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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001748-MR

KENTUCKY SCHOOL BOARDS
INSURANCE TRUST — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
CIVIL ACTION NO. 02-CI-00022

BOARD OF EDUCATION
OF WOODFORD COUNTY, KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, Chief Judge; McAnulty, Judge; and HUDDLESTON, Senior Judge.[1]

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[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 Ky. Rev. Stat. (KRS) 21.580.

HUDDLESTON, Senior Judge: At issue in this declaratory judgment action are two exclusions contained in the "Educators Legal Liability Coverage Document"[2] pursuant to which the Kentucky School Boards Insurance Trust[3] is "legally obligated to pay for any civil claims made against [members of the Board of Education of Woodford County] because of a Wrongful Act . . . ,"[4] subject to "all of the terms, conditions and exclusions" set forth therein. Because it determined that the claims in the underlying litigation which prompted the instant case "involve the loss of civil rights of a student through the failures of the [Board] in hiring and supervising a teacher and do not allege any assault and battery, bodily harm, or physical or

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[2] The coverage document was effective from July 1, 1999, to July 1, 2000.

[3] In its own words, KSBIT "is a non-profit organization that administers a self-insured liability pool for member school districts." "As the administrator of a self-insurance group under KRS 304.48-050, KSBIT provides 'coverage' under 'coverage documents'" as opposed to being an "insurer" that provides "insurance coverage" and issues "insurance policies." Although KSBIT is presumably attempting to draw a distinction between "insurance" and "coverage" so as to argue that insurance law is inapplicable here, for the purposes of our analysis, it is a distinction without a difference.

[4] "Wrongful Act shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by a Member in the performance of duties for the Educational Entity." KSBIT concedes that "[i]f the coverage analysis stopped here, [it] arguably would owe the [Board] coverage" against the underlying claims because the allegations "could reasonably be construed to allege a "breach of duty by [the Board] in the performance of [its] duties."

mental injury directly caused by the Board," the circuit court concluded that the exclusions were not applicable. KSBIT appeals from the summary judgment granted in favor of the Board on that basis as well as the denial of its own motion for summary judgment.[5] On appeal, the dispositive issue is whether the underlying negligence claim "aris[es] out of" a bodily, mental or emotional injury or assault and battery.

The current dispute stems directly from a civil action initiated by Dale Moore, a former student at Woodford County High School, against the Board, in the United States District Court for the Eastern District of Kentucky styled Moore v. Woodford County Board of Education.[6] Moore characterized his lawsuit as "an action for violation of a substantive due process interest pursuant to the Fourteenth Amendment of the United States Constitution and the abuse of state power pursuant to 42 U.S.C.A. § 1983." He sought "money damages for violation of his substantive due process interest to be free from sexual molestation by his teacher [Pat Davis]; for violation of his

[5] Although the circuit court did not grant the Board's motion as to the allegation that the denial of coverage by KSBIT was made in bad faith and granted KSBIT's motion as to that issue because KSBIT "made a very reasonable legal argument in this case concerning coverage," the Board has not appealed from that determination. Accordingly, our sole function on review is to interpret and apply the exclusionary language.

[6] Civil Action No. 00-451.

right to bodily integrity; and for the [Board's] failure to provide a safe school environment."[7]

Moore first met Davis in August 1999 at which time he was enrolled in an English course Davis was teaching at Woodford County High School. Near the end of that month, Moore was transferred into a U.S. history course that was being taught by Davis. During that class period, Davis also began tutoring Moore in mathematics which resulted in Moore having Davis as an instructor in three of the four special education classes he was taking. Davis began taking a "personal interest" in Moore, and the two had conversations regarding their shared interest in horseback riding.

During the last week of September 1999, Davis invited Moore to her house to ride one of her horses and, approximately one week later, Davis again invited Moore to go horseback riding with her at her residence. During the latter visit, Davis approached Moore and, without any provocation by Moore, began to sexually manipulate his genitals. Davis then undressed, performed oral sex on Moore and demanded that he engage in sexual intercourse with her, which he did. Moore then dressed and went home but "was too embarrassed and fearful about his

[7] Because the underlying facts are undisputed for purposes of review, our factual summary is derived largely from Moore's complaint.

relationship" with Davis to inform his parents. Because he feared being expelled, Moore did not report Davis to school officials.

Davis continued having a sexual relationship with Moore throughout October and November 1999, with Davis arranging encounters between the two that involved numerous incidents of both oral sex and sexual intercourse. During this period, Davis also began purchasing beer and tobacco products for Moore who was not legally old enough to purchase the items for himself. In early December 1999, their relationship was discovered by Chris Henderson, Moore's mother, who immediately notified the Board and took measures to control her son's behavior. Word of the relationship spread throughout the school system causing Moore "such humiliation and embarrassment" that he refused to complete the remainder of the fall semester. Moore did return for "a less than successful spring semester" but chose not to enroll for the fall term in August 2000. Henderson has been informed that during September, October and November of 1999, Davis falsified Moore's scholastic and attendance records in order to make it appear that he was performing well in her classes and ensure that he would remain her student.

