

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 5, 2009 Session

**TENNESSEE RISK MANAGEMENT TRUST v.
LORI ANN YANCEY, ET AL.**

**Appeal from the Circuit Court for Scott County
No. 7352 John McAfee, Judge**

No. E2009-00677-COA-R3-CV - FILED JANUARY 19, 2010

Tennessee Risk Management Trust (“TRMT”) sued Lori Ann Yancey (“Yancey”), next of kin and representative of the estate of Hubert Dean Yancey, and Marty Carson (“Carson”) seeking a declaratory judgment with regard to governmental liability insurance coverage provided by TRMT to Carson’s employer, Scott County. TRMT filed a motion for summary judgment. The Trial Court granted TRMT’s motion for summary judgment holding, *inter alia*, that the policy at issue does not provide coverage for Carson’s intentional shooting and killing of another Scott County employee. Yancey appeals to this Court. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., and JOHN W. MCCLARTY, J.J., joined.

Howard R. Ellis, Oneida, Tennessee, for the appellant, Lori Ann Yancey, next of kin and representative of the estate of Hubert Dean Yancey.

John D. Schwalb, Franklin, Tennessee, for the appellee, Tennessee Risk Management Trust.

OPINION

Background

In November of 2003, Scott County deputy sheriff Marty Carson shot and killed his partner, Hubert Dean Yancey (“Officer Yancey”), during a raid on a meth lab. As a result of Officer Yancey’s death, a wrongful death suit was filed in the United States District Court for the Eastern District of Tennessee. TRMT, which provided governmental insurance coverage to Scott County, provided a defense in that case to Carson subject to a reservation of rights. After a trial, the jury returned a verdict in favor of the plaintiff¹, Yancey, in the amount of \$5 million finding that Carson had violated Officer Yancey’s civil rights.

After the federal trial, TRMT filed this declaratory judgment action in the Circuit Court for Scott County seeking a judgment that there was no coverage under the insurance policy issued by TRMT for Carson’s shooting and killing Officer Yancey, that TRMT was not obligated to pay Yancey or to indemnify Carson as a result of the judgment in the federal case, and also that TRMT was not obligated to provide Carson any further defense in that action. The insurance policy at issue provides, in pertinent part:

GENERAL COVERAGE DEFINITIONS

1. **MEMBER** means not only the **NAMED MEMBER** as accepted by **TSB-RMT** for coverage, but also includes any past, present or future officials, **MEMBERS** of boards or commissions, trustees, directors, officers, partners, volunteers, student teachers or employees of the **MEMBER** while acting within the scope of their duties as such, and any person, organization, trustee or estate to whom the **MEMBER** is obligated by virtue of a written contract or agreement to provide coverage such as is offered by this coverage, but only in respect of operations by or on behalf of the **MEMBER**.

* * *

¹Lori Ann Yancey was one of several plaintiffs involved in the federal lawsuit. Ms. Yancey is the only one of those plaintiffs involved in the instant suit. For ease of readability only, we refer to Ms. Yancey in this Opinion as the plaintiff in the federal action with the understanding that she was, in fact, one of several plaintiffs in that case.

3. **BODILY INJURY** means physical injury (including death) to any person, and any mental anguish or shock, sickness, disease, disability or death associated with or arising from such physical injury.

* * *

8. **LAW ENFORCEMENT ACTIVITIES** means the activities of any **MEMBER** while acting as a law enforcement official, officer, auxiliary officer, employee, or volunteer of a law enforcement agency or department of the **MEMBER**. **LAW ENFORCEMENT ACTIVITIES** do not include **EMPLOYMENT PRACTICE VIOLATIONS**.

