RENDERED: NOVEMBER 22, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000143-MR

MARGARET H. BROWN APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 13-CI-000587

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Margaret H. Brown challenges the Jefferson Circuit Court's grant of summary judgment to Kentucky Farm Bureau Mutual Insurance Company (KFB) on the basis that there is no insurance coverage as a matter of law.

The facts underlying this case are tragic. Brown's son, Roy Marshal Jeffries, was shot and killed by Clayton Kerr on property owned by Kerr's parents and insured by KFB. Kerr subsequently buried Jeffries on Kerr's parents' property. Kerr was indicted for first-degree manslaughter for causing Jeffries death "by intentionally shooting him in the head with a .22 caliber handgun" and tampering with physical evidence by burying Jeffries's body and disposing of other evidence. Kerr pled guilty as charged and was sentenced to a total of twenty-years' incarceration.

Brown, individually and as executrix for the Estate of Jeffries, filed a civil wrongful death suit against Kerr and Kerr's parents. Brown was granted summary judgment in her favor against Kerr on the issues of liability and causation. Kerr's parents were granted summary judgment as owing no duty of care to Brown and this decision was affirmed on appeal in *Brown v. Kerr*, No. 2009-CA-000943-MR, 2010 WL 1404785 (Ky.App. 2010) (unpublished).

Brown was granted a final agreed judgment against Kerr. As part of this judgment it was determined that Brown:

> shall have a Judgment against Clayton Tae Kerr with regard to the issues of liability and causation as set forth in the Complaint and as further described herein for the outrageous and wrongful tampering, mishandling and mutilation of the body of Roy Marshal Jeffries, and for the outrageous and wrongful failure to notify Margaret H. Brown, next of kin, of the death and the whereabouts of the body of Roy Marshal Jeffries[.]

Later, the parties stipulated the amount of compensation due and Brown was personally awarded compensatory damages of $250,000.

Brown, in her individual capacity, filed a demand with KFB that it satisfy the judgment against Kerr pursuant to Kerr's parents' homeowners insurance policy for damages she suffered personally as an unintended consequence of Kerr having shot, killed and buried Jeffries. KFB denied her claim.

Brown then filed a complaint against KFB in the circuit court seeking a declaration that KFB is obligated under the homeowner's insurance policy to pay her, to the extent of its coverage, sums Kerr owes her pursuant to her civil judgment. KFB conceded that Kerr was an insured, but filed a motion for summary judgment on the basis that Kerr's undisputed intentional acts did not qualify as an "occurrence" or an "accident" and, therefore, coverage was excluded. The circuit court agreed and granted summary judgment in KFB's favor.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any 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). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a

judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

Brown argues that losses and damages arising from the unintended consequences or collateral harm suffered as a result of intended acts by an insured are covered under the terms "accident" and "occurrence" pursuant to *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co*., 814 S.W.2d 273 (Ky. 1991) (*Brown Foundation*), and, therefore, there is a question of fact as to whether Kerr expected and subjectively intended the damage which resulted to Brown when Kerr formed the intent to kill Jeffries.

The KFB policy provides that if a claim is made or suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, it will pay up to its limit of liability for the damages for which the insured is legally liable. The policy provides that "**'Occurrence'** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. **'Bodily Injury'**; or b. **'Property damage'**[.]" The KFB policy also excludes personal liability for bodily injury or property damage "[w]hich is expected or intended by one or more 'insureds'[.]"

Brown Foundation involved the question of whether comprehensive general liability policies applied where the current owner of wood preserving treatment plants was ordered by the EPA to clean-up environmental contamination which developed over many years. The insurance policies defined "occurrence" as: "An accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." *Brown Foundation*, 814 S.W.2d at 275. The circuit court granted summary judgment to the insurance company on the basis that "there was no covered 'occurrence' because the operators of the processing plants were aware of the damage that was being incurred by the routine operations." *Id.* at 276. The Court of Appeals agreed and affirmed.

