

STATE OF MICHIGAN
COURT OF APPEALS

PIONEER STATE MUTUAL INS CO,

Plaintiff-Appellee,

v

JAE YUN SONG and YUNG SU SONG,

Defendants-Appellants.

and

TAE GUN LEE,

Defendant.

UNPUBLISHED
June 4, 1996

No.172882
LC No.92-443314

PIONEER STATE MUTUAL INS CO,

Plaintiff-Appellee,

v

TAE GUN LEE

Defendant-Appellant

and

JAE YUN SONG and YUNG SU SONG,

Defendants.

No.174542
LC No.92-443314

Before: Doctoroff, C.J., and Corrigan and J.B. Sullivan,* J.J.

*Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Rule 1995-6.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right the order of the Oakland Circuit Court granting summary disposition to plaintiff on its claim that it had no duty to defend or indemnify defendant Lee. We affirm.

This action arose out of an altercation between defendant Lee and defendant Yae Yun Song wherein Lee struck Song in the head with a trophy causing injury. Lee pleaded nolo contendere to aggravated assault. Song and his wife then filed a two count claim against defendant Lee alleging assault and battery and negligence. Lee submitted the claim to plaintiff, his homeowner's insurance carrier, which then filed a complaint for declaratory judgment and the instant motion for summary disposition.

The policy at issue has an exclusion for bodily injury "which may be reasonably expected from the intentional or criminal acts of an insured or which is in fact intended by an insured." On appeal, both Song and Lee claim that there is a genuine issue of material fact because Song testified in his deposition that Lee intentionally struck Song, whereas Lee testified in his deposition that he was acting in self-defense and did not intend to strike Song.

On appeal, this Court reviews the grant of summary dispositions de novo. *Isabella Co DSS v Thompson*, 210 Mich App 612; 534 NW2d 132 (1995). In a case where an insured is sued for tortious conduct and argues self-defense, there is no duty to defend. *Smorch v Auto Club Ins*, 179 Mich App 125; 445 NW2d 192 (1989). The rationale is that, regardless of the jury's finding on the self-defense issue, the insurer would be under no duty to pay on behalf of the insured. If the jury accepted the self-defense, there would be no liability, and if the jury rejected the self-defense, the insured would have committed an intentional act not covered by the policy. *Id.* Where neither outcome leads to a duty of the insurer to pay on behalf of the insured, this Court will not impose on the insurer a duty to defend. *Id.* Assault and battery are intentional acts, and there is no duty to defend or provide coverage where the complaint is a transparent attempt to trigger insurance coverage by characterizing allegations of tortious conduct under the guise of "negligent" activities. *Id.*

In this case, the complaint against Lee alleged assault and battery and negligence, and Lee claimed self-defense. As to the assault and battery, plaintiff had no duty to defend because those are intentional acts. The negligence count is nothing more than a transparent attempt to trigger insurance coverage by characterizing allegations of tortious conduct as negligence. Lee's claimed self-defense does not trigger the duty to defend because under either version of the facts, there is no duty to pay on behalf of the insured. The trial court did not err in granting plaintiff's motion for summary disposition.

In No. 174542, Lee also claims that the introduction by plaintiff of Lee's nolo contendere plea into the civil proceeding was improper and that the trial court "may and probably

considered the evidence of this plea in making its conclusion.” However, Lee provides no support for this purely speculative argument. Moreover, given our conclusion on the first issue, this issue is not relevant. In any event, MRE 410(2) provides that a plea of nolo contendere “may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea.”

Affirmed.

/s/ Martin M. Doctoroff

/s/ Maura D. Corrigan

/s/ Joseph B. Sullivan