* * *

SECTION II COMPREHENSIVE GENERAL LIABILITY

SECTION II INSURING AGREEMENTS

- A. **COMPREHENSIVE GENERAL LIABILITY:** The **TSB-RMT** agrees, subject to the coverage limitations, terms and conditions, to pay on behalf of the **MEMBER**, all sums which the **MEMBER** is legally obligated to pay by reason of the liability imposed upon the **MEMBER** by law or assumed by the **MEMBER** under contract or agreement, for damage direct or consequential, and expenses, all as more fully defined by the term **LOSS**, on account of **PERSONAL INJURY** or **BODILY INJURY**, suffered or alleged to have been suffered by any person(s) or organizations(s), and/or **PROPERTY DAMAGE** or the loss of use thereof, arising out of any **CLAIM** from any cause including **HOST LIQUOR LIABILITY** and/or **LIQUOR LIABILITY**, **INCIDENTAL MEDICAL MALPRACTICE**, or liability arising out of **LAW ENFORCEMENT ACTIVITIES**.

* * *

SECTION II EXCLUSIONS

IN ADDITION TO THE GENERAL EXCLUSIONS OF THIS COVERAGE, THIS SECTION DOES NOT INSURE AGAINST:

* * *

B. BODILY INJURY, PROPERTY DAMAGE, or PERSONAL INJURY, which the **MEMBER** intended or expected; unless resulting from:

- (1) An act alleged to be assault and battery for the purpose of preventing injury to persons or damage to property;
- (2) Corporal punishment (unless providing coverage for corporal punishment is prohibited by law); or
- (3) An act alleged to be assault and battery by a **MEMBER** resulting from **LAW ENFORCEMENT ACTIVITIES** during the time of arrest or incarceration process, but only as respects claims against the **MEMBER** for liability of the **MEMBER**.

Yancey answered the complaint and filed a counterclaim for declaratory judgment and damages alleging, among other things, bad faith and violations of the Tennessee Consumer Protection Act. Yancey also filed a motion for judgment on the pleadings. After a hearing, the Trial Court denied the motion for judgment on the pleadings.

TRMT filed a motion for summary judgment supported, in part, by a Statement of Undisputed Material Facts. In her response to the Statement of Undisputed Material Facts, Yancey admitted that it was undisputed that:

3. At the conclusion of the proof and following argument Judge Varlan instructed the jury [in the federal trial] on the elements of the claim of a civil rights violation. As it relates to the issues in this case the charge was as follows:

In order to prove plaintiff's claim, the burden is upon the plaintiff to establish by a preponderance of the evidence each of the following elements:

First, that the defendant performed acts that operated to deprive [sic] the plaintiff of one or more of the plaintiff's federal constitutional rights, as defined and explained in these instructions, by shooting and killing Huber [sic] Dean "John John" Yancey.

Second, that defendant then and there acted under color of state law.

Third, that defendant's acts were the proximate cause of damages sustained by plaintiff.

The first requirement the plaintiff must show is that the defendant performed acts that operated to deprive the plaintiff of one or more of the plaintiff's federally protected rights.

The plaintiff's first theory, as you have heard, is that the defendant intended to shoot and kill Hubert Dean "John John" Yancey. An intentional killing satisfies the first requirement of finding deprivation of a federally protected right.

The plaintiff's alternative theory is that Marty Carson acted maliciously and sadistically when he shot and killed Hubert Dean "John John" Yancey. Such conduct would also satisfy the first requirement of finding a deprivation of a federally protected right.

* * *

4. During deliberations in the federal action the jury submitted a question regarding the charge and the following discussion took place:

THE COURT: My law clerk has given you the charge or response to the jury that the Court intends to give. The Court intends to send this back as an attachment to the question. For the record, again, the question is, "What is the difference in intentional versus acting maliciously and sadistically?" The attachment reads as follows:

As to issue one, "Whether the plaintiff Lori Ann Yancey has proven by a preponderance of the evidence that Marty Carson intentionally shot and killed Hubert Dean "John John" Yancey, "*intentional*" means that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted."

