RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001044-MR

ASBURY COLLEGE; and
GUIDEONE MUTUAL INSURANCE COMPANY APPELLANTS

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 02-CI-00050

OHIO CASUALTY INSURANCE COMPANY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: In February of 1978, John Sowers, a student and employee of Asbury College, allegedly assaulted, battered, sexually abused and falsely imprisoned Kevin Thornton, who was thirteen years old at the time. Almost 24 years after the sexual abuse occurred, Kevin Thornton and his parents, filed a complaint in the Jessamine Circuit Court against Asbury College, three former members of Asbury's discipline committee, and John Sowers. In turn, Asbury filed a third-party complaint and

petition for declaratory judgment against two of its insurers, GuideOne Mutual Insurance Company and Ohio Casualty Insurance Company (Ohio Casualty). Ohio Casualty filed a motion for summary judgment declaring that it had no duty to defend or indemnify because although at one time it had provided comprehensive general liability coverage, that coverage had lapsed in February of 1978 when Kevin Thornton alleged he was sexually abused. In February of 1978, Asbury had only an umbrella liability policy with Ohio Casualty. The trial court granted Ohio Casualty's motion for summary judgment, and later denied Asbury's motion to alter, amend or vacate summary judgment. Because the prevailing view in insurance law is that the time of the occurrence of an accident is when the complaining party was actually damaged and not the time when the negligent or wrongful act was committed, we affirm.

The insurance coverage issues in this case are complicated by the fact that Asbury does not have the comprehensive general liability (CGL) policy that it had with Ohio Casualty in 1976 and 1977. In the course of routine discovery, Asbury requested that Ohio Casualty produce all policies of insurance that it issued covering Asbury College from January 1, 1975, through January 1, 1980. In response and after the trial court had already issued summary judgment in Ohio Casualty's favor, Ohio Casualty produced only the umbrella

liability policy and indicated that it was the only policy found at that time. So the CGL policy is a lost policy.

In the trial court's order granting Ohio Casualty's motion for summary judgment, the trial court found that "[t]here was no incident or occurrence under any CGL policy issued by Ohio Casualty and Ohio Casualty has no obligation or duty to provide primary coverage and a defense to Third Party Plaintiff, Asbury College, in this case." After Ohio Casualty could not provide a copy of the CGL policy, Asbury made a motion to alter, amend, or vacate its order granting summary judgment. The basis of the motion was that Ohio Casualty could not produce a policy definitively establishing that it contained a definition of "occurrence" that precluded coverage for Asbury. The trial court denied Asbury's motion, precipitating this appeal.

On appeal, Asbury asserts that in the complaint, among other claims, the Thorntons alleged claims against Asbury College for negligent hiring, supervision and retention of John Sowers, and also for statutory negligence and obstruction of justice. It claims that the CGL policy that was in effect in 1976 and 1977 should apply because this is when Asbury is alleged to have engaged in numerous acts of misconduct. Since the CGL policy is lost and its terms have not been established, summary judgment was premature and inappropriate.

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 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 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., 814 S.W.2d 273, 276 (Ky. 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., 807 S.W.2d 476, 480 (Ky. 1991). Although the interpretation of an insurance contract is a matter 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, 836 S.W.2d 893, 895 (Ky. 1992); Fryman v. Pilot Life Insurance Co., 704 S.W.2d 205, 206 (Ky. 1986).

Although we do not know how "occurrence" is defined in the CGL policy, we do know how "occurrence" is defined in the umbrella policy in effect in February of 1978 -- the date that

John Sowers allegedly first had inappropriate physical contact with Kevin Thornton. As defined in the umbrella policy:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured.

For the purpose of establishing the applicable policy, the trial court determined that the "occurrence" trigger was the time the claimant was injured, not the time when the negligence leading up to the injury occurred. Kentucky courts have not squarely addressed this issue, but other jurisdictions have. The rule among those jurisdictions, with the exception of Louisiana, is that the time of the occurrence of an accident is when the complaining party was actually damaged or injured and not the time when the wrongful act was committed. See Stillwell v. Brock Brothers, Inc., 736 F.Supp. 201, 205 (S.D.Ind. 1990) (predicting that Kentucky would adopt this almost unanimous common approach to determine when an accident triggering insurance coverage occurs). This approach is based on the fundamental that "the tort of negligence is not deemed to have been committed 'unless and until some damage is done.'" Id. (quoting Muller Fuel Oil Co. v. Insurance Co. of North America, 95 N.J.Super. 564, 579, 232 A.2d 168, 175 (1967).

We conclude that the trial court correctly applied this doctrine to the facts of this case. The "accident" upon

which the Thorntons based their claim did not "occur" within the CGL policy period. See id. It occurred in February of 1978 during the umbrella policy period. Thus, under the terms of the insuring agreement between Asbury and Ohio Casualty, Ohio Casualty had no obligation to provide primary coverage or a defense to Asbury College.

The summary judgment in favor of Ohio Casualty is affirmed.

ALL CONCUR.

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