The Kentucky Supreme Court reversed, explaining as follows:

> Whether an insured intended the consequences of its action is normally a question of fact and not one of law. The determination of whether an insured expected or intended the damage resulting in the claim is for the jury. Determination of intent is normally inappropriate for summary judgment. Summary judgment can be proper on any issue including state of mind questions such as intent and expectation. Generally when any claim has no substance or controlling facts are not in dispute, summary judgment can be proper. In this case, the record indicates that there are substantial disputed areas of fact including the factual question of intent. The record does not compel only one reasonable inference.

Id. at 276–77 (internal citations omitted).

In interpreting *Brown Foundation*, the Kentucky Supreme Court noted in *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 77–78 (Ky. 2010) (footnote omitted), that when a policy, unlike the one at issue in *Brown Foundation*, separates out from the definition of occurrence any reference to the expectations or intent of the insured (as is the case with the KFB policy), that *Brown Foundation* is "at most [of] limited value in determining whether there is an 'occurrence' in the case at hand." The Sixth Circuit has also noted that the *Brown Foundation* policy was read broadly because it was a comprehensive general liability policy, and that someone who purchases a homeowner's insurance policy is not entitled to such broad protections. *Lenning v. Commercial Union Ins. Co*., 260 F.3d 574, 583-84 (6th Cir. 2001).

Addressing whether summary judgment could properly be granted as to intent in an appropriate case under *Brown Foundation*, the Court in *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 812-14 (Ky.App. 2000), determined that intent could be inferred from the insured shooting his son at close range where there was substantial medical evidence to support the conclusion that the insured, though depressed, was capable of forming an intent to act and that he knew the nature and quality of his acts. Similarly, "the 'inherently injurious' act of punching someone in the face supports the trial judge's inference as a matter of law that [the insured] intended to injure [the victim]." *Walker v. Econ. Preferred*

Ins. Co., 909 S.W.2d 343, 345 (Ky.App. 1995). *See Goldsmith v. Physicians Ins. Co. of Ohio*, 890 S.W.2d 644, 646 (Ky.App. 1994) (intent to harm can be inferred from the act of sexual molestation).

In *Walker*, 909 S.W.2d at 346, the Court favorably quoted *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388, 391–92 (1979), for the following proposition:

> A specific subjective intent was not required to apply the exclusion:
>
> > Although [the insured] may not have intended the specific injury which resulted, such specific subjective intent is not required to exclude coverage under the policy. The "intent" which is necessary to exclude coverage is not the intent to act nor the intent to cause the specific injury. Instead it is the intent to cause bodily injury to the person acted upon and it makes no difference if the actual injury is more severe or of a different nature than the injury intended.

We are interpreting two separate insurance provisions. One defines "occurrence" but unlike *Brown Foundation*, it does not include the insured's intent in determining whether something qualifies as an occurrence. Instead, it is simply defined as an accident which results in bodily injury or property damage. Summary judgment was appropriately granted under the plain language of this provision because there is no factual dispute. By pleading guilty in his criminal

case, Kerr admitted that he intentionally shot Jeffries and concealed his body. Intentional actions cannot be accidental.

Brown admits that Kerr's actions toward Jeffries were intentional but goes far afield from *Brown Foundation* in insisting that coverage for her claims and the personal harm she suffered is appropriate because there is a factual dispute as to whether Kerr intended the specific harm that she suffered from the burial and concealment of Jeffries's body. Essentially, Brown argues that the harm to her was accidental because Kerr concealed the body for purposes of obtaining a more favorable plea offer for himself rather than to harm Brown, and the harm to Brown is the harm that must be considered in determining whether the insurance policy applies to allow her to collect on the wrongful death award.

We disagree. The occurrence at issue is not any harm caused to Brown, but the shooting and burial of Jeffries. Therefore, there was no occurrence covered by the KFB policy.

The second policy provision we interpret excludes personal liability for bodily injury or property damage expected or intended by the insured. Under the *Jones* decision quoted favorably in *Walker*, 909 S.W.2d at 346, Kerr's intent to cause bodily injury to Jeffries is sufficient to exclude Kerr's actions from coverage under this second provision. It is irrelevant whether by doing so he also intended

or did not intend the subsequent injury that resulted to Brown because her injury is not the relevant injury for purposes of determining whether coverage exists.

Accordingly, we affirm the Jefferson Circuit Court's grant of summary judgment to KFB.

ALL CONCUR.

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