2016 IL App (5th) 150249-U

NO. 5-15-0249

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

E.H., a Minor, by and Through His Parents, S.H. and T.H.,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff-Appellant,	)	
v.	)	No. 14-MR-199
STATE FARM FIRE & CASUALTY COMPANY,	)	
Defendant-Appellee	)	
(A.S., a Minor, Through Her Mother, Keyona Fisher, Defendant).	)	Honorable Stephen P. McGlynn, Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: In a declaratory judgment action seeking a duty to defend a minor against a complaint based on an alleged sexual assault, it is improper for the circuit court to hold a cross-motion for judgment on the pleadings in abeyance to await resolution in the underlying litigation of the issue of whether the minor had the intent to injure.

¶ 2 After entering an order on January 30, 2015, holding State Farm Fire & Casualty Company's (State Farm) cross-motion for a judgment on the pleadings in abeyance, the

following question was certified by the circuit court of St. Clair County pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2015):

> "In a declaratory judgment action seeking a duty to defend, does Illinois law mandate the trial court to await resolution of the underlying litigation prior to determining whether a duty to defend is owed to a minor accused of committing an act that would otherwise be barred from coverage under the inferred-intent doctrine and where there are also allegations of negligence?"

¶ 3 For the reasons that follow, we answer the certified question in the negative, vacate those portions of the circuit court's January 30, 2015, order that address State Farm's duty to defend,[1] and remand this cause with directions that the circuit court make a determination as to whether the defendant has a duty to defend the plaintiff in the underlying action.

¶ 4 FACTS

¶ 5 The plaintiff, E.H., a minor, by and through his parents, S.H. and T.H., filed a complaint for a declaratory judgment against, *inter alia*, the defendant, State Farm Fire & Casualty Company (State Farm), in the circuit court of St. Clair County. Although the complaint for a declaratory judgment does not appear in the supporting record on appeal,

[1]The circuit court's order also addressed State Farm's duty to indemnify the plaintiff. Our disposition of this appeal in no way disturbs the circuit court's decision to hold its determination of State Farm's duty to indemnify in abeyance, which is appropriate for reasons that we later discuss.

it appears from the pleadings that were included in the record that count I requested that the circuit court order State Farm to defend the plaintiff, pursuant to a homeowners' insurance policy, in underlying civil litigation alleging that the plaintiff sexually assaulted a female in the girls' bathroom at O'Fallon Township High School on April 13, 2013. Count II requested that State Farm indemnify the plaintiff for any damages awarded in the underlying lawsuit. According to the pleadings that were included in the supporting record on appeal, State Farm filed a counterclaim requesting a declaratory judgment that it does not owe the plaintiff a duty to defend or indemnify the plaintiff in the underlying lawsuit because the complaint in the underlying lawsuit did not allege an "occurrence," which is defined by the policy as an accident, and because the policy excluded coverage where an injury was either expected or intended by the insured.

¶ 6 The first amended complaint in the underlying action (the complaint) is included in State Farm's supplemental supporting record. The complaint identifies the defendant, who is the plaintiff in the present action, as a minor, but does not state his age. The complaint alleges that the plaintiff "did willfully and maliciously perpetrate a sexual attack upon [the underlying plaintiff] without [the underlying plaintiff's] consent and against her will, causing her injuries." Count I of the complaint alleges that the plaintiff "physically intruded, with the intent to do so, upon the seclusion of [the underlying plaintiff]." Count II alleges that the plaintiff "intentionally approached [the underlying plaintiff] in a manner that caused [the underlying plaintiff] to realize reasonable apprehension of an imminent, offensive contact with [the underlying plaintiff's] person," and that the plaintiff's "intentional actions directed toward [the underlying plaintiff]

caused [the underlying plaintiff] to suffer injuries and to incur damages." Count III alleges that the plaintiff "willfully touched [the underlying plaintiff] in an offensive and harmful manner without [the underlying plaintiff's] consent." Count IV alleges that the plaintiff "unreasonably and unlawfully restrained [the underlying plaintiff's] liberty against her will" as part of a plan or scheme to commit a sexual assault upon the underlying plaintiff. Counts V and VI of the complaint allege intentional infliction of emotional distress and negligent infliction of emotional distress respectively. The remaining counts of the complaint stated causes of action against the plaintiff's parents, the school district, and some of its employees.

