No. 108799

In The
Supreme Court of Illinois

PEKIN INSURANCE COMPANY et al.(Pekin Insurance Company) Plaintiff Appellant, vs. **JACK O. WILSON,** Defendant Appellee, and **TERRY JOHNSON**, Defendant.	Appeal from the Appellate Court of the Fifth District of Illinois Circuit Court Case No. 05 MR 24 Honorable Paul W. Lamar Judge Presiding

Amicus Brief Of The Illinois Trial Lawyers Association

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Table of Contents

Table of Authorities

Cases

Other Authorities

Treatises

Jury Instructions

ARGUMENT

EVIDENCE BEYOND THE COMPLAINT MAY BE CONSIDERED WHEN DETERMINING WHETHER A DUTY TO DEFEND EXISTS

The plaintiff-appellee Pekin Insurance Company (hereinafter "Pekin") argues that when considering whether a duty to defend exists the court is limited to an examination of the allegations contained in the complaint. This is a misstatement of the law of insurance coverage in the State of Illinois.

In *American Family Mut. Ins. Co. v. Savickas*, (Ill. 2000) 739 N.E.2d 445, 193 Ill.2d 378, this court, looking beyond the allegations contained in the plaintiff's complaint, held that a verdict in a criminal prosecution finding the insured guilty should be considered by the court in determining whether coverage existed for the events sued upon in the complaint. *Savickas* was declaratory action brought by the insurer seeking a determination that it had no duty to defend the insured from allegations that insured negligently shot the plaintiff or negligently assessed the "need for self defense."

The court found the verdict in the criminal case to judicially estop the victim and the insured from asserting coverage for the events alleged in the complaint. By considering the conviction of the insured this court implicitly found that courts' may consider evidence that is beyond the complaint in determining issues of coverage. See *Farmers Auto. Ins. Ass'n v. Tanner*, (Ill.App. 4 Dist. 2009) 2009 WL 3327207; *L.A. Connection v. Penn-America Ins. Co.*, (Ill.App. 3 Dist. 2006) 843 N.E.2d 427, 363 Ill.App.3d 259; *Mutlu v. State Farm Fire & Casualty Co.*, 337 Ill.App.3d 420, 271 Ill.Dec. 757, 785 N.E.2d 951 (2003); *Fidelity & Casualty Co. v. Envirodyne Engineers, Inc.*, 122 Ill.App.3d 301, 77 Ill.Dec. 848, 461 N.E.2d 471 (1983)

In *Fidelity & Cas. Co. of New York v. Envirodyne Engineers, Inc*., (Ill.App. 1 Dist. 1983) 461 N.E.2d 471, 122 Ill.App.3d 301, the Appellate Court eloquently stated:

> "[W]e find no support for [insured's] contention that the court may not look beyond the underlying complaint even in a declaratory proceeding where the duty to defend is at issue. . . . [I]f an insurer opts to file a declaratory proceeding, we believe that it may properly challenge the existence of such a duty by offering evidence to prove that the insured's actions fell within the limitations of one of the policy's exclusions. (See Appleman, Insurance Law & Practice § 4683, at 53 (1979); see also *Kepner v. Western*

Fire Insurance Co. (1973), 109 Ariz. 329, 509 P.2d 222; *Employers' Fire Insurance Co. v. Beals* (1968), 103 R.I. 623, 240 A.2d 397.) The only time such evidence should not be permitted is when it tends to determine an issue crucial to the determination of the underlying lawsuit (see *Maryland Casualty Co. v. Peppers* (1976), 64 Ill.2d 187, 355 N.E.2d 24; *Employers' Fire Insurance Co. v. Beals* (1968), 103 R.I. 623, 240 A.2d 397) . . . To require the trial court to look solely to the complaint in the underlying action to determine coverage would make the declaratory proceeding little more than a useless exercise possessing no attendant benefit and would greatly diminish a declaratory actions's purpose of settling and fixing the rights of the parties. . . . [W]e have encountered a number of Illinois cases where evidence was apparently presumed to be admissible in declaratory judgment proceedings such as the one at issue here. In *Mid America Fire v. Smith* (1982), 109 Ill.App.3d 1121, 65 Ill.Dec. 634, 441 N.E.2d 949, the trial court considered documents, including deposition testimony, when ruling on an insurer's duty to defend in a motion for summary judgment in a declaratory proceeding. In two other Illinois cases, the court went beyond the underlying complaint to take judicial notice of the scope of the duties performed by professional architects and engineers. (*Wheeler v. Aetna Casualty & Surety Co.* (1973), 11 Ill.App.3d 841, 298 N.E.2d 329, vacated as moot, 57 Ill.2d 184, 311 N.E.2d 134; *Sheppard, Morgan & Schwaab, Inc. v. U.S. Fidelity & Guaranty Co.* (1976), 44 Ill.App.3d 481, 3 Ill.Dec. 138, 358 N.E.2d 305.) . . . We believe that the above cases are sufficiently analogous to the case at bar to lend support for allowing evidence beyond the complaint in a declaratory judgment action such as the one at issue here." (461 N.E.2d at 473-74)

