming. I don't remember it." (J.A. 237.) He could not offer any

testimony to dispute the pertinent portions of Copp's testimony.⁴ Jacobson further testified that his only factual basis for saying that Copp "intentionally" hit him was, "He did hit me." (J.A. 238.)

B. The Resulting Charges.

Copp was charged with assault and battery under Virginia Code §18.2-57. (J.A. 55.)⁵ He pled no contest to the charge – but testified that he did so based on the very favorable plea arrangement his counsel had negotiated and because of financial and other concerns that caused him to desire a quick resolution. (J.A. 206-07.) No facts or testimony suggested Copp pled no contest because he in fact believed he was guilty.

C. The Exclusions in Nationwide's Policies.

There is no dispute as to the language contained in the two insurance policies issued to Copp's parents and which covered Copp as an

⁴ See J.A. 215-16 (confirming that Copp was being restrained by at least two individuals, and that there were other individuals in the breezeway); J.A. 232-33 (could not deny that Copp's arms were being held); J.A. 233 ("I don't know whether [Copp's arm movements] were directed to anyone personally or if he was just trying to get people to get away from him...."); J.A. 242 (could not deny that a punch was thrown at Copp).

⁵ Nationwide tendered the documents relating to the charge and Copp's plea to the Court as Exhibits at trial. (J.A. 268.)

“insured.”⁶ Both Nationwide’s Golden Blanket Policy and its Personal Umbrella Policy provide coverage for damages for bodily injury that the insured is legally obligated to pay due to an “occurrence” during the policy period. (J.A. 27, Golden Blanket Policy; J.A. 49, Personal Umbrella Policy.) Both policies define an “occurrence” to mean an “accident.” (J.A. 34, Golden Blanket Policy; J.A. 48, Personal Umbrella Policy.) The Golden Blanket Policy contains an exclusion for bodily injury “which is expected or intended by the insured” (J.A. 28) and an amendatory endorsement excludes coverage for bodily injury “caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured’s conduct.” (J.A. 38.) The Personal Umbrella Policy similarly excludes liability for bodily injury “intended or expected by the insured.” (J.A. 50.) The Circuit Court relied on these “intentional acts” exclusions in ruling that Copp was not entitled to coverage under either policy. (J.A. 68.)

⁶ Copp was a college student at Virginia Tech at the time of the events giving rise to the underlying tort claim. (J.A. 82.) Nationwide has never contested that the policies were in effect at the time of the incident, that Copp meets the definition of an “insured” under the policies, and that the policies would in fact provide coverage to Copp for claims of bodily injury resulting from an “occurrence” under the policies.

D. Exception to Exclusion in Personal Umbrella Policy For Intentional Acts Taken In Self-Defense.

In ruling that Copp was not entitled to coverage based on the “intentional acts” exclusions, the Circuit Court wholly ignored the specific exception to the Personal Umbrella Policy’s exclusion for acts taken in self-defense. That exception appears immediately after the language quoted, and relied upon, by the Circuit Court:

Excess liability and additional coverages do not apply to:

1. bodily injury or property damage intended or expected by the insured. ***This does not apply to bodily injury or property damage caused by an insured trying to protect person or property.***

(J.A. 50, emphasis added.) The Personal Umbrella Policy does not incorporate the exclusions from the underlying policy. Rather, it specifically recognizes that it may provide coverage where the underlying policy provides no coverage. (J.A. 49.)⁷

⁷ In such cases, the Personal Umbrella Policy “will pay for damages an insured is legally obligated to pay in excess of the retained limit” – with “retained limit” being defined as either the total amount of the underlying liability insurance **or**, “if the occurrence is not covered by the Required Underlying Insurance but is covered by this policy, a deductible amount shown on the policy’s Declarations.” (J.A. 49.)

ARGUMENTS AND AUTHORITIES

- I. THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER AND APPLY THE EXCEPTION IN NATIONWIDE'S PERSONAL UMBRELLA POLICY, WHICH PROVIDES THAT THE EXCLUSION RELIED ON BY NATIONWIDE "DOES NOT APPLY TO BODILY INJURY OR PROPERTY DAMAGE CAUSED BY AN INSURED TRYING TO PROTECT PERSON OR PROPERTY."