As to issue two, "In the alternative whether the plaintiff Lori Ann Yancey has proven by a preponderance of the evidence that Marty Carson acted maliciously and sadistically when he shot and killed Hubert Dean "John John" Yancey, *malicious or sadistic behavior entails unjustifiable intentional conduct undertaken with the direct purpose of causing harm to the victim.*"

The Court is going to send this back as an attachment to the question. I have signed it. I have put after the question please see attached response and then signed it with the time and date.

* * *

6. Following deliberation, the jury returned a verdict in favor of the plaintiff, Lori Ann Yancey, against Marty Carson in the amount of \$5 million finding that Carson violated the decedent's civil rights under the charge of the court.

(emphasis in original).

Along with her response to the motion for summary judgment, Yancey filed a copy of a Memorandum Opinion filed in the federal case and a copy of Carson's deposition taken in that case.

After a hearing, the Trial Court entered its Order Granting Summary Judgment and Declaratory Relief granting TRMT summary judgment and holding that the insurance policy at issue "does not provide coverage to Marty Carson for the judgment rendered in the matter of of [sic] *Yancey et. al. vs. Carson et. al.* No. 3:04-CV-00556 a matter previously pending in the United States District Court for the Eastern District of Tennessee" and that TRMT was "relieved of any obligation whatsoever to indemnify Carson or pay any judgment resultling [sic] therefrom." The Trial Court's order also dismissed the counter-claims with prejudice.

Yancey appeals to this Court.

Discussion

Although not stated exactly as such, Yancey raises one issue on appeal: whether the Trial Court erred in granting summary judgment to TRMT.

Our Supreme Court reiterated the standard of review in summary judgment cases as follows:

The scope of review of a grant of summary judgment is well established. Because our inquiry involves a question of law, no presumption of correctness attaches to the judgment, and

our task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Cent. S.*, 816 S.W.2d 741, 744 (Tenn. 1991).

A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party seeking the summary judgment has the ultimate burden of persuasion “that there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law.” *Id.* at 215. If that motion is properly supported, the burden to establish a genuine issue of material fact shifts to the non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant’s claim or demonstrate that the nonmoving party cannot establish an essential element of his case. *Id.* at 215 n.5; *Hannan v. Alltel Publ’g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008). “[C]onclusory assertion[s]” are not sufficient to shift the burden to the non-moving party. *Byrd*, 847 S.W.2d at 215; *see also Blanchard v. Kellum*, 975 S.W.2d 522, 525 (Tenn. 1998). Our state does not apply the federal standard for summary judgment. The standard established in *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn. 1998), sets out, in the words of one authority, “a reasonable, predictable summary judgment jurisprudence for our state.” Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 Tenn. L. Rev. 175, 220 (2001).

Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). In making that assessment, this Court must discard all countervailing evidence. *Byrd*, 847 S.W.2d at 210-11.

Recently, this Court confirmed these principles in *Hannan*.

Giggers v. Memphis Housing Authority, 277 S.W.3d 359, 363-64 (Tenn. 2009). Issues involving the scope of coverage of an insurance policy present questions of law, which may be resolved by summary judgment if the facts are undisputed. *Victoria Ins. Co. v. Hawkins*, 31 S.W.3d 578, 580 (Tenn. Ct. App. 2000). Here, the material facts are undisputed.

To begin, Yancey asserts on appeal that TRMT “implicitly recognized ambiguity in its policy” when it provided a defense in the federal trial. We disagree. Yancey has pointed to no ambiguity in the policy at issue, nor can this Court find any ambiguity after a careful and thorough review of the policy provisions at issue. An insurer’s decision to provide a defense subject to a reservation of rights cannot be taken as an admission of ambiguity in the policy absent any other evidence of ambiguity.