In this case where the policy itself grants coverage for acts of self-defense it is only logical that the court should consider matters beyond those pled by the plaintiff including the insured's answer, counterclaims and affirmative defenses to determine if the duty to defend exists.

VIEWPOINT AS TO WHETHER AN EVENT IS INTENTIONAL OR ACCIDENTAL

In determining insurance coverage for injuries and damages which are "accidentally" caused or which are not "intentionally" caused the incident is viewed from the perspective of the injured victim unless the policy provides otherwise.

In *E.J. Albrecht Co. v. Fidelity & Cas. Co. of New York*, (Ill.App. 1 Dist. 1937) 7 N.E.2d 626, 289 Ill.App. 508, the court examined an insurance policy that limited coverage to injuries "as a result of an accident." The court adopted the reasoning that whether an injury is accidental is to be determined from the standpoint of the person injured, and "if the injury comes to him through external force, not of his choice or provocation, then as to him the injury is accidental." (quoting *Georgia Casualty Company v. Alden Mills*, 156 Miss. 853, 127 So. 555, 73 A.L.R. 408; 7 N.E.2d at 628)

See also, Scott v. Instant Parking, Inc., (Ill.App. 1 Dist. 1969), 245 N.E.2d 124, 105 Ill.App.2d 133.

> In this case the Pekin policy expressly provides:
>
> "'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured (the intentional-act exclusion)." (Appellate Opinion 909 N.E.2d at 383)

Historically, the phrase "from the standpoint of the insured" "was added to homeowner's policies to protect insurance companies from a court finding that while the insured may have acted intentionally, the injured party met with an accident. (*Scott v. Instant Parking Inc*. (1969), 105 Ill.App.2d 133, 245 N.E.2d 124.)" *Aetna Cas. & Sur. Co. v. Dichtl*, (Ill.App. 2 Dist. 1979) 398 N.E.2d 582, 78 Ill.App.3d 970.

The policy by its express limitation excludes only coverage for liability where the insured subjectively expects or intends the injury or damage to occur. Contrast this with the language used in other policies which also exclude coverage for damages or injures that may "reasonably" be expected to result from the "intentional acts" of the insured. (See for example the policy in *Country Mut. Ins. Co. v. Olsak*, (Ill.App. 1 Dist. 2009) 908 N.E.2d 1091, 391 Ill.App.3d 295). Thus, the Pekin policy in this case the provides for an ***subjective*** state of mind of the insured and ***not*** that of the victim or a reasonable person controls to determine whether the conduct is "expected or intended."

THE APPELLATE COURT ERRED IN APPLYING AN OBJECTIVE STANDARD TO THE INTENTIONAL ACT EXCLUSION

As previously stated the policy specifically states that the determination of whether a certain damage or injury are excluded as intentional is viewed from the viewpoint of the insured, and not the viewpoint victim or a reasonable person.

The Appellate Court stated: "Each count alleges intentional conduct that Wilson ***should have*** expected or intended, thus bringing all the allegations under the intentional-act exclusion." (Appellate Opinion at 909 N.E.2d 386, Emphasis added.). The Appellate Court applied an "objective person[1]" standard where none was provided.

[1] See for example *O'Neil v. Continental Bank, N.A.*, (Ill.App. 1 Dist. 1996) 662 N.E.2d 489, 278 Ill.App.3d 327, where the court describes the difference between the two standards as what someone ""would have done" (subjective standard) or "***should have*** done" (objective standard)" (Emphasis added, 662 N.E.2d at 496). Likewise in *People v. Carrera*, (Ill.App. 1 Dist. 2001) 748 N.E.2d 652 at 664, 321 Ill.App.3d 582, the court explained the standard adopted by the Supreme Court in *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct.