The Circuit Court in its decision quoted and relied on only a portion of the exclusion contained in Nationwide's Personal Umbrella Policy.⁸ The Circuit Court stated that the policy excludes coverage for "bodily injury or property damage intended or expected by the insured." (J.A. 67.) But the

⁸ As this Court has explained:

The interpretation of a contract presents a question of law subject to de novo review. *Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C.*, 269 Va. 315, 324, 609 S.E.2d 49, 53 (2005). "We review questions of law de novo, including those situations where there is a mixed question of law and fact." *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005)... "[W]e have an equal opportunity to consider the words of the contract within the four corners of the instrument itself." *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002) (citing *Wilson v. Holyfield*, 227 Va. 184, 187-88, 313 S.E.2d 396, 398 (1984)).

PMA Capital, 271 Va. at 357-358, 626 S.E.2d at 372.

exclusion in fact contains an exception that the Circuit Court wholly ignored. The Personal Umbrella Policy provides that:

Excess liability and additional coverages do not apply to:

1. bodily injury or property damage intended or expected by the insured. ***This does not apply to bodily injury or property damage caused by an insured trying to protect person or property.***

(J.A. 50, emphasis added.)

Where an exclusion contains an exception, the parts must be construed together. *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 157-58, 427 S.E.2d 193, 196 (1993). Applying the plain meaning of the two sentences above inescapably leads to the result the parties intended: No coverage is available for bodily injury or property damage stemming from acts which the insured intended, or reasonably should have expected, to cause harm **but**, as an exception to this rule, if the insured acts intentionally to protect person or property then resulting bodily injury or property damage will be deemed to arise from an “occurrence” under the policy and coverage will be afforded.⁹

⁹ This is consistent with the rulings from numerous other courts which have held that intentional acts undertaken in self-defense fall within the definition of an “accident,” and thus constitute an “occurrence” for purposes of insurance coverage even in the absence of a self-defense exception. *see infra* at p. 27.

Indeed, other Courts have held that the very purpose of a self-defense exception such as the one found in Nationwide's policy is to provide coverage for certain intentional torts, even if alleged as such, if the actions were taken to protect person or property. See, e.g., *Cochran v. Aetna Cas. & Surety Co.*, 637 A.2d 509, 513-14 (Md. App. 1994) (construing similarly-worded exclusion), *aff'd*, 651 A.2d 859 (Md. 1995).

Moreover, "No word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." *Heron v. Transportation Cas. Ins. Co.*, 274 Va. 534, 539, 650 S.E.2d 699, 702 (2007). In deciding the case based solely on the language in the first sentence of the exclusion, and ignoring the plain language of the exception to the exclusion found in the second sentence, the Circuit Court violated one of the most basic principles of contract construction: the requirement that it construe the policy as a whole.

- A. The Circuit Court Was Required to Look Outside the Motion for Judgment to Determine Whether Copp Had a Viable Claim of Self-Defense, and the Uncontradicted Evidence Established that a Jury Could Find That He Was Acting in Self-Defense.

Nationwide contracted to provide coverage for intentional acts undertaken in self-defense. A determination of whether the insured in fact

was acting (or has a viable claim to have been acting) in self-defense will necessarily require an examination of matters outside the Complaint.

This Court has held in other cases that coverage, and the corresponding duty to defend, under an insurance policy is determined by the terms of the insurance contract and the allegations in the underlying complaint, and that matters raised by the insured in defense normally are not to be considered. *E.g., Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 192, 397 S.E.2d 100, 104 (1990). However, this Court has never addressed an “intentional acts” exclusion including an exception for intentional acts undertaken in self-defense. Notably, this Court did address a similar circumstance in *Johnson v. Insurance Co. of North America*, 232 Va. 340, 350 S.E.2d 616 (1986).

In *Johnson*, the insurer sought a declaration that it had no coverage for a tort claim for injuries suffered in a shooting by a mentally ill insured based on the “intentional acts” exclusion in its policy. On appeal, this Court reviewed the underlying evidence and factual findings of the trial court in determining whether the insured’s act of shooting his friend was in fact covered by the “intentional acts” exclusion. It recited the testimony of two psychiatrists and a forensic psychologist regarding the insured’s mental condition, as well as the insured’s deposition testimony which was

presented into evidence. *Id.* at 342-43, 350 S.E.2d at 617. On a review of the evidence, this Court affirmed the trial court's finding that the insured in fact "was aware of what he was doing and that he intended to cause injury to" his friend. *Id.* at 348, 350 S.E.2d at 621.

