

RENDERED: DECEMBER 12, 2003; 10:00 a.m.
ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
NOVEMBER 10, 2004 (2004-SC-0033-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001738-MR

JOE JAMES and his wife, JUDY JAMES,
as Co-Administrators of the Estate of
Jessica Jeanette James, a minor under the
age of 18 years; THOMAS WAYNE STEGER
and his wife, SABRINA COLLINS STEGER,
as Co-Administrators of The Estate of
Kayce Steger, a minor under the age of
18 years; AND GWEN HADLEY, as Administratrix
of the Estate of Nicole Marie Hadley,
a minor under the age of 18 years

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 00-CI-004551

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLEE

TO BE HEARD WITH
NO. 2002-CA-001739-MR

ALAN C. STOUT, CHAPTER 7 TRUSTEE
IN BANKRUPTCY FOR THE ESTATE OF
MICHAEL CARNEAL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 00-CI-004551

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLEE

OPINION AND ORDER

AFFIRMING

** ** * * *

BEFORE: McANULTY, AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

McANULTY, JUDGE: This is an appeal from the grant of summary judgment in a declaratory judgment and insurance bad faith action denying coverage under two policies of insurance and dismissing all bad faith claims against the insurer. Appellants argue that genuine issues of material fact prevented summary judgment in favor of the insurer. Because we conclude that no insurance coverage existed for the circumstances at issue, we affirm.

In appeal number, 2002-CA-001738-MR, appellants are the administrators of the estates of three students who Michael Carneal, the insured, shot and killed at Heath High School in Paducah, Kentucky. In appeal number, 2002-CA-001739-MR, the appellant is the Trustee of Michael Carneal's Chapter 7 bankruptcy estate. In both appeals, Kentucky Farm Bureau Mutual Insurance Company (Kentucky Farm Bureau), the insurer, is the appellee.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On December 1, 1997, Michael Carneal, then 14 years old, took at least four long-barreled guns and one .22 pistol to Heath High School where he was a student. He concealed the long-barreled guns in a bundle of blankets and the pistol in his backpack. While other students gathered in a circle to participate in a morning prayer before classes started, Michael Carneal pulled a clip of ammunition from his pocket and slipped the clip in the .22. Then, he pulled the gun out of his backpack, pointed it at the students in the prayer circle, cocked it, turned off the safety and started shooting. He killed three students in the prayer circle -- Jessica Jeanette James, Kayce Steger and Nicole Marie Hadley -- and injured five other students.

At the time the tragic events of this case happened, Michael Carneal's parents, John and Ann Carneal, maintained homeowner's and umbrella insurance policies through Kentucky Farm Bureau. Under the homeowner's policy, if a claim was made or suit brought against an insured for damages because of bodily injury caused by an "occurrence" to which insurance coverage applied, Kentucky Farm Bureau was obligated to: (1) pay up to their limit of liability for the damages for which the insured was legally liable and (2) provide a defense at their expense by counsel of their choice, even if the suit was groundless, false or fraudulent. The homeowner's policy defined "occurrence" as

"an accident, including continuous or repeated exposure to substantially the same general harmful conditions which results during the policy period" in bodily injury or property damage. The term, "accident," is not further defined in the policy. Moreover, the homeowner's policy excluded personal liability coverage for bodily injury "which is expected or intended by one or more 'insureds.'" There is no dispute that Michael Carneal was insured under this policy as a child of John and Ann Carneal who resided in their household.

The umbrella policy obligated Kentucky Farm Bureau to pay damages for which the insured became legally responsible due to personal injury caused by an "occurrence." However, the duty to pay under the umbrella coverage "applied only to damages in excess of the underlying limit" of comprehensive personal liability under the homeowner's policy. In addition to the duty to pay, Kentucky Farm Bureau agreed to defend any suit seeking damages for personal injury covered by the policy. The umbrella policy employed a slightly different definition for occurrence than did the homeowner's policy. The umbrella policy defined an "occurrence" as "an accident including the continuous or repeated exposure to conditions, during the policy term," which resulted in personal injury "neither expected nor intended by" the insured. The term, "accident," is not further defined in the policy. Moreover, the umbrella policy excluded coverage for

any claim arising out of an intentional act committed by or at the direction of the insured. Kentucky Farm Bureau disputes the estate administrators' assertion that Michael Carneal is covered under the umbrella policy, however, we see no need to decide this issue based on our conclusion that there was no "occurrence."