Here the policy exclusion expressly calls for the use of a subjective standard for the state of mind of the insured where it states that the determination, as to whether some injury or damage was "expected" or "intended," must be made "from the stand point of the insured". See *Aetna Cas. & Sur. Co. v. O'Rourke Bros., Inc.*, (Ill.App. 3 Dist. 2002) 776 N.E.2d 588 at 595, 333 Ill.App.3d 871; *Aetna Cas. & Sur. Co. v. Dichtl*, (Ill.App. 2 Dist. 1979) 398 N.E.2d 582, 78 Ill.App.3d 970; *Western States Ins. Co. v. Kelley-Williamson Co.*, (Ill.App. 2 Dist. 1991) 569 N.E.2d 1289, 211 Ill.App.3d 7; *Country Mut. Ins. Co. v. Hagan*, (Ill.App. 2 Dist. 1998) 698 N.E.2d 271, 298 Ill.App.3d 495; *State Farm Fire & Casualty Co. v. Watters*, 268 Ill.App.3d 501, 506, 205 Ill.Dec. 936, 644 N.E.2d 492 (1994). Other jurisdictions have held likewise *City of Johnstown v. Bankers Standard Insurance Co.*, 877 F.2d 1146 (2d Cir.1989); *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178 (C.A.2 (N.Y.), 1995); *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 827 P.2d 1024, 64 Wn.App. 838 (Wash. App., 1992); *Morton Intern., Inc. v. General Acc. Ins. Co. of America*, 629 A.2d 895, 266 N.J.Super. 300 (N.J. Super. A.D., 1991); *Group Ins. Co. of Michigan v. Czopek*, 489 N.W.2d 444, 440 Mich. 590 (Mich., 1992) (Michigan Supreme Court).

In light of insurance policies that expressly adopt the objective state of mind for such an exclusion[2] it would be unfair and improper to read such an objective standard into the policy in favor of the insurer and against the insured. The insurer is far more knowledgeable in such matters and drafted the policy language. "Where competing reasonable interpretations of a policy exist, a court is not permitted to choose which interpretation it will follow. * * * Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy." *Gillen v.*

1160, 94 L.Ed.2d 364 (1987), as "an "objective" standard of reasonableness, as opposed to a " subjective" standard, and that an officer cannot be said to have acted in good faith reliance upon a statute if a reasonable officer ***should have*** known that the statute was unconstitutional." (Emphasis added, 748 N.E.2d at 664.) See also, *People v. Comage*, (Ill.App. 4 Dist. 1999) 709 N.E.2d 244 at 248, 303 Ill.App.3d 269; *People v. Nash*, 282 Ill.App.3d 982, 985-86, 218 Ill.Dec. 410, 669 N.E.2d 353, 356 (1996).

[2] See, *Country Mut. Ins. Co. v. Olsak*, (Ill.App. 1 Dist. 2009) 908 N.E.2d 1091, 391 Ill.App.3d 295; *Allstate Ins. Co. v. Schmitt*, 238 N.J.Super. 619, 570 A.2d 488 (App.Div.1990), certif. denied, 122 N.J. 395, 585 A.2d 394 (1990), where the policy provided that it did "not cover any bodily injury or property damage which may *reasonably* be expected to result from the intentional or criminal acts of an insured person" Id at 623; and *Fire Ins. Exchange v. Diehl*, 450 Mich. 678, 545 N.W.2d 602 (Mich., 1996) explaining the significance of the use of the term "reasonably" in such an exclusion.

State Farm Mut. Auto. Ins. Co., (Ill. 2005) 830 N.E.2d 575 at 583, 215 Ill.2d 381 quoting *Employers Insurance of Wausau*, 186 Ill.2d at 141, 237 Ill.Dec. 82, 708 N.E.2d 1122.

Wilson also argued that Pekin had taken a statement from him and was aware that he denied any intention to harm Johnson. Wilson argued that any harm that Johnson suffered "would have been by accident." If true, based upon the subjective point of view contained in the "intentional act exclusion," the conduct of Wilson is not excluded as intentional or expected. Therefore, the Appellate Court erred in determining that no duty to defend exists absent the "self-defense" exception to the "battery" exclusion.

