

Circuit Court for Montgomery County
Case #121991

IN THE COURT OF APPEALS OF MARYLAND

No. 137

September Term, 1995

BYRON C. BAILER et al.

v.

ERIE INSURANCE EXCHANGE

*Murphy, C. J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker

JJ.

Dissenting Opinion by Chasanow, J.

Filed: January 27, 1997

*Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, § 3A, he

also participated in the decision
and the adoption of this opinion.

In straining to provide insurance coverage for a "peeping Tom" with a video camera, this Court nullifies a specific limitation of coverage in an insurance policy. In doing so the Court not only ignores the clear language of the insurance policy at issue, but also ignores one of the most fundamental rules of contract interpretation.

It is a fundamental rule of contract interpretation that if provisions of an insurance contract or of any other type of contract are apparently in conflict, the Court should first attempt to reconcile the provisions rather than to nullify arbitrarily one of the provisions of the contract. *Chew v. DeVries*, 240 Md. 216, 221, 213 A.2d 742, 744-45 (1964). All of the provisions of this contract can easily be reconciled; there is no need to nullify a clear limitation on coverage and rewrite the contract to make the insurance carrier pay for Mr. Bailer's intentional tortious conduct that the carrier expressly excluded from coverage.

In numerous prior cases, this Court has recognized some basic rules of contract interpretation that are not even acknowledged in the majority opinion. The first is that when interpreting a contract a court will try to give effect to all of the agreement's provisions. *See, e.g., Sagner v. Glenangus Farms*, 234 Md. 156, 167, 198 A.2d 277, 283 (1964). A related principle of the law of contracts is that courts will attempt to reconcile apparently conflicting provisions in construing an

agreement. *Chew*, 240 Md. at 221, 213 A.2d at 744-45 (1965); see also *Lumber Co. v. Bldg. & Savings Assn.*, 176 Md. 403, 5 A.2d 458 (1939). "[I]f a reconciliation can be effected by a reasonable interpretation, such interpretation should be given to the apparently repugnant provisions, rather than nullify any." *Chew*, 240 Md. at 221, 213 A.2d at 744-45.

The majority reads the instant policy as containing both an "exclusion and an express covenant insuring against liability for one or more intentional torts." ___ Md. ___, ___, ___ A.2d ___, ___ (1997)(Majority Op. at 15). Finding a conflict between what it labels an "express covenant" and the exclusion provision of the policy, the majority nullifies the clear and specific exclusion. These provisions need not be construed as conflicting when they easily can and should be reconciled and read in harmony.

There are three relevant provisions in the insurance contract at issue. The first is the basic coverage provision. The insurance policy provides that:

"We will pay the ultimate net loss which anyone we protect becomes legally obligated to pay as damages because of personal injury or property damage covered by this policy. (Emphasis added).¹

The underlined qualifying language included in this coverage

¹In quoting portions of the Erie policy we have not reproduced bold type which at times is used to highlight terms that are defined in the policy.

provision necessarily implies that some forms of personal injury and property damage are excluded from coverage. It seems clear that the policy does not cover all personal injury or all property damage; instead it only promises to pay the ultimate net loss as the result of personal injury and property damage which is covered by this policy. The majority seems to disregard entirely the limiting words "covered by this policy."

The next relevant provision is the definition of "personal injury." It is noteworthy that this is only a definition of the broad category "personal injury;" it is not and does not purport to be a definition of "personal injury covered by this policy."

The term "personal injury" means:

"(1) bodily injury; (2) libel, slander or defamation of character; (3) false arrest, wrongful detention or imprisonment, malicious prosecution, wrongful entry or eviction, invasion of privacy, or humiliation caused by any of these."

Somehow the majority reads this provision as an "express covenant" insuring against all forms of invasion of privacy. This definition or this definition coupled with the previously cited clause clearly does not insure against all forms of invasion of privacy any more than it insures against all forms of bodily injury. I trust the Court is not suggesting that all forms of bodily injury are covered by this excess insurance policy. By defining the broad term "personal injury" the insurance contract does not say or imply that all forms of

personal injury constitute "personal injury covered by this policy."

