

No. 1-15-0375

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

GREEN DOLPHIN, INC., by its assignee,)	Appeal from the
JOHNNY POE,)	Circuit Court of
)	Cook County
Plaintiff/Counter-defendant-Appellant)	
)	
v.)	
)	No. 14 CH 8672
CAPITAL SPECIALTY INSURANCE)	
CORPORATION,)	
)	
Defendant/Counter-plaintiff-Appellee)	
)	
(Johnny Poe, individually)	Honorable
)	Peter A. Flynn,
Defendant).)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Simon concurred in the judgment.
Justice Hyman specially concurred.

ORDER

¶ 1 *Held:* Circuit court's order granting summary judgment for the defendant-insurer is affirmed where the insurance policy specifically excluded liability for assault or battery.

¶ 2 Plaintiff Green Dolphin, Inc. by its assignee Johnny Poe (Green Dolphin) appeals from

the circuit court's order granting Capital Specialty Insurance Corporation's (CSIC) motion for summary judgment and denying Green Dolphin's motion for summary judgment, finding that CSIC did not have a duty to defend or indemnify Green Dolphin in an underlying personal injury lawsuit. On appeal, Green Dolphin contends the circuit court erred because the underlying complaint alleges an injury that potentially falls within the policy's coverage. Green Dolphin also argues that CSIC should be estopped from asserting any policy defenses because it failed to defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. We affirm.

¶ 3

BACKGROUND

¶ 4 This case involves an insurance coverage dispute arising out of the defense and settlement of an underlying personal injury lawsuit. In the underlying lawsuit, Johnny Poe alleged that while a patron of the Green Dolphin Street nightclub, he was injured when another patron Thaddeus Macon stabbed him with a knife. In his amended complaint he alleged that "on December 10, 2011, at about 3:00 a.m., JOHNNY POE was stabbed with a knife by THADDEUS MACON at or near the bottom of a staircase inside the nightclub." Count I alleged that Green Dolphin was negligent in: (1) failing to provide adequate security and protection against harm to Poe; (2) failing to provide proper care and assistance to him during and after the assault; (3) failing to implement adequate security; (4) failing to provide properly trained security; and/or (5) carelessly providing security measures that it voluntarily undertook to perform. Count II alleged liability under the Dram Shop Act.¹

¶ 5 Upon notice of the Poe lawsuit, Green Dolphin tendered the complaint to CSIC for

¹ Count III was directed against Thaddeus Macon. Count III alleged alternatively that Macon intentionally and/or negligently stabbed Poe in the abdomen and arm with a knife on December 10, 2011.

defense and indemnification. At all relevant times, Green Dolphin was insured under a CSIC commercial general liability and liquor liability policy, number BR02058305. After receipt of the complaint, CSIC sent a letter to Green Dolphin denying coverage and explaining that CSIC had no duty to defend or indemnify Green Dolphin due to the "Assault or Battery" Exclusion in the insurance policy.

¶ 6 The exclusion, in relevant part, provides as follows:

ASSAULT OR BATTERY EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM and LIQUOR LIABILITY COVERAGE FORM

C. The following exclusion is added to:

- 1. SECTION 1 – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions and SECTION I – COVERAGES, COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY, 2. Exclusions of the GENERAL LIABILITY COVERAGE FORM; and**
- 2. SECTION I – LIQUOR LIABILITY COVERAGE, 2. Exclusions of the LIQUOR LIABILITY COVERAGE FORM:**

"Assault or Battery" Exclusion

This insurance does not apply to, nor shall we have a duty to defend any claim or "suit" seeking damages or expenses due to "bodily injury," "property damage," "personal and advertising injury," or "injury", as defined respectively in the Commercial General Liability Coverage Form and Liquor Liability Coverage Form, arising out of, resulting from, or in connection with any of the following acts or omissions regardless of their sequence or any concurring causes:

- a. "Assault or battery", whether or not caused or committed by or at

the instruction of, or at the direction of or arising out of the negligence of you, any insured, any person or legal entity, or any causes whatsoever;