In the insurance context, generally, extrinsic facts, gathered in the discovery process, may be considered in determining whether a duty to defend is shown as long as they do not bear upon issues in the underlying litigation. *Mutlu v. State Farm Fire and Cas. Co.*, (Ill.App. 1 Dist. 2003) 785 N.E.2d 951 at 961-2, 337 Ill.App.3d 420; *Atlantic Mut. Ins. Co. v. American Academy of Orthopaedic Surgeons*, (Ill.App. 1 Dist. 2000), 315 Ill.App.3d 552 at 567, 248 Ill.Dec. 342, 734 N.E.2d 50 at 62.

The California Supreme Court, in *Gray v. Zurich Insurance Co*., 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168, reviewed the issue of insurance coverage for an action brought by the plaintiff on a theory of assault and battery and defended on a theory of self-defense. The policy contained an clause[3] excluding coverage for intentional acts. The court addressed itself to an insurer's duty to defend the exclusionary clause noting that the insured "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 a wilful and intended injury, but engaged only in nonintentional tortious conduct." 54 Cal.Rptr. at 113, 419 P.2d at 177.

A DUTY TO DEFEND EXISTS UNDER THE EXPRESS LANGUAGE OF THE POLICY FOR ACTS OF SELF DEFENSE

Pekin has written an insurance policy which excludes damages and injuries which from insured's point of view were expected or intended, while at the same time creating

[3] "The policy contains a provision that "[T]his endorsement does not apply" to a series of specified exclusions set forth under separate headings, including a paragraph (c) which reads, "under coverages L and M, to bodily injury or property damages caused intentionally by or at the direction of the insured." *Gray v. Zurich Insurance Co*., 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168.

an exception in the "battery" exclusion for acts of "self defense". The Pekin policy provided a "self defense" exception to the intentional-act exclusion, stating:

> "This exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property (the self-defense exception)." (909 N.E.2d 383)

The defendant **WILSON,** as part of his answer and counterclaim plead that during the incident at D&J Tarp Service, "Johnson was the aggressor and Wilson was defending himself." (Appellate opinion 909 N.E.2d at 383) He also alleged:

> "Because of the physical size difference of * * * Wilson and * * * Johnson, [Wilson] picked up a piece of thin wall conduit used in the tarp service and, without moving in any threatening manner but merely possessing the pipe as to defend himself from * * * Johnson, renewed his demand that Johnson leave the premises." (909 N.E.2d at 383)

Contrast the exclusion in this case with the exclusion in *Thornton v. Illinois Founders Ins. Co.*, (Ill. 1981) 418 N.E.2d 744, 84 Ill.2d 365, which provided:

> 'EXCLUSION OF ASSAULT AND BATTERY
> It is agreed that the insurance does not apply to Bodily Injury or Property Damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such assault and battery.' " (*Thornton,* 418 N.E.2d at 746)

Even viewing the facts as plead from a "reasonable man" or objective standard it is clear that Wilson was acting in a manner fairly characterized as "self defense" and clearly within the "self defense" exception to the intentional act exclusion. Without a doubt, Pekin owes Wilson a duty to provide him with a defense in the underlying litigation.

ANY INTERPRETATION OF THE INSURANCE POLICY THAT EXCLUDES ACTS OF SELF DEFENSE FROM COVERAGE WOULD RENDER THE EXCEPTION TO THE ASSAULT AND BATTERY EXCLUSION ILLUSORY, DECEPTIVE AND MISLEADING

The Pekin policy in this case contains an "self defense" exception to the intentional for acts exclusion contained in the policy. The Farmers policy does not. Where the insurance policy excludes from coverage injuries and damages which are expected or intended form the "standpoint of the insured" and contains an exception for acts of "self defense" any interpretation that denies a duty to defend and indemnify the

insured for acts of self defense would cause such exception to be meaningless. This court has held that insurance policies should not be read so as to render some of its provisions meaningless, by reading into the insurance contract something that is not there. See, *Rich v. Principal Life Ins. Co*., (Ill. 2007) 875 N.E.2d 1082, 226 Ill.2d 359. If this Court were to accept Pekin's position it would have to strike out the express "self defense" exception to the exclusion from coverage for intentional acts.