¶ 7 On November 24, 2014, the plaintiff filed, pursuant to section 2-615(e) of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615(e) (West 2014)), a motion for a judgment on the pleadings as to count I of the complaint for a declaratory judgment, which addressed State Farm's duty to defend the plaintiff in the underlying action. It appears that State Farm subsequently filed a combined response and cross-motion for judgment on the pleadings as to both counts of its counterclaim as well as count I of the plaintiff's complaint regarding the duty to defend, although the copy included in the supporting record on appeal does not bear a file stamp.

¶ 8 On January 30, 2015, the circuit court entered an extensive written order addressing the cross-motions for a judgment on the pleadings. The circuit court discussed at length the holding of the Second District in *Country Mutual Insurance Co. v. Hagan*, 298 Ill. App. 3d 495 (1998), which we discuss in detail below. The circuit court concluded, based on its reading of *Hagan*, as follows:

"Nonetheless, prudence would direct this court not to decide coverage or duty to defend in this matter until the trier of fact in the underlying case determines whether E.H.'s conduct constitutes an intentional act clearly excluded by the policy, or if he was merely negligent intending no harm to his victim. Plaintiff's motion for summary judgment[2] requesting State Farm be directed to provide a defense to E.H. in the underlying cause is denied without prejudice. [State Farm's] cross-motions for summary judgment are held in abeyance until such time as the trier of fact in the underlying case determines issues involving E.H.'s intent."

¶ 9 On February 9, 2015, the plaintiff filed a motion to reconsider, which the circuit court denied on May 19, 2015. On June 3, 2015, the plaintiff filed a motion for a certification of the question of State Farm's duty to defend pursuant to Rule 308. On June 16, 2015, the circuit court entered an order certifying the following question for interlocutory appeal:

"In a declaratory judgment action seeking a duty to defend, does Illinois law mandate the trial court to await resolution of the underlying litigation prior to determining whether a duty to defend is owed to a minor accused of committing an act that would otherwise be barred from coverage under the inferred-intent doctrine and where there are also allegations of negligence?"

This court granted the plaintiff's petition for leave to appeal on August 5, 2015.

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[2]We note that, as set forth above, the parties actually filed cross-motions for a judgment on the pleadings, rather than cross-motions for a summary judgment.

¶ 10 ANALYSIS

¶ 11 We begin by setting forth our standard of review. Because this appeal concerns a question of law certified by the circuit court pursuant to Rule 308, our standard of review is *de novo*. *In re M.M.D.*, 213 Ill. 2d 105, 113 (2004). Although the scope of our review is generally limited to the question that is certified by the circuit court, if the questions so certified require limitation in order to materially advance the termination of the litigation, such limitation is proper. See *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 557 (2009). In addition, in the interests of judicial economy and the need to reach an equitable result, we may consider the propriety of the circuit court order that gave rise to the certified question. *Id.* at 558 (citing *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 354 (2007)).

¶ 12 While perhaps inartfully worded, the certified question on appeal essentially asks this court to determine whether the circuit court properly held its decision on the cross-motions for a judgment on the pleadings in abeyance pending the outcome of the underlying litigation. Where both parties have filed a cross-motion for judgment on the pleadings, it is generally conceded that no fact questions exist and that the issues presented to the court are solely issues of law. *Zipf v. Allstate Insurance Co.*, 54 Ill. App. 3d 103, 108 (1977). However, the court must examine the pleadings to determine if a factual issue exists or if a matter of law is solely involved. *Id.* Here, the circuit court was asked to determine, on the pleadings, whether State Farm had a duty to defend the plaintiff in underlying litigation. Accordingly, we turn to the legal standards governing the determination of an insurer's duty to defend its insured in Illinois.