Like the issue of whether the mentally ill insured in *Johnson* in fact acted willfully *and* with an intent to injure his friend, the issue of whether Copp was acting in self-defense cannot be determined solely from the face of Jacobson's Motion for Judgment. The insured's affirmative defense of self-defense will seldom (perhaps never) be apparent from the face of the plaintiff's Complaint. See *Cochran v. Aetna Cas. & Surety Co.*, 637 A.2d 509, 513-14 (Md. App. 1993), *aff'd*, 651 A.2d 859 (Md. 1995). Rather, as here, it will be a matter asserted by the insured in defense and determined by the finder of fact at trial. The exception in Nationwide's policy, therefore, compels an exception to the "eight corners" rule.¹⁰

The Circuit Court, however, expressly stated that it reached its conclusion by looking only at the allegations of Jacobson's pleading (J.A. 67-68), thereby ignoring substantial uncontradicted evidence showing that

¹⁰ Nationwide implicitly recognized as much in its arguments below. While paying lip service to the "eight corners" rule, Nationwide introduced extrinsic evidence in an effort to prove its case (J.A. 268) and argued this evidence in urging the Court to rule in its favor. (J.A. 250-57.)

Copp presented a viable claim of self-defense.

Copp's uncontradicted testimony establishes that his actions were reflexive and were undertaken in an effort to free himself from a dangerous situation. Copp was outnumbered and was being restrained by two individuals; a punch had already been thrown at him; he legitimately feared for his safety; and his acts were undertaken in an effort to free himself from danger rather than in an effort to cause injury to another. (*Supra* at pp. 8-10.) The reflexive, defensive move made by Copp is properly classified as one made in self-defense or for self-preservation, and not with any intent to harm Jacobson (or anyone else). His actions would not necessarily be expected to result in harm to another, and certainly cannot be held to have been unreasonable under the circumstances. Copp did not brandish a weapon, and did not even throw a punch toward any of the individuals who were threatening him. Instead, he executed a "football maneuver" which successfully freed him from the individuals who were restraining him. In the course of that maneuver he apparently struck Jacobson, but he did so unintentionally and accidentally.

In the face of this evidence, the Circuit Court nonetheless effectively assumed that Copp was unable to establish his affirmative defense of self-defense. But a jury plainly could accept Copp's defense and conclude

Jacobson's injuries resulted from actions Copp took to defend himself.¹¹ The evidence supporting the claim of self-defense is uncontradicted and was introduced by Nationwide, and this Court therefore can (and should) consider it, Va. Code § 8.01-681, and should reverse the Circuit Court's erroneous ruling.

If permitted to stand, the Circuit Court's ruling would have the effect of denying coverage in the only circumstance in which the exception to the intentional acts exclusion could ever apply. If Nationwide is permitted to deny coverage, and thereby avoid its duty to defend, solely on the basis

¹¹ Nationwide relies heavily on the fact that Copp was charged with assault and battery, and that he pled no contest to the criminal charges against him, to support its argument for applicability of the intentional acts exclusions. (J.A. 256; Brief in Opposition, pp. 5-6.) The Circuit Court, of course, did not rely on this evidence in any way, nor would it have been justified in doing so. This Court has long recognized that "a judgment of conviction or acquittal in a criminal prosecution does not establish in a subsequent civil action the truth of the facts on which it was rendered." *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 261, 355 S.E.2d 579, 579 (1987) (quoting *Smith v. New Dixie Lines*, 201 Va. 466, 472, 111 S.E.2d 434, 438 (1959)).

Moreover, Copp's testimony offers a logical and rational explanation for that decision which is in no way consistent with an admission of guilt. This Court has recognized that, in such circumstances, the fact finder is free to disregard the plea to the criminal charge. *Chodorov v. Eley*, 239 Va. 528, 532, 391 S.E.2d 68, 71 (1990) ("Although the jury reasonably could have found from this evidence that Eley, by paying the fine voluntarily, had acknowledged that he was following too closely, the jury also reasonably could have found that Eley paid the fine to avoid the inconvenience and expense of contesting the charge.").

that the underlying complaint alleges Copp's act was "intentional," then the exception for acts taken in self-defense is rendered meaningless.

B. The Circuit Court Improperly Relieved Nationwide of Its Burden to Prove the Applicability of the Exclusion in its Personal Umbrella Policy.

The Circuit Court also erred in concluding that Nationwide somehow proved the applicability of its exclusion. It is well-settled that Nationwide had the burden of proving the applicability of the exclusion(s) upon which it relied. *Transcontinental Insurance Co. v. RBMW, Inc.*, 262 Va. 502, 512, 551 S.E.2d 313, 318 (2001); *Bituminous Cas. Corp. v. Sheets*, 239 Va. 332, 336, 389 S.E.2d 696, 698 (1990). Since the exclusionary language and the exception to the exclusion must be construed together, *Floyd v. Northern Neck Ins. Co.*, 245 Va. at 157-58, 427 S.E.2d at 196, Nationwide thus had the burden of proving that the injury to Jacobson was "intended or expected by" Copp **and** that the act was not "caused by [Copp] trying to protect person or property."