The final relevant provision of the policy is the clear and unambiguous intentional injury exclusion clause. This provision sets out the forms of personal injury that are not "covered by this policy." It is headed "WHAT WE DO NOT COVER--EXCLUSIONS." It provides:

"We do not cover:

* * *

(2) personal injury or property damage expected or intended by anyone we protect. We do cover reasonable acts committed to protect persons or property."

The majority apparently concludes that "the exclusion totally swallows the insuring provision, the provisions are completely contradictory." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 10). This is not only a strained reading of this contract, it is also an affront to the maxim that courts should attempt to reconcile all provisions of a contract.

The three relevant provisions of this insurance contract are easily and obviously reconcilable. Certainly "a reconciliation can be effected by a reasonable interpretation." *Chew*, 240 Md. at 221, 213 A.2d at 744. The coverage provision applies to "personal injury or property damage covered by this policy." The broad definition of personal injury, not all of which is covered by the policy, includes such things as bodily injury as well as

invasion of privacy. The forms of personal injury which are not covered by the policy are found in the exclusion which provides that the policy does not cover "personal injury or property damage expected or intended by anyone we protect." This interpretation is in accord with the requirement that courts attempt to reconcile all provisions of any contract and not rewrite the contract by voiding any provision. The Bailers were sued for and apparently paid a settlement for an intended invasion of privacy,² and the intentional injury exclusion clause should be applicable to the claim against them.

The United States Court of Appeals for the Fourth Circuit recently construed a personal liability policy with terms analogous to those at issue in the present case in *Fuisz v. Selective Ins. Co. of America*, 61 F.3d 238 (1995). In *Fuisz, supra*, the personal liability policy at issue contained the following broad definition of coverage:

"If a suit is brought against an insured for damages because of ... *personal injury*, ... caused by an occurrence to which this policy applies, [Selective Insurance Co.] will provide a defense at our expense by counsel of our choice." (Emphasis in original)(footnote omitted).

Fuisz, 61 F.3d at 240. The definition of "personal injury" included "injury arising out of ... [l]ibell, slander or

²Count II of the Complaint also alleged that Victoria Bailer had knowledge of and co-conspired with her husband to videotape Ms. Meier.

defamation of character,'" but the policy excluded coverage for "`any act committed by or at the direction of an insured with intent to cause ... personal injury....'" *Id.* Thus, the *Fuisz* policy contained the same potential conflict as the policy at issue in the present case.

The Fourth Circuit noted that "at first glance," the provisions might, as the majority argues in its opinion here, "appear to be in direct conflict, particularly when one recognizes that defamation is commonly classified as an `intentional tort.'" *Fuisz*, 61 F.3d at 242-43. The *Fuisz* court held that the provisions were not in direct conflict, however, and the court expressly disapproved of the interpretation espoused by the majority in the present case, that the policy is inherently ambiguous and that it must be construed in favor of the insured:

"if the intentional acts exclusion was strictly interpreted to eliminate coverage for injuries arising from all defamation claims because defamation is an intentional tort, then this exclusion would swallow the policy coverage for defamation, permitting Selective to `give with the right hand and then take away with the left.'" (Citation omitted).

Fuisz, 61 F.3d at 243. The court was unwilling to interpret the exclusion in this way because such an interpretation would render the clause that purported to provide coverage for defamation meaningless. *Id.* Instead, the court held that some forms of

defamation would be covered by the policy and some would not.

Id.

I am troubled by the statement in the majority opinion that:

"To the reasonable person the promise to pay damages for liability for invasion of privacy, at the time of contracting and under the circumstances presented here, refers to an intrusion upon seclusion. In other words, in an excess policy designed for owners of at least one house and at least one automobile, the contracting parties would not contemplate that the term, 'invasion of privacy,' primarily relates to such relatively exotic and usually commercial-context torts as appropriation of another's name or likeness, or unreasonable publicity, or false light publicity.