¶ 13 "An insurer's duty to defend its insured is much broader than its duty to indemnify its insured." *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154 (2005) (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125 (1992)). "An insurer may not justifiably refuse to defend an action against its insured unless it is clear from the face of the underlying complaint that the allegations set forth in that complaint fail to state facts that bring the case within or potentially within the insured's policy coverage." *Id.* (citing *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991)). "A court must compare the allegations in the underlying complaint to the policy language in order to determine whether the insurer's duty to defend has arisen." *Id.* at 154-55 (citing *Outboard Marine*, 154 Ill. 2d at 125). "If the underlying complaint alleges facts within or potentially within policy coverage, an insurer is obligated to defend its insured even if the allegations are groundless, false or fraudulent." *Id.* at 155 (citing *Dixon Distributing Co. v. Hanover Insurance Co.*, 161 Ill. 2d 433, 438-39 (1994)). "The allegations in the underlying complaint must be liberally construed in favor of the insured." *Id.* (citing *Outboard Marine*, 154 Ill. 2d at 125). "In addition, if several theories of recovery are alleged in the underlying complaint against the insured, the insurer's duty to defend arises even if only one of several theories is within the potential coverage of the policy." *Id.* (citing *United States Fidelity & Guaranty Co.*, 144 Ill. 2d at 73).

¶ 14 Under Illinois law, an intentional injury exclusion in an insurance policy requires that an insured act with the specific intent to injure. *Scudder v. Hanover Insurance Co.*, 201 Ill. App. 3d 921, 927 (1990). Similarly, the issue of whether an incident constitutes

an "accident," and therefore an "occurrence," when so defined in an insurance policy, turns on whether the injury is expected or intended. See *State Farm Fire & Casualty Co. v. Watters*, 268 Ill. App. 3d 501 (1994). Here, State Farm's motion for a judgment on the pleadings asserts that it is entitled to a judgment in its favor because the complaint is based upon allegations that the plaintiff sexually assaulted a minor, which triggers the intentional injury exclusion of the insurance policy at issue.[3] In addition, State Farm argues that the intentional nature of the allegations in the complaint removes the incident from the purview of an "occurrence," which is defined as an "accident" under the policy. State Farm's arguments are based on the doctrine of inferred intent, which is applied to infer the intent to injure when the underlying complaint is predicated on allegations that an adult insured sexually abused a minor. See *Western States Insurance Co. v. Bobo*, 268 Ill. App. 3d 513 (1994); *Watters*, 268 Ill. App. 3d 501; *Scudder*, 201 Ill. App. 3d 921.

¶ 15 In its order denying the plaintiff's motion for a judgment on the pleadings and holding State Farm's motion for a judgment on the pleadings in abeyance pending the outcome of the underlying litigation, the circuit court relied on *Country Mutual Insurance Co. v. Hagan*, 298 Ill. App. 3d 495 (1998), stating that the holding in that case justifies such a result. The central holding of *Hagan* is that the doctrine of inferred intent should not be applied when the insured is a minor alleged to have sexually abused another minor. *Id.* at 506. The court held that because a minor insured may or may not have the capacity to form the intent to injure another minor with whom he engages in sexual conduct, the minor's intent is a factual question to be determined based on that minor's

[3]The insurance policy at issue is not part of the supporting record on appeal.

particular characteristics and experience. *Id*. at 505. Because the underlying complaint only contained allegations that the minor insured had intended the sexual acts, but contained no allegations that the minor had intended to injure the underlying minor plaintiff, the court found that the circuit court erred in applying the inferred-intent doctrine and granting a summary judgment to the insurer regarding the duty to defend. *Id.* at 506.

¶ 16 This court recognizes that some of the language in the *Hagan* case is ambiguous as to whether the court's holding required further development of the factual record in order to determine the duty to defend. For example, the court stated:

> "By refusing to apply the inferred-intent standard, we do not require insurers to defend *and* provide coverage whenever a minor sexually abuses another minor. We merely require that the minor perpetrator's intent be determined on a case-by-case basis. *Coverage* will be required only when a trier of fact determines, based on the particular characteristics and experience of a minor, that the minor did not act with the intent to injure when he sexually abused another minor." (Emphasis added.) *Hagan*, 298 Ill. App. 3d at 505-06.