The Circuit Court's ruling that Nationwide owed no coverage, and thus had no duty to defend, because Copp's action was alleged to be "intentional" addressed only one part of Nationwide's exclusion. The Circuit Court read the second sentence of the exclusion, which excuses efforts to protect person or property *even if the insured's act was intentional and was*

intended or expected to cause harm, out of the policy. In doing so, it re-wrote the policy and made a new contract between Copp and Nationwide. This was legal error. *Heron*, 274 Va. at 539, 650 S.E.2d at 702; *PMA Capital*, 271 Va. at 361, 626 S.E.2d at 374.¹²

As a result, the Circuit Court improperly relieved Nationwide of its burden of proving the applicability of the exclusion. The Court did not require Nationwide to come forward with any evidence to negate Copp's claim of self-defense.¹³ Instead, it only required Nationwide to "prove" that the motion for judgment in the underlying tort action contained an allegation that Copp's actions were "intentional." That "proof" did not satisfy even the first sentence of the referenced exclusion (because it failed to establish that

¹² If Nationwide wanted to exclude coverage for claims even where the insured was acting in self-defense, it could have done so by including different language in its policy. See, e.g., *Clarendon Amer. Ins. Co. v. Embers, Inc.*, 273 F.3d 1107 (5th Cir. 2001) (policy exclusion provided that coverage did not apply to bodily injury arising from "assault", "battery", or "harmful or offensive contact between or among two or more persons" and that such injuries were excluded "regardless of degree of culpability or intent") (Table; text in WESTLAW); *Acceptance Ins. Co. v. Brown*, 832 So.2d 1 (Ala. 2001) (limiting language in policy exclusion stated that exclusion "does not apply to 'bodily injury' *resulting from the use of reasonable force* to protect persons or property"; emphasis added).

¹³ There is no suggestion by Nationwide that Copp's affirmative defense of self-defense had been rejected by the Court or the jury in the *Jacobson v. Copp* case (nor could there have been such a suggestion, as the case has not yet been tried).

Jacobson's recovery was necessarily dependent on a finding that Copp intended his actions to cause harm to Jacobson). It most assuredly did not negate Copp's affirmative defense of self-defense, and therefore failed to negate the exception in the second sentence of the exclusion.

It was *Nationwide's* burden to come forward with *facts* to prove that no jury could ever conclude Jacobson's bodily injuries resulted from Copp's trying to protect his person. Nationwide wholly failed to produce such evidence. In fact, the only evidence that was produced conclusively established that Copp was trying to protect his person at the time of the accident, rendering the exclusion inapplicable. Bodily injury resulting from these acts is covered under the Personal Umbrella Policy, and Nationwide correspondingly had a duty to defend Copp in the underlying tort action. *Granite State Ins. Co. v. Bottoms*, 243 Va. 228, 233, 415 S.E.2d 131, 134 (1992) (“[W]hen an insurer owes coverage, *ipso facto* it has a duty to defend.”).¹⁴

¹⁴ Nationwide had a contractual obligation to defend even if coverage was available only under its Personal Umbrella Policy. J.A. 49; see n. 7, *supra*.

- II. EVEN IF THE COURT DOES NOT RECOGNIZE A GENERAL EXCEPTION TO THE “EIGHT CORNERS” RULE WHERE THE POLICY EXPRESSLY PROVIDES COVERAGE FOR INTENTIONAL ACTS TAKEN IN SELF-DEFENSE, THE CIRCUIT COURT NONETHELESS ERRED IN REFUSING TO CONSIDER FACTS OUTSIDE THE MOTION FOR JUDGMENT THAT WERE KNOWN TO NATIONWIDE, AND THAT WERE PLACED INTO EVIDENCE BY NATIONWIDE, WHICH SUPPORTED COVERAGE.

Even if the Court does not recognize an exception to the “eight corners” rule in cases, such as this one, where the insurance policy contains an exception providing coverage for intentional acts taken in self-defense, the Court still should recognize an exception in this particular case because Nationwide itself placed extrinsic evidence of self-defense in the record.