Intrusion upon seclusion must always be intentional in order to be tortious, and it is the intrusion that constitutes the harm against which that form of invasion of privacy is intended to protect."

___ Md. at ___, ___ A.2d at ___ (Majority Op. at 21-22). That statement seems to indicate that, based upon what the majority believes to be the understanding of the insured, the only form of invasion of privacy covered by this policy is unreasonable intrusion upon seclusion. I assume the reason for this distinction is that apparently the majority does recognize that other forms of invasion of privacy might be committed recklessly or negligently. Rather than construe the insurance policy according to its express language and give effect to all of the policy provisions, the majority voids a clear and explicit intentional injury exclusion clause based on the tortured

assumption that a "reasonable" policy purchaser would consider the term "invasion of privacy" to refer only to intrusion upon seclusion. The majority's construction further presumes that a "reasonable" policy purchaser is sufficiently knowledgeable of the law of torts to understand that an intrusion upon seclusion can only be committed intentionally and that, as a result, the inclusion of coverage for invasion of privacy supersedes the policy's intentional injury exclusion clause. A better way to construe this insurance policy is to assume the purchaser read the policy and recognized that it meant what it plainly said: coverage is available for invasions of privacy, bodily injuries, defamations of character, etc., except when they were committed intentionally; thus there was no coverage when the injury was "expected or intended." The express language of the policy is a better aid to construction than assumptions about a reasonable person who is ignorant of the variations of invasion of privacy, some of which may be committed unintentionally, but who does know what the Court of Appeals reveals for the first time in the instant case, that the unreasonable invasion of seclusion form of invasion of privacy can only be committed intentionally.

I should also note that the statement that "intrusion upon seclusion must always be intentional in order to be tortious," ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 21), does not take into account indications to the contrary in several of this Court's prior cases. This Court has never before held that

invasion of privacy must be intentional; to the contrary, we have indicated that for most forms of the tort, including unreasonable intrusion upon seclusion, the requirement is that the defendant must have acted unreasonably, not that the defendant must have acted intentionally. In *Beane v. McMullen*, 265 Md. 585, 291 A.2d. 37 (1972), a case involving the issue of whether the McMullens' complaints to public authorities about the Beanes' possible violations of zoning and other county laws constituted an invasion of privacy, we said:

"In all of the types of invasions of privacy, except perhaps '(b) Appropriation of the other's name or likeness,' reasonableness under the facts presented is the determining factor. We inquire then whether, under the facts of the present case, the Beanes produced legally sufficient evidence from which a jury might conclude that the complaints of the McMullens, already described, were unreasonable...."

Beane, 265 Md. at 600-01, 291 A.2d at 45. In *Household Fin. Corp. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969), a case involving the unreasonable intrusion upon seclusion by a debt collector making repeated phone calls to collect a debt, this Court stated:

"As a prelude to a discussion of 'Unreasonable Intrusion,' we call to mind that we have elsewhere stated that the question of how far a creditor may go to collect his debt must be decided on the individual facts of each case, but usually on the ground of reasonableness. It is generally recognized that a creditor has a right to take reasonable measures to pursue

his debtor and persuade payment, although the steps taken may result in some invasion of the debtor's privacy."

Household Fin., 252 Md. at 540, 250 A.2d at 884. In *Household Finance* we also cited with approval *Harms v. Miami Daily News, Inc.*, 127 So.2d. 715 (Fla. Dist. Ct. App.1961), a case finding liability for unreasonable intrusion upon seclusion invasion of privacy. We characterized *Harms* as follows:

"In *Harms v. Miami Daily News, Inc.*, *supra*, a columnist included the following item in his column, 'Wanna' hear a sexy telephone voice? Call ---- and ask for Louise.' The telephone number given happened to be that of the business office of Louise's employer and the publication resulted in hundreds of unwanted telephone calls, not to mention the resulting embarrassment from the innuendo contained in the wording of the publication. Whether intentional or unintentional, the defendant's action not only resulted in harassment of the plaintiff but cast aspersions on her character [and resulted in an unreasonable intrusion upon solitude]." (Emphasis added).