¶ 17 This ambiguity is buttressed by the procedural posture of the *Hagan* case following the *Hagan* decision, in which the court concluded:

> "Based on the questions of fact with respect to coverage under the policy, we hold that it was error for the trial court to grant summary judgment in favor of [the insurer] on the issue of its duty to defend. For the same reasons, the trial court erred in granting summary judgment in favor of [the insurer] on the issue of

indemnification. When there is a *bona fide* dispute as to whether an insured acted negligently or intentionally, the *issue of indemnification* may not be decided on declaratory judgment until the underlying tort litigation has been completed. See *State Farm Fire & Casualty Co. v. Leverton,* 289 Ill. App. 3d 855, 856 (1997).

Accordingly, we reverse the trial court's decision to grant summary judgment in favor of [the insurer] and against [the insured], and we remand the cause for further proceedings on the declaratory judgment complaint." (Emphasis added.) *Id.* at 510.

¶ 18 This court can see how the above-quoted language from *Hagan* might be construed to require some type of factual determination of the minor's intent prior to determining the duty to defend, whether it be within the declaratory judgment proceeding itself, or as the circuit court in this case determined, within the context of the underlying litigation.[4] However, we decline to read *Hagan* to initiate any such procedural requirement in the context of a duty to defend analysis. Such a reading of *Hagan* would require a vast departure from the longstanding legal standards governing the determination of an insurer's duty to defend its insured in Illinois. As explained above,

[4]We note that, assuming *arguendo* that it was appropriate to forego a determination of the duty to defend pending termination of the underlying litigation, the issue of the insured's intent to injure might never be resolved in such litigation depending on the elements of the underlying claims, which may or may not require proof of the intent to injure.

and as recognized by the *Hagan* court, the duty to defend depends solely on a comparison of the allegations of the underlying complaint with the insurance policy at issue in order to determine whether a potential for coverage exists. *Id.* at 500. To allow the circuit court to withhold judgment regarding the duty to defend pending the termination of the underlying litigation, or to otherwise develop the facts surrounding the underlying litigation, would effectively eviscerate the "four corners of the complaint rule" and narrow the duty to defend such that it would be on par with the duty to indemnify. See *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154 (2005) (the duty to defend is much broader than the duty to indemnify (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125 (1992))). Such a result is clearly contrary to Illinois law, and to the extent *Hagan* can be read in this manner, we decline to follow it. For these reasons, we answer the certified question on appeal in the negative[5] and vacate the circuit court's January 30, 2015, order.

¶ 19 On appeal, State Farm advances arguments as to why, despite *Hagan*'s holding that, in the case of sexual assault of another minor, the court should not infer the intent of

[5] Both parties agree that the certified question should be answered in the negative. State Farm asserts this appeal should be dismissed for that reason. However, we find that answering the certified question will aid in the ultimate termination of the litigation. If this appeal is dismissed, the circuit court's ruling on the cross-motions for a judgment on the pleadings will be held in abeyance pending termination of the underlying litigation, which, as we have discussed, is contrary to Illinois law.

a minor to injure, such an inference should be made in this case. Specifically, State Farm argues that the reasoning of the *Hagan* court would indicate that the inferred intent standard should still apply in the case of a 15-year-old minor, and also that the allegations of the complaint in this case, unlike in *Hagan*, specifically allege an intent on the part of the plaintiff to injure the underlying plaintiff. Similarly, the plaintiff urges this court to make a determination on the merits of whether State Farm has a duty to defend in this case. We decline to address the application of the inferred intent standard to the facts of this case, or to otherwise make a determination on the merits regarding State Farm's duty to defend. Our reason for this is twofold. First, the plaintiff specifically requested that the circuit court certify the question of State Farm's duty to defend for interlocutory appeal, and the circuit court declined to do so, instead certifying the question before us. Second, the supporting record on appeal does not contain the complaint for a declaratory judgment or the insurance policy at issue. Accordingly, this court does not have a sufficient record to make such a determination. This determination is for the circuit court to make by first assessing whether, under *Hagan*, inferring the intent of the plaintiff to injure is warranted, and then, in light of that determination, considering whether the allegations of the underlying complaint indicate a potential for coverage.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we answer the certified question in the negative, vacate those portions of the January 30, 2015, order of the circuit court of St. Clair County that address State Farm's duty to defend, and remand this cause with directions that the circuit

court make a determination, based on the pleadings, as to whether the defendant has a duty to defend the plaintiff in the underlying action.

¶ 22 Certified question answered; order vacated in part; cause remanded with directions.