In October of 1998, Michael Carneal entered a plea of guilty but mentally ill, pursuant to North Carolina v. Alford, 394 U.S. 956, 89 S. Ct. 1306, 22 L. Ed. 2d 558 (1969), to three counts of murder and five counts of attempted murder. In addition, the administrators of the estates of the three students brought a wrongful death action against Michael Carneal, his parents, and a number of other defendants (the civil suit). In August of 2000, Michael Carneal filed a confession of judgment in order to resolve all claims asserted against him in the civil suit. As a result, the trial court entered a judgment in the amount of \$42,191,488.00 against Michael Carneal. Throughout the criminal and civil proceedings, a guardian ad litem represented Michael Carneal.

In July of 2000, the estate administrators filed this declaratory judgment action against Kentucky Farm Bureau and Michael Carneal. The same guardian ad litem represented Michael Carneal in this action. Later, in December of 2000, the estate administrators, as creditors of Michael Carneal, filed an

involuntary bankruptcy petition against Michael Carneal. Eventually, the trial court allowed the bankruptcy trustee's substitution for Michael Carneal in the declaratory judgment action. After obtaining leave from the trial court, the bankruptcy trustee filed a cross-claim against Kentucky Farm Bureau in which it alleged breach of contract and bad faith and violations of the Kentucky Consumer Protection Act and the Unfair Claims Settlement Practices Act.

Kentucky Farm Bureau filed a motion for summary judgment on all claims, and the estate administrators filed counter motions for summary judgment. In its motion, Kentucky Farm Bureau contended that Michael Carneal's actions did not meet the definition of "occurrence" under the policies. Moreover, his acts were intentional acts excluded from coverage under the policies. In response and in support of its own motion, the estate administrators argued that Kentucky Farm Bureau was estopped from denying coverage due to its bad faith and misconduct in handling the claim. In the alternative, the estate administrators asserted that if the trial court reached the merits of the coverage issue, the shooting was an "occurrence" and the exclusions were inapplicable. Finally, at the very least, the coverage issues constituted questions of fact for a jury.

The trial court agreed with Kentucky Farm Bureau and granted summary judgment to Kentucky Farm Bureau on all claims except the trustee's claim under the Unfair Claims Settlement Practices Act because Kentucky Farm Bureau did not address this claim in its motion to dismiss. However, the trial court noted that this claim also appeared subject to dismissal given the court's conclusion that there was no coverage under either insurance policy.²

The standard of review of a trial court's granting of 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, Ky. App., 916 S.W.2d 779, 781 (1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial warranting a judgment in its favor. See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., Ky., 814 S.W.2d 273, 276 (1991). Moreover, we are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in its favor. See Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Although the interpretation of an insurance contract is a matter

² The record on appeal indicates that the trial court dismissed this claim on August 29, 2002, upon motion of Kentucky Farm Bureau.

of law for the court, the terms of an insurance policy must be interpreted according to the usage of the average person and as they would be read and understood in light of the general rule that uncertainties and ambiguities must be resolved in favor of the insured. See Morganfield National Bank v. Damien Elder & Sons, Ky., 836 S.W.2d 893, 895 (1992); Fryman for Fryman v. Pilot Life Insurance Co., Ky., 704 S.W.2d 205, 206 (1986).

In granting summary judgment to Kentucky Farm Bureau on all claims, the trial court stated that the events of December 1, 1997, were not in any way accidental. Accordingly, the trial court concluded that there was no "occurrence" and no coverage under either policy. Moreover, the trial court applied Kentucky's "inferred intent" rule in holding that the intentional act exclusions also precluded coverage under both policies. As to the bad faith arguments raised by both the estate administrators and the bankruptcy trustee, the trial court set out the requirements of classic bad faith and coverage by estoppel claims under Kentucky law. Given the facts that Kentucky Farm Bureau defended under a reservation of rights, a guardian ad litem represented Michael Carneal throughout the civil suit, and Kentucky Farm Bureau was not obligated to pay any claims under either policy, the court dismissed the bad faith claims as well.

As the appellants are consistent in their assertions of error, we address the issues raised in their briefs simultaneously. Appellants argue that summary judgment was premature because genuine issues of material fact existed on both the bad faith and coverage issues. First, appellants contend that Kentucky Farm Bureau acted in bad faith in handling the claim, and such mishandling precludes any assertion of coverage defenses. Appellants believe that Kentucky Farm Bureau's bad faith resulted in Michael Carneal now having a \$42 million judgment against him. Second, appellants argue that the question of whether the events of December 1, 1997, constituted an occurrence was a question of fact for a jury given the numerous inconsistencies given by Michael Carneal in his statements to various persons. Moreover, appellants assert that Kentucky's "inferred intent" has never been applied in the context of a juvenile actor, much less one with pronounced emotional disturbances and should not have been applied in this case.