Household Fin., 252 Md. at 541, 250 A.2d at 885. Certainly at the time this insurance policy was written Erie could have believed that lawsuits could be instituted against homeowners for unintended invasions of privacy including unintended intrusions upon seclusion, and Erie expressed its intent only to defend and compensate for unintended invasions of privacy.

A number of other jurisdictions recognize negligent invasion of privacy, without regard to type, as a valid cause of action. See, e.g., *Boyles v. Kerr*, 806 S.W.2d 255, 259 (Tex. Ct. App.

1991)(stating that "the basis for liability in a privacy action may rest upon a negligent, as well as an intentional, invasion"); *Prince v. St. Francis - St. George Hosp., Inc.*, 484 N.E.2d 265, 268 (Ohio Ct. App. 1985)(observing that "a negligent invasion of the right of privacy ... can just as effectively invade one's right of privacy as an intention to do so").

Judge Turner correctly noted the distinction between intentional and negligent invasions of privacy in his written opinion and order below, observing that:

"The tort of invasion of privacy is usually one of an intentional act, however, it can be in the form of a negligent act under some circumstances. Clearly had this been a negligent invasion of privacy, the policy would have covered such a claim made against the Bailers. However, since this was clearly an intentional act on the part of the plaintiff, Byron C. Bailer, there can be no doubt that the exclusion under the policy of insurance would allow the defendant to deny defense and indemnification. Even though the definition of 'personal injury' encompasses the tort of invasion of privacy, it is still clear from the language of the policy that an 'intentional' invasion of privacy shall not be covered. There can be no doubt that Mr. Bailer intentionally intended the result of his acts both by deliberately filming Ms. [Meier] and in knowing or should have known that such an action would cause embarrassment, humiliation and injury to her." (Emphasis in original).

The policy potentially would provide coverage if, as Judge Turner posited at the summary judgment hearing, the camera had been placed in the bathroom in response to the theft of jewelry or

other items from that room and the Bailers "negligently" failed to tell Ms. Meier about the camera when they permitted her to use the shower.

Part of the justification for the majority's reading of the policy is an apparent misreading of the Self-Insured Retention. The majority says "the policy clearly seems to have been drafted to provide some insurance against liability for claims based on invasion of privacy, under which Erie would pay the damages above the Self-Insured Retention of \$500 up to the catastrophe policy limit per occurrence, as well as paying all costs of defense." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 9). Further, according to the majority the catastrophic personal liability policy "operate[s] as primary coverage for certain risks that are not covered at all by the underlying policy. In the latter instances, the catastrophe policy pays in excess of the `Self-Insured Retention.'" ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 9). Contrary to the majority interpretation, the self-insured retention also is inapplicable to, and excludes, intentional injuries. The policy states:

"`Self-Insured Retention' means `the amount shown on the Declarations which is retained and payable by anyone we protect with respect to each **occurrence** not covered by underlying insurance but which is covered by this policy. All expenses incurred by us, or by anyone we protect with our consent, in the investigation or defense of a claim or suit within the self-insured retention shall be payable by us.'" (Emphasis in original).

What the majority apparently fails to recognize is that "occurrence" is a defined term in the homeowner's policy, as well as in the catastrophic liability policy. In both policies "`occurrence' means an accident." It is quite clear from the policies and from our prior cases that an "occurrence," when defined as an accident, excludes intentional conduct. See, e.g., *Sheets v. Brethren Mutual*, 342 Md. 634, 679 A.2d 540 (1996). Thus it would seem that the intentional invasion of privacy is not an occurrence because it is not an accident. Based on the established definitions of occurrence, the "self-insured retention" is not applicable to intentional torts, and this not only fails to support the majority's interpretation, but is a further indication that intentional injuries are not meant to be covered by this policy.