Reading the policy in such a manner as to remove from coverage, intentional acts of self defense, renders the "self defense" exception to the battery exclusion meaningless and very likely deceptive and misleading. In *Thornton v. Illinois Founders Ins. Co.*, (Ill. 1981) 418 N.E.2d 744, 84 Ill.2d 365, the policy provisions were redundant excluding both intentional acts and battery. In *Thornton* there was no exception for "self defense" to the "battery" exclusion as exists in this case.

In *Thornton v. Illinois Founders Ins. Co.*, (Ill. 1981) 418 N.E.2d 744, 84 Ill.2d 365, this Court held that merely because two provisions tend to overlap exclusions from coverage does not render them conflicting. Under the policy in that case " 'occurrence' was defined as 'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.' In addition, the assault and batter exclusion (cited above) did not provide an exception for intentional acts of self defense.

In *Thornton v. Illinois Founders Ins. Co.*, (Ill. 1981) 418 N.E.2d 744, 84 Ill.2d 365, unlike this case there was no ambiguity because there was no "self-defense" exception to the "Assault and Battery" exclusion. Here the policy provisions are not merely redundant and overlapping as in *Thornton*, but instead the policy in this case unambiguously carves out "self-defense" as hole from the absolution exclusion of all intentional acts.

To construe the policy in this case as excluding coverage for all intentional acts including those of "self-defense" would render the "self-defense" exception illusory. If the insurer here intended the "self-defense" exception to the "Assault and Battery" exclusion to be meaningless and unenforceable it was engaging in deceptive conduct with its insureds.

SELF DEFENSE BY ITS NATURE IS AN AFFIRMATIVE DEFENSE

Pekin argued that because "self defense" was raised in Wilson's pleadings and not by Johnson, the plaintiff in the underlying case, there is no duty to defend. This position would require the courts to ignore the express language of the policy which specifically refers to the exception to the intentional act exclusion a "***defense.***"

The Appellate Court in *People v. Chatman*, (Ill.App. 2 Dist. 2008) 886 N.E.2d 1265, 381 Ill.App.3d 890, stated:

> "Self-defense is an affirmative defense (720 ILCS 5/7-14 (West 2002)) and "the raising of such a defense necessarily constitutes an admission by the defendant that he committed the crime for which he is being prosecuted" (*People v. Raess*, 146 Ill.App.3d 384, 391, 100 Ill.Dec. 121, 496 N.E.2d 1186 (1986)). Thus, " '[r]aising the issue of self-defense requires as its sine qua non that defendant had admitted [the battery] as the basis for a reasonable belief that the exertion of such force was necessary.' " *People v. Diaz*, 101 Ill.App.3d 903, 915, 57 Ill.Dec. 273, 428 N.E.2d 953 (1981), quoting *People v. Lahori*, 13 Ill.App.3d 572, 577, 300 N.E.2d 761 (1973); see also *People v. Charleston*, 132 Ill.App.3d 769, 773, 87 Ill.Dec. 636, 477 N.E.2d 762 (1985) ("Self-defense relates to knowingly and intentionally using force to deter another; for it to be present defendant must have fired the gun intentionally and, where an accident is claimed, self-defense is out of the case"); *People v. Kelly*, 24 Ill.App.3d 1018, 1027, 322 N.E.2d 527 (1975) ("Self-defense presupposes the intentional use of force in defense of one's person" and "[t]he test is whether [the] accused honestly believed that he was in such danger, or apparent danger, as required the means taken for his protection"). No instruction on self-defense, IPI Criminal 4th No. 24-25.09 or otherwise, is applicable to an act that a defendant denies committing." (886 N.E.2d at 1272)

In *Winn v. Inman*, (Ill.App. 3 Dist. 1983) 457 N.E.2d 141, 119 Ill.App.3d 836, the Appellate Court held that self defense is an affirmative defense to assault and battery upon which the defendant has the burden of proof. The law of self-defense applies in both criminal and civil cases and criminal cases and statutes pertaining to self-defense are persuasive authority in civil cases in which this affirmative defense is raised. *First Midwest Bank of Waukegan v. Denson*, (Ill.App. 2 Dist. 1990) 562 N.E.2d 1256, 205 Ill.App.3d 124; see also *Blackburn v. Johnson*, (Ill.App. 4 Dist. 1989) 543 N.E.2d 583, 187 Ill.App.3d 557. The defendant bears the burden of proof on the issue of "self-defense" in a civil action for assault and battery. *Ewurs v. Pakenham*, (Ill.App. 3 Dist. 1972) 290 N.E.2d 319, 8 Ill.App.3d 733; *Irwin v. Omar Bakeries, Inc.*, (Ill.App. 2 Dist. 1964) 198 N.E.2d 700, 48 Ill.App.2d 297. Self Defense is an affirmative defense to civil

