

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2004-CA-001121-MR

GLORIA MIRACLE, INDIVIDUALLY  
AND AS PERSONAL REPRESENTATIVE AND  
ADMINISTRATRIX OF THE ESTATE OF  
ROGER DALE MIRACLE, JR., DECEASED;  
ROGER MIRACLE, SR., INDIVIDUALLY AND  
AS CO-GUARDIAN AND/OR NEXT FRIEND OF  
CHRISTOPHER DALE MIRACLE, A MINOR;  
JUDY A. MIRACLE, CO-GUARDIAN AND/OR  
NEXT FRIEND OF CHRISTOPHER DALE MIRACLE,  
A MINOR; AND ANGELA WILLIAMS, AS PARENT  
AND/OR NEXT FRIEND OF BRITTANY MICHELLE  
MIRACLE, A MINOR.

APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE THOMAS L. WALLER, JUDGE  
ACTION NO. 99-CI-00039

KENTUCKY FARM BUREAU MUTUAL  
INSURANCE COMPANY  
AND RONALD JOHNSON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

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<sup>1</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KNOPF, JUDGE: The Miracles appeal from a declaratory judgment by the Bullitt Circuit Court finding that Kentucky Farm Bureau Mutual Insurance Company has no obligation to defend or indemnify Ronald Johnson for claims arising from Johnson's shooting of Roger Miracle, Sr. and Roger Miracle, Jr. The Miracles contend that summary judgment was inappropriate because there was a genuine issue of material fact concerning Johnson's intent to cause injury. Under the circumstances presented in this case, we agree with the trial court that Johnson's actions were so likely to cause injury that intent may be presumed as a matter of law. Hence, we affirm.

On November 18, 1998, Ronald Johnson shot Roger Miracle, Sr. and Roger Miracle, Jr. near Knob Creek in Bullitt County, Kentucky. As a result of the shooting, Roger Sr. was injured and Roger Jr. was killed. Thereafter, Johnson was indicted by a Bullitt County grand jury on charges related to the shooting. Following a jury trial, he was convicted of reckless homicide and assault under extreme emotional disturbance. The jury fixed his sentence at a total of three and one-half years.

Following the shooting, the Miracles brought this civil action against Johnson, seeking damages for assault,

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wrongful death, and loss of consortium. Thereafter, Kentucky Farm Bureau filed an intervening complaint. Kentucky Farm Bureau, which had issued a farm policy to Johnson, sought a declaration that it has no duty to provide coverage or defend the claims against Johnson. Subsequently, the trial court granted Kentucky Farm Bureau's motion for summary judgment, finding that it owes no duty of coverage or defense to Johnson. The Miracles now appeal from this judgment.

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." <sup>2</sup> We are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in her favor.<sup>3</sup> As a general rule, interpretation of an insurance contract is a matter of law for the court.<sup>4</sup> While ambiguous terms are to be construed against the drafter and in favor of

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<sup>2</sup> Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996); *citing* CR 59.03.

<sup>3</sup> Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

<sup>4</sup> Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893 (Ky. 1992).

the insured,<sup>5</sup> we must also give the policy a reasonable interpretation, and there is no requirement that every doubt be resolved against the insurer.<sup>6</sup> Finally, the terms should be interpreted in light of the usage and understanding of the average person.<sup>7</sup>

The issue in this case concerns the application of two exclusions in Kentucky Farm Bureau's policy. In the "General Policy Provisions" section, the policy provides:

5. INTENTIONAL LOSS

WE will not insure for an intentional loss caused directly or indirectly if such loss is intended or committed by or at the direction of an INSURED PERSON.

Section II, Farm and Personal Liability, further provides in pertinent part

EXCLUSIONS

Under Farm and Personal Liability Coverage and Medical Payments to Others Coverage, WE do not cover:

. . . .

7. BODILY INJURY or PROPERTY DAMAGE

expected or intended by any INSURED PERSON.

