RENDERED: AUGUST 12, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000350-MR

MELISSA COLEMAN, AS GUARDIAN
OF S.C., A MINOR; AND HOWARD DALE
THOMPSON, AS ADMINISTRATOR OF THE
ESTATE OF SHAWN DALE THOMPSON — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 14-CI-00076

STATE FARM FIRE AND CASUALTY;
AND DANIEL MOSS — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND MAZE, JUDGES.

D. LAMBERT, JUDGE: This is an appeal from the February 10, 2015 order of the Warren Circuit Court granting declaratory and summary judgment in favor of appellee State Farm Fire and Casualty ("State Farm"). State Farm intervened in a wrongful death action brought against one of its insureds and argued that it had no

duty to defend or indemnify the insured under the facts of the case. After review, we affirm.

I. INTRODUCTION

On January 25, 2013, appellee Daniel Moss shot and killed Shawn Thompson after an altercation broke out between the two men at Moss' home. Moss claimed that he shot Thompson in self-defense to prevent Thompson from attacking him with a sword. After a criminal trial, Moss was convicted of manslaughter in the second degree and for tampering with physical evidence. Moss was insured under a State Farm homeowner's insurance policy.

Following Moss' conviction, Thompson's estate brought a wrongful death action against Moss. State Farm intervened in the action and sought a declaration of rights as to its obligations under the homeowner's policy. In its petition for declaratory judgment, State Farm argued that it did not have a duty to defend or indemnify Moss because Moss intentionally shot Thompson and that the policy did not cover "bodily injury or property damage reasonably expected or intended by the insured." Moss countered that he shot Thompson in self-defense and in doing so, did not subjectively intend to kill him. The circuit court ultimately accepted State Farm's argument and held that State Farm had no duty to defend or indemnify Moss based on the policy exclusion. This appeal followed.

II. STANDARD OF REVIEW

On review of a decision to grant summary judgment, the task of an appellate court is to gauge whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The trial court must have viewed the record in a light most favorable to the party opposing summary judgment and resolved all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Moreover, since determining whether any factual disputes exist does not require the trial court to make any factual determination, the trial court's decision to grant summary judgment is reviewed *de novo*. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

III. DISCUSSION

On appeal, this Court is faced with the same issue the parties presented to the trial court: Does the homeowner's policy cover the shooting? Moss argues the policy does cover the shooting as a matter of law and points to the unpublished decision of *Owners Ins. Co. v. Utley*, 2009 CA 001471-MR, for the proposition that one who acts out of self-defense does not act intentionally in injuring his attacker. Moss also argues that there is at least a factual issue as to whether he acted intentionally under the circumstances. State Farm, on the other

hand, argues that the homeowner's policy does not cover the shooting because Moss intentionally shot Thompson and admitted as much during his criminal trial. State Farm further asserts that this Court should infer Moss' intent to harm Thompson as a matter of law because Moss pointed a rifle at Thompson and pulled the trigger. For the following reasons, the homeowner's policy does not cover the shooting.

In Kentucky, a court interprets an insurance contract by giving unambiguous policy language its plain meaning and narrowly construing policy exclusions in favor of insureds. *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 226-27 (Ky. 1994). Policy exclusions referencing an insured's expectations or intent are ordinarily "inapplicable unless the insured specifically and subjectively intends the injury giving rise to the claim." *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991). In other words, coverage may still be available "even though the action giving rise to the injury itself was intentional." *Id.* Under the doctrine of inferred intent, however, a trial court may infer intent as a matter of law based on the actor's conduct and attendant circumstances. *Kentucky Farm Bureau Mut. Ins. Co. v. Coyle*, 285 S.W.3d 299, 304 (Ky. App. 2008). The inferred intent doctrine is particularly applicable when the actor engages in "inherently injurious" conduct that is "substantially certain to result in some injury." *Thompson v. West*

American Ins. Co., 839 S.W.2d 579, 580–81 (Ky. App. 1992) (molesting a child); *see also, e.g., Walker v. Economy Preferred Ins. Co.*, 909 S.W.2d 343, 345 (Ky. App. 1995) (punching another in the face); *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 810 (Ky. App. 2000) (pointing rifle at nearby infant son and pulling the trigger); *Nationwide Mut. Fire Ins. Co. v. Pelgen*, 241 S.W.3d 814, 815 (Ky. App. 2007) (shooting wife with shotgun while suffering mental illness); *Kentucky Farm Bureau Mut. Ins. Co. v. Coyle*, 285 S.W.3d 299, 306 (Ky. App. 2008) (discharging a bullet at victim and later admitting that he did so "intentionally and deliberately").

