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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001471-MR

OWNERS INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 06-CI-00361

TIMOTHY KEITH UTLEY
AND JEFFREY KELLER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Owners Insurance Company appeals from the Christian Circuit Court's order denying its motion for a declaratory judgment. Owners sought a declaratory judgment determining that it was not obligated under its policy to defend or indemnify the appellee, Timothy Utley, with regard to an attack

in which Utley injured a man while defending himself at a bar in Hopkinsville, Kentucky. After careful review, we affirm the order of the trial court denying Owners' motion for declaratory judgment.

This litigation arose out of an attack that occurred at the Horseshoe Restaurant in Hopkinsville, Christian County, Kentucky, on or about March 31, 2005. That evening, Timothy Utley and his wife, Amy, went to the Horseshoe Restaurant in Hopkinsville, Kentucky to have dinner. Jeffrey Keller, who was intoxicated, was also present in the restaurant. Utley and Keller did not know each other previously.

At some point, Utley and his wife decided to leave the restaurant, but Utley wanted to use the restroom before they left. Because the men's room was occupied, Utley waited outside the restroom door. Keller emerged from the restroom, grabbed Utley by the neck, pushed Utley into the restroom, and threatened to kill him. Keller's friend pulled Keller away from Utley and forced him down the narrow hallway and out the front door of the restaurant.

Utley went back into the restaurant and told his wife that they needed to leave. As Utley and his wife were walking through the bar area toward the side door, Keller suddenly appeared at the end of the bar, blocking their way. Utley told Keller that he did not want any trouble, and that he and his wife were attempting to leave. Keller again threatened to kill Utley, and he suddenly struck Utley in the face with his fist. Keller knocked Utley and his wife to the floor, got on top of Utley, and continued to punch him. Utley heard someone yell, "He's got

a gun!" Upon hearing that, Utley managed to get his pocket knife out of his pants pocket, and he swung it wildly, attempting to get Keller off of him and to protect himself and his wife from serious harm. While swinging his arm, Utley's hand struck something, and the knife went flying out of his hand.

Other people intervened, pulling Keller off of Utley, who immediately jumped up and ran out the side door of the restaurant in order to get away from Keller. Utley's face was battered, his shirt was torn, and he had blood on his clothing. Keller received non-life threatening wounds to his hand and neck.

Utley was indicted for first-degree assault against Keller, and an affidavit was filed by Detective Joseph Witherspoon. The criminal matter was eventually dismissed. Keller also filed a personal injury suit against Utley, seeking damages for his injuries. At the time of the incident, Utley had a homeowner's insurance policy with Owners, which included coverage for bodily injury to others if the injury was caused by the insured. Utley demanded that Owners meet its obligations under his homeowner's insurance policy.

Owners moved for declaratory judgment, claiming that it was not liable under Utley's insurance policy because the policy did not cover "bodily injury or property damage reasonably expected or intended by the insured." Utley argued that Owners was obligated to provide coverage because he was defending himself and his wife from serious bodily harm or death when he injured Keller. He argued that he did not intend to injure Keller, and Keller's injuries were not reasonably expected by Utley.

The trial court agreed with Utley, finding that the evidence did not support Owners' argument that Utley intended or reasonably expected the bodily injury sustained by Keller. Furthermore, the trial court found that no such intention or reasonable expectation could be inferred from the facts before the court. The trial court concluded by finding that the only reasonable inference that it could draw from the facts of this case was that Utley reasonably expected and intended to do nothing more than stop Keller's assault and protect his wife and himself from any further harm. Based on these findings, the court found that Owners was obligated to provide Utley coverage under the insurance policy. This appeal now follows.

"[T]he standard of review on appeal from a declaratory judgment is whether such judgment was clearly erroneous." *Uninsured Employers' Fund v. Bradley*, 244 S.W.3d 741, 744 (Ky. App. 2007) (citing *American Interinsurance Exchange v. Norton*, 631 S.W.2d 851, 852 (Ky. App. 1982)).

As a general rule, the construction and legal effect of an insurance contract is a matter of law for the Court. *Bituminous Casualty Corporation v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007). Where not ambiguous, the ordinary meaning of the words chosen by the insurer is to be followed. *Id.*

The policy in this case provided that Owners would pay "all sums any insured becomes legally obligated to pay as damages because of or arising out of bodily injury or property damage to which this coverage applies." The exclusion

promoted by Owners provides that personal liability and medical payments do not apply to "bodily injury or property damage reasonably expected or intended by the insured. This exclusion applies even if the bodily injury or property damage is of a different kind or degree, or is sustained by a different person or property than that reasonably expected."