In construing intentional act exclusions such as the ones presented in this case, the Kentucky Supreme Court has held

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<sup>5</sup> Kentucky Farm Bureau Mutual Insurance Co. v. McKinney, 831 S.W.2d 164 (Ky. 1992).

<sup>6</sup> Motorists Mutual Insurance Co. v. RSJ, Inc., 926 S.W.2d 679 (Ky.App. 1996).

<sup>7</sup> Fryman v. Pilot Life Insurance Co., 704 S.W.2d 205 (Ky. 1986).

that the determination of whether an insured expected or intended the damage resulting in the claim is for the jury. Because the test is subjective, the issue is usually inappropriate for summary judgment.<sup>8</sup> But certain acts are 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.<sup>9</sup> Kentucky courts have held that sexual misconduct,<sup>10</sup> intentional assault,<sup>11</sup> and shooting another person at close range<sup>12</sup> are all so likely to cause harm that a court may infer intent as a matter of law. To determine whether an injury is expected or intended, the court must focus on the intent to cause the specific injury to the victim, rather than the intentional nature of the act itself.<sup>13</sup>

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<sup>8</sup> James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 276 (Ky. 1991).

<sup>9</sup> Thompson v. West American Insurance Co., 839 S.W.2d 579, 581 (Ky.App. 1992).

<sup>10</sup> Thompson, supra; and Goldsmith v. Physicians Insurance Co. of Ohio, 890 S.W.2d 644, (Ky.App. 1994).

<sup>11</sup> Parsley v. Kentucky Farm Bureau Mutual Insurance Co., 32 S.W.3d 103 (Ky. App. 2000); and Walker v. Economy Preferred Ins. Co., 909 S.W.2d 343 (Ky.App. 1995).

<sup>12</sup> Stone v. Kentucky Farm Bureau Mutual Insurance Co., 34 S.W.3d 809, (Ky.App. 2000).

<sup>13</sup> See Physicians Insurance Co. of Ohio v. Swanson, 58 Ohio St. 3d 189, 569 N.E.2d 906, 910-11 (1991).

The Miracles urge that summary judgment was inappropriate because there was a genuine issue of material fact concerning Johnson's intent at the time he shot Roger Sr. and Roger Jr. While Johnson admits to the shooting, he states that he never intended to shoot or harm anyone. Rather, he states that he felt threatened when Roger Sr. and Roger Jr. approached him, and he began shooting out of fear.

Johnson's criminal conviction for reckless homicide and assault under extreme emotional disturbance would tend to support his assertion that the shooting was not pre-meditated.<sup>14</sup> However, the issue of pre-meditated intent is different from the question of whether Johnson subjectively intended to cause injury. Moreover, criminal definitions of intent are not applicable to the construction of contract terms.<sup>15</sup>

Nevertheless, we agree with the trial court that intent to cause injury can be inferred from Johnson's actions. According to Johnson, Roger Sr. and Roger Jr. were approaching him from two different sides while he was seated on a bulldozer. Johnson admits that he knew at the time that they were unarmed.

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<sup>14</sup> In the criminal case, with regard to Roger Sr., the jury was instructed on first degree assault and assault under extreme emotional disturbance. With regard to Roger Jr., the jury was instructed on murder, first degree manslaughter, second degree manslaughter and reckless homicide.

<sup>15</sup> Fryman v. Pilot Life Ins. Co., *supra* at 206.

Johnson states that he pulled out his pistol and started shooting when they were six to eight feet away from him. Johnson denies having any further recollection of the incident after he began shooting.

Even if Johnson was acting out of panic, the record is undisputed that he deliberately shot at two unarmed men from near range. Likewise, there is no dispute that he fired his weapon multiple times in two different directions. Such actions are so likely to cause harm that the trial court could reasonably presume intent to cause injury. Therefore, the trial court properly granted summary judgment for Kentucky Farm Bureau.

Accordingly, the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

T. Scott Abell  
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BRIEF FOR APPELLEE  
KENTUCKY FARM BUREAU MUTUAL  
INSURANCE CO.:

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