Here, the inferred intent rule is applicable. Moss testified that he kicked Thompson, pointed a rifle at him at close range, and pulled the trigger. The conduct was admittedly deliberate and substantially certain to result in some injury. The conducted also resulted in death, similar to each of the cases cited above involving firearms. This conduct was also distinguishable from the situation in *Owners Ins. Co. v. Utley*, *supra,* because the insured in that case, rather than kick a man armed with a sword before firing a rifle cartridge at him, only swung a pocket knife in the air after hearing from someone that the man who was on top of him and punching him in the face "[had] a gun." Injury under the latter set of circumstances, though probable, was far from substantially certain.

Moss' argument in favor of creating a self-defense exception to the intentional-act exclusion is also unpersuasive. While courts are generally split on whether such a self-defense exception is sound policy,[1] an application of *Goldsmith v. Physicians Ins. Co. of Ohio*, 890 S.W.2d 644, 647 (Ky. App. 1994), where our Supreme Court addressed the problems associated with forcing an insurer to defend or indemnify insureds who sexually molest children, compels our decision. According to the Court, requiring insurers to provide coverage in such scenarios

> subsidizes the episodes of sexual abuse of which its victims complain, at the ultimate expense of other insureds to whom the added costs of indemnifying child molesters will be passed. [T]he average person purchasing homeowner's insurance would cringe at the very suggestion that he was paying for [coverage for liability arising out of his sexual abuse of a child]. And certainly he would not want to share that type of risk with other homeowner's policy holders. We are aware that

[1] A majority of jurisdictions hold that self-defense is not an exception to the intentional acts exclusion. *State Farm Fire and Cas. Co. v. Marshall*, 554 So. 2d 504, 505 (Fla. 1989)(citing *Western World Ins. Co. v. Hartford Mut. Ins. Co.*, 600 F.Supp. 313 (D.Md.1984); *Home Ins. Co. v. Neilsen*, 165 Ind.App. 445, 332 N.E.2d 240 (1975); *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 776 P.2d 123 (1989)). The main justification for this position is that the allegation of self-defense does not negate the element of intent involved in the act. *Erie Ins. Group v. Buckner*, 489 S.E.2d 901, 904 (N.C. App. 1997)(applying Virginia Law). However, "[o]ther courts reason that, when a person acts in self-defense, even though the person may intend to injure his or her attacker, the person is acting to prevent injury to himself or herself . . . [,] [and] the insurance company may not rely upon an intentional acts exclusion to deny coverage." *Bamert v. Johnson*, 909 So. 2d 705, 709 (La. App. 2 Cir. 2005)(citing *Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook*, 210 W.Va. 394, 557 S.E.2d 801, 810 (2001); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636, 641 (1981); *State Farm Fire & Cas. Co. v. Poomaihealani*, 667 F.Supp. 705, 708–709 (D.Haw. 1987)).

> application of the inferred-intent standard will deny [the victim] another source of compensation for his injuries, but we agree with other courts that have determined that the benefit of ensuring compensation of the victim is outweighed by the effect of allowing sexual offenders to escape having to compensate minors for the harm that the courts have established is inherent in such offenses.

Id. (internal citations and quotations omitted).

Applying this reasoning to the case at bar, we observe that the average person purchasing homeowner's insurance would also cringe at the very suggestion that he was paying to defend a person in a civil action who was convicted of wantonly causing the death of another person, *see* KRS[2] 507.040 (defining manslaughter in the second degree), or was paying for liability arising out of a wanton killing. Moreover, just as victims of sexual abuse are denied a source of compensation, ensuring compensation for the estate of a homicide victim is outweighed by the effect of allowing a wanton killer to escape having to compensate for the harm inherent in a second-degree manslaughter offense.

Accordingly, the homeowner's policy does not provide coverage for Moss, and State Farm has no duty to defend or indemnify him. The judgment of the Warren Circuit Court is hereby affirmed.

ALL CONCUR.

[2] Kentucky Revised Statutes.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE STATE FARM FIRE AND CASUALTY:

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