Nationwide knew from its own investigation (Copp’s Examination Under Oath which it took, and the deposition testimony from Copp and Jacobson which it obtained) that Copp claimed to have acted in self-defense and that there were facts supporting his affirmative defense to Jacobson’s claims. Having actual knowledge of facts that would support coverage, Nationwide could not rely on the mere allegations of Jacobson’s pleading (which did not negate the exception to the exclusion) in order to deny coverage to Copp and thereby avoid its duty to defend.

Numerous courts have held that when an insurer is aware of facts that would bring the claim within the coverage afforded under the policy, the insurer may not escape its duty to defend by relying on the “eight corners” rule. See *Esi-corp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966, 969 (8th Cir. 1999) (citing *Marshall's U.S. Auto Supply v. Maryland Cas. Co.*, 354 Mo. 455, 189 S.W.2d 529, 531 (1945)); *Metcalfe Bros., Inc. v. American Mutual Liability Ins. Co.*, 484 F. Supp. 826, 832 (W.D. Va. 1980); see also *Capital Environmental Services, Inc. v. North River Ins. Co.*, 536 F. Supp. 2d 633, 642 n. 19 (E.D. Va. 2008) (citing cases for this proposition).

This result is particularly appropriate here, given that Nationwide contracted to provide coverage for bodily injuries caused by intentional acts taken in self-defense – a matter of affirmative defense that cannot reasonably be expected to be reflected on the face of a plaintiff’s complaint.

Moreover, here, Nationwide was not only *aware of these facts*, but it *affirmatively tendered the facts* to the Circuit Court for its consideration as a part of its effort to prove the applicability of its policy exclusions. Under established rules, having offered that testimony, Nationwide was bound by Copp’s uncontradicted version of events, including his assertion that he acted in self-defense and his factual testimony supporting the assertion of

that defense. *Economopoulos v. Kolaitis*, 259 Va. 806, 812, 528 S.E.2d 714, 718 (2000) (“It is well established that, when an adverse party is called and examined by an opposing party, the latter is bound by all of the former’s testimony that is uncontradicted and is not inherently improbable.”).

The Circuit Court’s failure to charge Nationwide with knowledge of matters it learned from its own investigation, and to hold that Nationwide was bound by the facts it introduced in support of its request for declaratory judgment, was error.

III. **THE CIRCUIT COURT ERRED IN HOLDING THERE WAS NO THEORY OF RECOVERY IN THE UNDERLYING TORT ACTION THAT WOULD BE COVERED UNDER EITHER OF NATIONWIDE’S INSURANCE POLICIES, AND THAT NATIONWIDE THEREFORE OWED NO DUTY TO DEFEND.**

Copp’s valid claim of self-defense plainly entitles him to coverage under the exception for acts of self-defense contained in Nationwide’s Personal Umbrella Policy. But even absent the language of that exception, Copp’s valid self-defense claim should preclude applicability of the “intentional acts” exclusion in *both* of Nationwide’s policies, thereby entitling

Copp to a defense (and, potentially, coverage) under both the Golden Blanket Policy and the Personal Umbrella Policy.¹⁵

Numerous courts in other jurisdictions have recognized that when the insured acts in self-defense he acts to avoid harm to himself, rather than with the intent to inflict harm on others, and that such conduct does not fall within the “intentional acts” exclusion. *E.g.*, *Fire Ins. Exchange v. Berray*, 143 Ariz. 361, 694 P.2d 191 (1984); *Mullen v. Glens Falls Ins. Co.*, 73 Cal. App. 3d 163, 140 Cal. Rptr. 605 (5th Dist. 1977); *Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569 (Del. Super. Ct. 1997); *State Farm Fire and Cas. Co. v. Marshall*, 554 So. 2d 504 (Fla. 1989); *Allstate Ins. Co. v. Justice*, 229 Ga. App. 137, 493 S.E.2d 532 (1997), *reconsideration denied and cert. denied* (1998); *Allstate Ins. Co. v. Novak*, 210 Neb 184, 313 N.W.2d 636 (1981); *Vermont Mut. Ins. Co. v. Singleton By & Through*

¹⁵ As noted above, Nationwide has a duty to defend even if coverage is potentially available only under the Personal Umbrella Policy. *Supra* at n. 7. Accordingly, if the Court holds that the exception to the “intentional acts” exclusion in the Personal Umbrella Policy is applicable by virtue of Copp’s claim to have acted in self-defense, and that Nationwide therefore potentially has coverage (and thus a duty to defend Copp) in the underlying tort claim, the Court need not necessarily reach the issue of whether Nationwide also potentially has coverage under its Golden Blanket Policy, because Nationwide’s denial of coverage under that policy would make the Personal Umbrella Policy primary.

Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994); *Stoebner v. South Dakota Farm Bureau Mut. Ins. Co.*, 1999 S.D. 106, 598 N.W.2d 557 (S.D. 1999).

This result is consistent with the Virginia rule that harm from intentional acts is excluded only if the insured both intentionally undertook the underlying act *and* the insured intended the resulting harm or the harm necessarily was the natural consequence of his actions. See *Johnson v. Insurance Co. of North America*, 232 Va. 340, 347-48, 350 S.E.2d 616, 620-21 (1986); *Infant C v. Boy Scouts of America, Inc.*, 239 Va. 572, 583-84, 391 S.E.2d 322, 328-29 (1990). “Virginia courts have never extended the ‘intentional wrongdoing’ defense to conduct which, though itself ‘intentional,’ was not intended to cause injury. Instead, the defense has been confined to cases where the insured acted with the specific intent to cause harm.” *Atlantic Permanent Fed. Sav. & Loan v. Amer. Cas. Co.*, 839 F.2d 212, 217 (4th Cir. 1988), *cert. denied*, 486 U.S. 1056 (1988).

This case is fundamentally different from the “intentional acts” exclusion cases previously decided by this Court. Many of those cases have tended to involve insureds deliberately pointing weapons at their victims in connection with some personal dispute between them. See, e.g., *Travelers Indemnity Co. v. Obenshain*, 219 Va. 44, 45, 245 S.E.2d 247, 248 (1978); *Norman v. Insurance Co. of America*, 218 Va. 718, 721, 239

S.E.2d 902, 903 (1978); see also *Citizens Home Ins. Co. v. Nelson*, 218 Va. 216, 218, 237 S.E.2d 100, 101 (1977).¹⁶ In such cases, the insured cannot credibly claim that he did not “intend” the harm caused by firing the weapon at his intended victim. *Norman*, 218 Va. at 723, 239 S.E.2d at 905 (“An insured will not be permitted to say that an intentional and malicious firing of a pistol at another, resulting in an injury, was neither expected nor intended.”).

Here, however, Copp’s affirmative defense that he acted in self-defense, and his claim that any injury to Jacobson was inflicted accidentally and as a result of Copp’s efforts to avoid harm to himself, are not inherently implausible or incredible. Those facts could only be shown by looking outside the four corners of the complaint and the four corners of the policy to determine whether Copp asserted a viable claim of self-defense. In this case, those facts were placed before the Court by Nationwide, and they plainly showed that the jury in the underlying tort action could find that Copp acted in self-defense, rendering the intentional acts exclusions in both of Nationwide’s policies inapplicable. The Circuit Court’s ruling effectively held, as a matter of law, that Copp was not entitled to bring

¹⁶ None of these “intentional acts” exclusion cases involved an “intentional acts” exclusion including a self-defense exception like the one in Nationwide’s Personal Umbrella Policy.

himself within the policies' coverage provisions by pointing to evidence establishing that the jury could in fact reach such a conclusion. This result should not be permitted to stand.

CONCLUSION

For the foregoing reasons, the decision below should be reversed. This Court should rule that Copp's valid claim of self-defense entitles him to coverage under Nationwide's policies, and that Nationwide thus has a duty to defend Copp in the underlying tort action.

Respectfully Submitted,

ADAM CHARLES COPP

By 

Frank K. Friedman (VSB #25079)
friedman@woodsrogers.com
Mark D. Loftis (VSB #30285)
loftis@woodsrogers.com
Woods Rogers PLC
10 S. Jefferson St., Suite 1400
P.O. Box 14125
Roanoke, Virginia 24038-4125
Phone: 540.983.7692
Facsimile: 540.983.7611

Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I have complied with Rule 5:26(d) and that an electronic copy in PDF format was filed with the court by email and also I hereby certify that I have served by first class mail three true copies of the foregoing to John L. Cooley, Esq. and Michael C. Richards, Esq., WootenHart, PLC, 707 Building, Suite 300, 707 South Jefferson Street, P. O. Box 12247, Roanoke, Virginia 24024, counsel for Nationwide Mutual Insurance Company; and to Timothy E. Kirtner, Esq., Gilmer, Sadler, Ingram, Sutherland & Hutton, 65 East Main Street, P. O. Box 878, Pulaski, Virginia 24301, counsel for defendant Gregory M. Jacobson; all of the above this 13th day of July, 2009.