- b. The suppression of prevention of, or the failure to suppress or prevent "assault or battery" by you, any insured, or any person or legal entity;
- c. The failure by you, any insured, or any legal entity to provide an environment safe from "assault or battery", including but not limited to the failure to provide adequate security, or the failure to warn of the dangers of the environment which could contribute to "assault or battery" or failure to maintain the premises by you, any insured or any person or legal entity;
- d. The negligent employment, investigation, hiring, supervision, training, retention, or any other employment related practice by an insured or any person or legal entity, including but not limited to contractors or subcontractors;
- e. The use of any force to protect persons or property whether or not the "bodily injury," "property damage," "personal or advertising injury" or "injury" was committed by or at the direction of you, any insured or any person or legal entity;
- f. The rendering of or failure to render or secure treatment or care necessitated by any "assault or battery" by you, any insured or any person or legal entity;
- g. The reporting to the proper authorities or failure to do so by you, any insured, or any person or legal entity; or
- h. Caused by, arising out of or resulting from the intoxication of any person.

D. Definitions

The following is added to **SECTION V – DEFINITIONS** of both the General Liability Coverage Form and Liquor Liability Coverage Form and Liquor Liability Coverage Form:

"Assault or battery" means:

- b. Battery, including sexual abuse, sexual battery, sexual molestation, any physical altercation and any actual harmful or offensive contact between two or more persons, whether or not caused or committed by or at the instructions of, or at the direction of, or arising out of the negligence of you, any insured, any legal entity, or any causes whatsoever, regardless of fault or intent. (Emphasis in original).

¶ 7 On February 10, 2014, Poe and Green Dolphin settled Poe's claims in exchange for \$175,000 and obtained dismissal of Poe's lawsuit. According to the terms of the settlement agreement, Poe agreed to seek satisfaction and payment of the \$175,000 from Green Dolphin's CSIC liability policies and not Green Dolphin's personal assets. In exchange Green Dolphin assigned all rights, interests, and causes of action against any liability insurer to Poe.

¶ 8 On May 21, 2014, Green Dolphin filed the instant complaint for declaratory judgment, seeking a declaration that CSIC is obligated to provide coverage relating to the December 10, 2011, occurrence. CSIC filed an answer and a counterclaim seeking a declaration that there is no coverage under the policy, that CSIC has no duty to defend, and that CSIC has no duty to indemnify Green Dolphin from this occurrence.

¶ 9 Thereafter, CSIC filed a motion for summary judgment and argued that the "Assault or Battery" provision unambiguously excludes coverage for the December 2011 occurrence. Green Dolphin also argued that because CSIC breached its duty to defend, it should be estopped from asserting any policy defense or disputing the settlement amount and should indemnify Green Dolphin. In response, Green Dolphin filed its own motion for summary judgment and argued that the insurance policy is ambiguous and the occurrence possibly fell within the policy coverage.

¶ 10 On January 29, 2015, the circuit court entered an order granting CSIC's motion for summary judgment and denying Green Dolphin's motion for summary judgment. The circuit

court found the insurance policy afforded no coverage to Green Dolphin with respect to the underlying lawsuit and that CSIC had no duty to defend or indemnify Green Dolphin. The circuit court concluded that the "Assault and Battery" Exclusion clearly and unambiguously covered the allegations in the complaint. The circuit court stated that it was clear "what the company is trying to do is get itself clean out of the realm of bar fights in any way, shape, or form."

¶ 11 ANALYSIS

¶ 12 Summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. Where, as here, the parties file cross-motions for summary judgment, they agree that no genuine issue of material fact exists, and that the case turns solely on a question of law. *Id.* We review a trial court's grant of summary judgment *de novo*. *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 311 (2007).

¶ 13 I. Duty to Defend

¶ 14 Green Dolphin contends CSIC was obligated to defend Poe's underlying personal injury lawsuit on Green Dolphin's behalf, and that CSIC breached this duty.

¶ 15 As a threshold matter we find plaintiff has waived review of this contention. Plaintiff's appellant brief contains several pages reciting case law and discussing when an insurer has a duty to defend, yet plaintiff dedicates only five paragraphs to the subsection addressing its argument that CSIC had a duty to defend Green Dolphin. Of those five paragraphs, none connect its argument to the case law cited. Supreme Court Rule 341(h)(7) (Ill. S. Ct. Rule 341(h)(7) (eff.