Owners first argues that the trial court erred by ignoring the exclusions contained in the insurance contract between Owners and Utley. However, the record indicates that the trial court did consider the exclusions found in the insurance policy, but simply found the exclusions to be inapplicable under the facts of this case because Utley did not intend to injure or harm Keller.

Owners further argues that the trial court erred by limiting the proper rule for finding expected or intended harm to the subjective standard discussed in *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991), and by not applying the doctrine of inferred intent.

Under Kentucky law, "the 'expected or intended' exception is inapplicable unless the insured specifically and subjectively intends the injury giving rise to the claim." *Id*. If the injury was not actually and subjectively intended by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and foreseeable. *Id*. While the activity which produced the alleged damage may be fully intended, coverage will not be denied unless the insured intended the resulting damages. *Id.*

In the alternative, Owners urges this court to apply the doctrine of inferred intent. Under certain circumstances, the circuit court may infer that an insured intended or expected the damage as a matter of law. *Id.* at 277. "That is to say, in certain circumstances one may reasonably infer from the facts that the actor intended the harm, without needing to resort to proof of that intent." *Nationwide Mut. Fire Ins. Co. v. Pelgen*, 241 S.W.3d 814, 817 (Ky. App. 2007).

For instance, courts have applied the inferred intent rule in sexual molestation cases because "sexual molestation is so inherently injurious, or substantially certain to result in some injury, that the intent to injure, or the expectation that injury will result, can be inferred as a matter of law." *Thompson v. West American Ins. Co.*, 839 S.W.2d 579, 581 (Ky. App. 1992). "The emotional and psychological harm caused by sexual molestation is so well recognized, and so repugnant to public policy and to our sense of decency, that to give merit to a claim that no harm was intended to result from the act would be utterly absurd." *Id.*

Kentucky courts have inferred intent as a matter of law in cases other than sexual molestation cases under those limited circumstances where human experience dictates that the person intended to harm another person. For instance, in *Pelgren*, *supra*, the insured suffered from mental illness and did not have the capacity to understand the physical nature of the consequences of his actions, and thus he could not form any intent. *Pelgren*, 241 S.W.3d at 815. However, the Court applied the doctrine of inferred intent after finding that it would be

"unsound" to hold that the insured acted unintentionally when he deliberately pointed a gun at his wife's face and pulled the trigger.

In *Kentucky Farm Bureau Mut. Ins. Co. v. Coyle*, 285 S.W.3d 299 (Ky. App. 2008), a panel of this Court discussed the history of the inferred intent doctrine, noting that a trial court judge is certainly not absolutely prohibited from inferring on summary judgment that an insured intended or expected damage regardless of whether the objective or subjective test is used. In some cases, it is almost irrelevant whether an objective or subjective test is applied because of the circumstances. *Id.* at 304. However, the *Coyle* court held that in order for the doctrine of inferred intent to apply, the conduct in question must be **intentional** and **of such a nature and character that harm adheres in it**. *Id*. at 305. (Emphasis added).

In the instant case, Keller physically attacked Utley and threatened to kill him and harm his wife. After someone yelled that Keller had a gun, Utley used his knife to defend himself from what he thought was a potentially deadly attack. Based on these facts, it was not clearly erroneous for the trial court to conclude that Utley subjectively intended and expected nothing more than to stop Keller's assault and to protect his wife and himself from further harm. The trial court's conclusion that Utley did not subjectively intend to injure Keller is supported by the record. After making this factual finding, the trial court applied the subjective intent standard set out by the Kentucky Supreme Court in *James Graham Brown Foundation* and found that Utley did not subjectively intend to injure Keller

because he was simply defending himself from Keller's assaults. We find no clear error in the trial court's rulings.

Finally, the doctrine of inferred intent is not applicable to the facts of this case. In order for inferred intent to apply, Utley would have had to intend to injure Keller. We simply cannot say that a man acting in self defense intends to do anything more than protect himself and others subject to the attack. Therefore, any injuries to Keller were not intentional, and under *Coyle*, the doctrine of inferred intent simply does not apply.

Therefore, for the foregoing reasons, the July 15, 2009, order of the Christian Circuit Court denying Owners' motion for declaratory judgment is affirmed.

ALL CONCUR.

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