We first address the issues pertaining to the contention that Kentucky Farm Bureau acted in bad faith in handling the civil claim asserted against Michael Carneal. First, appellants assert that the reservation of rights letters were defective because the insurer did not have a reasonable basis in law and fact in determining that the insurance policies

did not cover liability for the shootings. Second, the letters were incomplete, inaccurate and untimely. Third, appellant's expert, Retired Judge Michael McDonald, opined, based on the content of the reservation of rights letters, that the actions of Kentucky Farm Bureau allowed it to control the defense of the case to achieve the denial of coverage.

However, appellants offer no evidence that the purported insureds, John, Ann and Michael Carneal, did not understand how Kentucky Farm Bureau's duties to defend and indemnify were being undertaken under the reservation of rights. Absent such a showing, these letters cannot be viewed in a vacuum to establish an estoppel or breach of contract claim. Having received the reservation of rights letters, the Carneals elected to have Kentucky Farm Bureau participate in their defense in the civil suit. In addition, a guardian ad litem represented Michael Carneal. This same guardian ad litem represented Michael Carneal while he remained a party in the case below and filed an answer asserting that Kentucky Farm Bureau did not control Michael Carneal's defense in the civil suit. Appellants cannot manufacture an issue of fact where none exists by proffering expert affidavits that do nothing more than reiterate their legal theory of the case. Once Kentucky Farm Bureau submitted their motion for summary judgment establishing that no genuine issue as to any material fact existed,

appellants had an obligation to do something more than rely upon allegations in their pleadings to show that evidence was available which would justify a trial. See Continental Casualty Co. v. Belknap Hdwe. & Mfg. Co., Ky., 281 S.W.2d 914, 916 (1955). They did not do so.

Appellants' first and third-party common law and statutory bad faith claims also fail because they cannot establish the requisite elements:

(1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. . . . [A]n insurer is . . . entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.

Wittmer v. Jones, Ky., 864 S.W.2d 885, 890 (1993). See also Motorists Mutual Insurance Company v. Glass, Ky., 996 S.W.2d 437, 453 (1997). Given that we are in agreement with the trial court that there was no "occurrence" under either insurance policy, appellants cannot establish the first prerequisite that the insurer was obligated to pay the claim under the terms of the policy.

We now move to the coverage issues. We believe this case is on all fours with Stone v. Kentucky Farm Bureau Mut. Ins. Co., Ky. App., 34 S.W.3d 809 (2000), discretionary review

denied, which held that in cases where the nature and character of the act in question is certain to cause a particular kind of harm, that conduct affords sufficiently clear demonstration of intent to harm subsuming any need for a separate inquiry into capacity. Id. at 813. In Stone, the insured shot and killed his 20-month old son with a rifle at close range and then turned the gun on himself and committed suicide. This Court affirmed the trial court's granting of summary judgment in favor of the insurer. In so doing, the court held that there was no "occurrence" within the provisions of the policy and inferred intent on the part of the insured despite assertions that the insured's depression rendered him incapable of forming the intent to harm. In this case, to give merit to a claim that no harm was intended to result from the act of shooting a loaded weapon into a crowd of people or that such an act was accidental would be unsound especially in light of Michael Carneal's sworn testimony to the contrary. See Thompson v. West American Insurance Co., Ky. App., 839 S.W.2d 579, 581 (1992).

For the foregoing reasons, the trial court's award of summary judgment in favor of Kentucky Farm Bureau is affirmed.

ORDER

Appellee's Motion to Dismiss Appeal No. 2002-CA-001738-MR is DENIED. Michael Carneal and his successor in interest, the trustee of his Chapter 7 bankruptcy estate, are

not indispensable parties to this appeal. Considering the trustee's separate appeal, neither party's absence from this appeal prevents this court from granting complete relief among those already parties.

Appellee's Motion to Strike Argument from appellant's brief in Appeal No. 2002-CA-001739-MR is DENIED. We decline to employ a hypertechnical reading of the statement of issues requirement in CR 76.03(8).

ALL CONCUR.

DATE: December 12, 2003

/s/ William E. McNulty
JUDGE, COURT OF APPEALS

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