July 1, 2008) requires, among other things, that an appellant present a fully developed argument with adequate legal and factual support (*Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009)) including citations to legal authority for all arguments advocated (*Soter v. Christoforacos*, 53 Ill. App. 2d 133, 137 (1964)). In addition, the citations must be relevant and cannot merely consist of citations to general propositions of law. *Robinson v. Point One Toyota, Evanston*, 2012 IL App (1st) 111889, ¶ 54. As we have repeatedly noted, supreme court rules are not suggestions, but rather, they are mandatory guidelines and rules that must be followed. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8; *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). The purpose of our supreme court rules is to require parties before a reviewing court to present clear and orderly arguments so that the court can properly ascertain and dispose of the issues involved. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7.

¶ 16 Appellant states in conclusory fashion that CSIC had a duty to defend and that CSIC's claim is not free and clear from doubt. However, plaintiff does not provide any substance to these arguments or make any attempt to demonstrate that the facts as alleged fall within the policy coverage, or that the exclusion does not apply to these facts, and the citation to case law does not cure this fatal deficiency. "The appellate court is not a depository in which the appellant may dump the burden of research" and "[a] conclusory assertion, without supporting analysis, is not enough" to satisfy Rule 341. (Internal quotation marks omitted.) *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶¶ 38-40.

¶ 17 In addition, in its reply brief Green Dolphin argues that the "Assault or Battery" exclusion does not apply to the underlying allegations in Poe's complaint. This position is not developed or mentioned in the initial appellate brief. An appellant's reply brief cannot be used as

an "end run" around the Supreme Court Rules requiring a cohesive and well developed argument supported by case law in the initial appellant brief. See *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 804 (2009) (failure to assert a well-reasoned argument supported by legal authority is a violation of Rule 341(h)(7); see also *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 401 Ill. App. 3d 966, 976 (2010) (an argument raised for the first time in a reply brief is waived). Therefore we find plaintiff waived review of this contention.

¶ 18 Waiver aside, Green Dolphin's contention is unmeritorious. The "Assault or Battery" Exclusion denies coverage to all claims for bodily injury "arising out of, resulting from, or in connection with *** '[a]ssault or battery', whether or not caused or committed by *** or arising out of the negligence of you, any insured, any person *** or any cause whatsoever." Moreover, the exclusion explicitly denies coverage for each allegation of negligence against Green Dolphin in the underlying complaint. The exclusion denies coverage for claims arising out of failure to: (1) "suppress or prevent 'assault or battery' "; (2) "provide adequate security"; (3) "provide an environment safe from 'assault or battery' "; (4) "warn of the dangers of the environment which could contribute to 'assault or battery' "; and (5) "render or secure treatment or care necessitated by any 'assault or battery.'" In addition, the exclusion denies coverage for "negligent employment *** hiring, supervision, training, retention or any other employment related practice."

¶ 19 When determining whether an insurer has a duty to defend, we look to the allegations in the underlying complaint and compare those allegations to the relevant provisions of the insurance policy. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010); see *Farmers Automobile Insurance Ass'n v. Country Mutual Insurance Co.*, 309 Ill. App. 3d 694, 698 (2000)

(referring to this principle as the "eight corners rule"). An insurer's duty to defend arises if "the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992).

¶ 20 In this case, Poe's underlying complaint alleged that Green Dolphin negligently allowed Poe to be injured by Macon. Green Dolphin contends the allegations of the underlying complaint possibly fall within policy coverage because the insurance policy covers personal injury claims that occur on the premise. Green Dolphin argues that although the insurance policy contains an "Assault or Battery" exclusion, the exclusion only applies to an intentional stabbing, and the underlying complaint leaves open the possibility that Poe may have been negligently stabbed.²