Even though I disagree with the majority, I would not write a dissent if the majority opinion merely was a *sui generis* construction of a single insurance contract. The majority opinion is not simply interpreting what this insurance contract covers; it is interpreting what the majority thinks the insurance contract ought to cover. We must be cautious in rewriting insurance contracts by nullifying a material exclusion. Even though when construing statutes the Court has sometimes disregarded express language in order to interpret what the Court thinks the legislature intended, see *Kaczorowski v. City of*

Baltimore, 309 Md. 505, 525 A.2d 628 (1987), we should not rewrite insurance contracts based on what we think the insured might have intended.

In broadening this personal catastrophic liability policy to cover intentional torts and possibly include punitive damage liability the majority states, "the subject catastrophe policy makes plain that it is intended not simply to operate as excess insurance over the limit of the required underlying insurance but also that it operates as primary coverage for certain risks that are not covered at all by the underlying policy." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 9). Based on the majority's expanded coverage reading of this policy, it is probably the best bargain in the insurance industry. The Bailers' basic automobile policy had a limit on personal liability of \$300,000. The Bailers' homeowner's policy had a limit on personal liability of \$100,000 and excluded intentional torts. The Bailers paid an annual premium of \$311.20 for their homeowner's policy. The catastrophic policy raises the limit of personal liability to \$1,000,000 in both the automobile and the homeowner's policy and, according to the majority, is also designed to extend coverage to certain intentional torts (and conceivably punitive damages), yet the annual premium for this extensive coverage is only \$115.

Erie did not intend to insure against all forms of personal

injury. It intended to exclude "personal injury which was expected or intended by the insured" and it clearly said so. Certainly, there is nothing improper about an insurance company contractually refusing to defend or pay claims for intentional torts or intended personal injury. Some jurisdictions even consider it against public policy to permit an insurance company to insure for a policyholder's deliberate tortious conduct. See, e.g., *Nielsen v. St. Paul Companies*, 583 P.2d 545 (Or. 1978); *Ambassador Insur. Co. v. Montes*, 371 A.2d 292 (N.J. Super. 1977), *aff'd*, 388 A.2d 603 (N.J. 1978). We should not rewrite the policy by nullifying this intentional injury exclusion and should not force Erie to pay for intentional tort liability coverage that it explicitly excluded. Even if Mr. Bailer believed he was covered for all intentional personal injury or intentional invasion of privacy, his belief was not justified by the written contract. At best, from Mr. Bailer's perspective, there was no meeting of the minds as to coverage for intentional personal injury, and the contract as a whole should be nullified, entitling Mr. Bailer to a return of his premiums. Mr. Bailer did not rely on his interpretation to his detriment; he does not even remotely suggest that he committed this deliberate invasion of privacy because he expected to have insurance coverage if he was caught. Mr. Bailer is not entitled to have the contract rewritten and is not entitled to coverage which is clearly and

obviously excluded by the insurance contract.

Mr. Bailer did not and could not make a claim under his homeowner's policy, which is at least as ambiguous as his excess policy. The Bailers' homeowner's policy only covered occurrences which excluded intentionally caused injuries. We should not rewrite this contract and nullify a material exclusion in a contract merely because it is an excess insurance policy. I do agree with the majority's implication that we would like our excess insurance policies to cover all liability that is not covered by our basic homeowner's policy, but insurance companies do not have to write excess policies without exclusions, and we should not rewrite insurance contracts to provide all the coverage we would like to have. It is obvious that Erie intended only to defend and, if necessary, indemnify for unintentional invasions of privacy. This intent could not have been made any clearer. By forcing Erie to defend and indemnify for any intentionally inflicted damages, the Court has rewritten this policy and nullified a clear and explicit intentional injury exclusion. Insurance companies, like all other litigants, are entitled to have their contracts construed fairly and impartially. This Court should be mindful of its responsibility to read insurance contracts and not write insurance contracts. I respectfully dissent.