The Trial Court found that the exclusion in the policy for bodily injury which was intended as contained in Section II part B applies to this case, thereby precluding coverage. The record reveals that Yancey, who was the plaintiff in the federal trial, prevailed in that action and successfully proved to the federal court jury that Carson intentionally shot and killed Officer Yancey thereby violating Officer Yancey’s civil rights. Yancey cannot now dispute that the actions of Carson were intentional as that was the very basis for Yancey’s successful claim in the federal court case against Carson. The plain language of the policy excludes coverage for this intentional bodily injury unless the actions fall within one of three specified exceptions to the exclusion. Of those exceptions, the first two, i.e., for “[a]n act alleged to be assault and battery for the purpose of preventing injury to persons or damage to property,” and “[c]orporal punishment” clearly do not apply given the facts and circumstances of this case.

Yancey, however, argues that the third of those exceptions applies, i.e., for “[a]n act alleged to be assault and battery by a **MEMBER** resulting from **LAW ENFORCEMENT ACTIVITIES** during the time of arrest or incarceration process . . .,” and that coverage, therefore, exists in this case. Yancey basically argues that Carson was engaged in law enforcement activities at the relevant time because a raid upon a meth lab conducted by officers while on duty and in uniform served the purposes of the employer and was within the scope of Carson’s duties.

We do not disagree that the raid upon a meth lab was within the scope of Carson’s duties as an officer. However, that does not mean that any and all of Carson’s actions committed while the raid was happening automatically fall within the scope of his duties. Carson clearly stepped outside of the scope of his duties when he intentionally shot and killed his partner. It cannot be said that the actions of a law enforcement officer who

intentionally shoots and kills his partner furthers his employer's purposes. Such an assertion would be bizarre. Furthermore, it is apparent that the exception to the bodily injury exclusion that Yancey attempts to rely upon was intended to apply to fact patterns quite different from the one in the instant case. Officer Yancey was in no way the subject of an arrest or incarceration. Nor was he the subject of an attempted arrest or incarceration. Under the facts in this case, particularly the fact that Yancey prevailed in the federal trial only by convincing a federal court jury that Carson intentionally shot and killed Officer Yancey, exception number three to the intentional bodily injury exclusion to coverage does not apply.

Yancey also argues that TRMT did not meet its burden of proof because it did not show "whether Carson was engaged in 'LAW ENFORCEMENT ACTIVITIES during the time of arrest ... [sic] process.'" Yancey is mistaken. As discussed above, Carson's actions in intentionally shooting and killing his partner, as found by the federal court jury, were clearly not law enforcement activities as Carson's intentionally shooting and killing his partner was not a part of Carson's activities "as a law enforcement ... officer" Carson's intentionally shooting and killing his partner can in no way be construed as his acting in his role as a law enforcement officer for Scott County. The fact that his intentionally shooting and killing his partner happened while a law enforcement activity, the raid, was occurring does not mean that Carson's action in intentionally shooting and killing his partner was a part of any law enforcement activity. TRMT made this showing through the filing of Yancey's response to the statement of undisputed material facts wherein Yancey admitted that it was undisputed that the federal court jury returned a verdict "finding that Carson violated the decedent's civil rights under the charge of the court," which charged the jury with two possible theories both requiring Carson's intentional conduct. This argument is without merit.

Yancey further argues that the policy is illusory and states in her brief on appeal that "[t]he policy at issue expressly covers 'LAW ENFORCEMENT ACTIVITIES' and 'civil rights' violations." However, as discussed above, Carson's actions in intentionally shooting and killing his partner do not constitute law enforcement activities. We find nothing under the facts of this case to lead us to the conclusion that the policy at issue was illusory. This argument also is without merit.

TRMT made a properly supported motion showing that there are no disputed issues with regard to the material fact that the injury in this case was intentional, or to any other material fact. The record shows that none of the three stated exceptions to the intentional bodily injury exclusion from coverage are applicable in this case. Given all this, we find no error in the Trial Court's holding that the policy at issue does not provide coverage.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Lori Ann Yancey, next of kin and representative of the estate of Hubert Dean Yancey, and her surety.

D. MICHAEL SWINEY, JUDGE