¶ 21 Omitting all but the relevant portions, the policy exclusion defines "battery" as: "any physical altercation and any actual harmful or offensive contact between two or more persons, whether or not caused or committed by *** or arising out of the negligence of you, any insured, any legal entity, or any causes whatsoever, regardless of fault or intent." Adding the phrase, "regardless of fault or intent" to the end of the definition is mere redundancy, and ambiguity does not arise from redundancy or prolixity. See *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.*, 252 Ill. App. 3d 96, 100 (1993). We find that the term "assault or battery," as defined in the policy, encompasses a stabbing as alleged in this complaint regardless of whether the stabbing was intentional or the result of a negligent act. See *Farmers Automobile Insurance*, 309 Ill. App. 3d at 698. The trial court was correct when it summarized the exclusion as CSIC's way of getting "clean out of the realm of bar fights in any way, shape or form." Considering this definition, there is no reasonable way to read the policy so that it provides coverage for the December 10,

² In the underlying complaint, Poe's two counts against Green Dolphin allege only that Macon stabbed Poe. Poe's single count against Macon alleges that Macon intentionally and/or negligently stabbed Poe.

2011 occurrence, when Macon stabbed Poe with a knife.

¶ 22 An insurance policy is not ambiguous merely because the parties fail to agree upon its meaning, and we will not strain to find an ambiguity where none exists. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). We find that the "Assault or Battery" exclusion is unambiguous and susceptible to only one reasonable interpretation: the policy does not cover claims arising from any physical altercation or any actual harmful contact between two people, regardless of whether the conduct is characterized as intentional or negligent.

Accordingly, we find that the allegations of the underlying complaint, alleging either an intentional or a negligent stabbing, do not fall, or potentially fall, within policy coverage. We therefore find that the trial court properly concluded that CSIC did not owe Green Dolphin a duty to defend.

¶ 23 II. Estoppel and Duty to Indemnify

¶ 24 Green Dolphin also argues that because CSIC failed to either defend the underlying suit under a reservation of rights or seek a declaratory judgment that there was no coverage prior to the settlement, CSIC should be estopped from disputing policy coverage and must indemnify Green Dolphin. However, the estoppel doctrine "applies only where an insurer has breached its duty to defend." *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151 (1999). The "[a]pplication of the estoppel doctrine is not appropriate if the insurer had no duty to defend," such as, "when the policy and the complaint are compared, there clearly was no coverage or potential for coverage." *Id.* The doctrine of estoppel "arises only where a duty to defend exists and has been breached by the insurer. It does not prevent the insurer from raising the issue of whether it did in fact breach a duty to defend." *JG Industries, Inc. v. National Union*

Fire Insurance Co., 218 Ill. App. 3d 1061, 1066-67 (1991) (citing *M/A Com, Inc. v. Perricone*, 187 Ill. App. 3d 358, 362 (1989)). Because we find that CSIC had no duty to defend Green Dolphin because of a policy exclusion, CSIC is not estopped from raising a policy exclusion as a defense to plaintiff's declaratory action.

¶ 25 Lastly, an insurer's duty to indemnify is narrower than its duty to defend. *Outboard Marine*, 154 Ill. 2d at 127. The duty to indemnify arises if the claim actually falls within policy coverage. *Id.* at 128. Because we find the allegations of the underlying complaint do not possibly fall within policy coverage, CSIC does not have a duty to indemnify Green Dolphin.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 28 Affirmed.

¶ 29 JUSTICE HYMAN, specially concurring:

¶ 30 While I agree with the result, I write to take exception to ¶¶ 15-17, which knock plaintiff's briefs for not abiding by supreme court rules governing appellate briefing. I believe the dissatisfaction to be unfounded, and that plaintiff properly observed appellate briefing rules. My reading of the plaintiff's opening and reply briefs does not detect the kind of faults that deserve comment much less invite criticism. Nor did CSIC in its response assert or suggest that plaintiff's opening brief might be noncompliant with the rules.

¶ 31 Contrary to the characterization of the opening brief as lacking "any substance" or arguing in a "conclusory fashion," and of the reply brief as creating an "end run" on the assault or battery exclusion, these briefs satisfactorily comply with the requirements for briefing appeals and are certainly in line with the majority of briefs received by the court.

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¶ 32 Accordingly, I decline to subscribe to the criticism of plaintiff's manner of briefing this appeal.