assault and battery. *Boyd v. City of Chicago*, (Ill.App. 1 Dist. 2007) 880 N.E.2d 1033, 378 Ill.App.3d 57; *Thompson v. Petit*, 294 Ill.App.3d 1029, 1035, 229 Ill.Dec. 387, 691 N.E.2d 860 (1998); First *Midwest Bank of Waukegan v. Denson*, 205 Ill.App.3d 124, 129, 150 Ill.Dec. 453, 562 N.E.2d 1256 (1990).

Both the Restatement of Torts and Prosser indicate that self-defense is a defense to an intentional tort. (Restatement (Second) of Torts secs. 63 through 76, (1965); W. Prosser, Law of Torts sec. 19, at 108-12 (4th ed. 1971).) *Blackburn v. Johnson*, (Ill.App. 4 Dist. 1989) 543 N.E.2d 583 at 586, 187 Ill.App.3d 557.

Whether injuries suffered in a tavern fight were a result of careless, reckless or mistaken conduct is a question of fact for a jury. *Winn v. Inman*, (Ill.App. 3 Dist. 1983) 457 N.E.2d 141 at 147, 119 Ill.App.3d 836; *Sunseri v. Puccia*, (Ill.App. 1 Dist. 1981) 422 N.E.2d 925, 97 Ill.App.3d 488.

In *Sunseri v. Puccia*, (Ill.App. 1 Dist. 1981) 422 N.E.2d 925, 97 Ill.App.3d 488, the court stated:

> "Assuming, arguendo, that plaintiff had initiated the fight, [defendant] was still not entitled to a directed verdict. Such evidence could have established [defendant's] privilege to use self-defense; however, that privilege may have been lost should the jury conclude that the force he employed was excessive under the circumstances. *Lanahan v. Taylor* (1972), 8 Ill.App.3d 482, 290 N.E.2d 310; *Nicholls v. Colwell* (1903), 113 Ill.App. 219; Restatement (Second) of Torts, sec. 71 (1965); Prosser, Torts, sec. 119 at 109-10 (4th Ed.1971)." (422 N.E.2d at 929)

In an action for injuries from assault by shooting, a jury instruction was upheld as proper where the defendant claimed self defense when the court instructed the jurors that the burden of proof was on defendant to prove by preponderance of evidence that the assault was necessary and made in "self defense;" and that defendant used no more force than was necessary to protect himself. *Mathes v. Lipe*, App.1948, 79 N.E.2d 874, 334 Ill.App. 621. (Memorandum opinion). Under both the plain language of the policy and under the abundance of case law, "self defense" is properly raised as an affirmative defense in a civil case.

CONCLUSION

It is proper for the court may review all of the pleadings in a case to determine whether there is a duty to defend under a liability insurance policy. This is especially true where the policy on its face states that it does not exclude acts of "self defense" from coverage. Where a policy states that whether an act is expected or intentional, versus accidental, is to be judged from the standpoint of the insured, and not that which is "reasonably" expected or intended, the policy requires a subjective evaluation intent or expectation and not that of a reasonable man. "Self defense" by its express nature is an affirmative defense and therefore any coverage or duty to defend for such acts would by necessity arise from the pleading of the defendant or insured and not by the party suing the insured. Any interpretation of the insurance policy which excludes acts of self defense from coverage would render the exception in the policy to the assault and battery exclusion illusory, deceptive and misleading. The decision of the Appellate Court decision should be sustained, insofar, as it reverses the grant of the judgment on the pleadings in favor of Pekin, holding that it had no duty to provide for a defense at its costs for Wilson in the underlying action, and reinstating Wilson's counterclaim against Pekin. To the extent that the Appellate Court applied an objective standard in determining if Wilson expected or intended the injuries or damages alleged by Johnson, the opinion should be reversed.

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