In Count I of his complaint, Moore alleged as follows:[8]

> 13. [Moore] is a citizen of the United States and is a resident of the Commonwealth of Kentucky. He brings this action pursuant to U.S.C.A., Title 42, Sections 1983 et seq., to redress the deprivation by [The Board], under color of state law, of rights, privileges, and immunities secured by the statutes and the Constitution of the United States of America. A special relationship exists between students who are required to attend school because of truancy laws and the government who provides the schools. Specifically, [Moore] alleges that [the Board] acting under color of state law, and acting recklessly in a gross and negligent manner, and with deliberate indifference to [Moore's] rights, privileges, and immunities, failed to protect [Moore] from harm, failed to provide [Moore] with a safe school environment, and failed to take reasonable steps to protect [Moore's] bodily integrity. The [Board] failed to follow its own statutory requirement and regulations designed to protect [Moore], failed to

[8] Because the nature of the claims made by Moore necessarily determines their implications, we have set forth both counts of his complaint in their entirety.

provide [Moore] with the level of care and protection required by law, and comparable to that which was made available to other similarly situated minors under the jurisdiction of the Board [].

14. [The Board] knew, or should have known, prior to [Davis's] sexual molestation of [Moore], that she was totally unfit for a position which required work and personal contact with students. At the time Pat Davis was hired by [The Board] as a special education teacher, she had a history of drug abuse, alcohol abuse, domestic violence, child neglect, anti-social behavior and professional misconduct. [Davis's] history of chemical dependence and criminal acts was widely known throughout Woodford County; it was common knowledge that [Davis] was a disbarred attorney who had received extensive medical and psychological treatment for her many problems.

15. As a direct result of the actions and inactions of [The Board] as set forth above, [Moore] has stopped attending school[,] severed his relationship with his family[,] become a management and discipline problem for his mother and lost all interest in pursuing his education. [Moore] has been subjected to extreme emotional and psychological

distress in that he has suffered and endured humiliation, mental anguish and fear. [Moore] has suffered permanent emotional and psychological damage which has manifested itself in mental and character disorders, loss of self-esteem and permanent impairment of his learning capacity.

Moore later amended his complaint to include a second count entitled "State-created danger," which consists of the following allegations:

16. The policy and custom of [the Board] in not supervising its teachers affirmatively produced a "state-created danger" by allowing [Davis] to establish and maintain a perverse sexual relationship with [Moore]. [Moore] was placed in danger of contracting a debilitating venereal disease and could have been fatally exposed to the AIDS virus by the sexual acts of [Davis], an agent of [the Board].

17. The Board's policy of non-supervision endangered the lives of all Woodford County High School students when [Davis] permitted her unattended students to "light fires in the classroom."

18. The Board's actions have also exposed [Moore] to the danger he will never be able to compete

> economically with his fellow students. Burdened by shame and ridiculed by his classmates, [Moore] dropped out of [high school] with little prospect of ever receiving a high school diploma. [Moore] is now in danger of holding menial jobs and of not being able to provide for his family in later years. [Moore] will be exposed to this economic danger for the rest of his life as a result of the Board's policies and customs.

Upon receiving notice of Moore's claims, the Board requested coverage from KSBIT for its defense. KSBIT denied coverage and refused to defend the Board because the "claims for bodily injury and/or personal injury" presented by Moore are properly classified as "general liability claims" and the Board "was not a member of KSBIT's general liability program during the period in question." Acknowledging that the Board was a member of its "Educators Legal Liability self-insurance pool during this time," KSBIT concluded that the coverage document "specifically excludes from coverage the type of claim asserted in the Complaint," citing the following exclusions:

> This Coverage Document does not apply to, and the Trust will not be liable for Loss related to or arising out of:
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> . . .

> 3. Any claim based upon or arising out of bodily injury, sickness, disease or death, mental or emotional injury or distress;
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> . . .
>
> 5. Any claim based upon or arising out of false arrest, assault and battery, detention or imprisonment.[9]

In response, the Board contended that the policy covers an allegation of "negligent hiring" such as that made by Moore. According to KSBIT, however, "this potential claim directly arises from the bodily/personal injury claim, i.e., *but for* the molestation," Moore would not have made the negligent hiring claim. "In the interest of fairness," KSBIT sought and received a formal legal opinion from outside counsel regarding the coverage issue. Based on that opinion, KSBIT maintained its position that any "negligent hiring" allegation resulted directly from the alleged sexual assault and bodily injury and, therefore, is expressly excluded by the terms of the coverage document.

[9] These exclusions will be referred to at times as the assault and battery and bodily/mental injury exclusions.

At that point, the Board presented KSBIT with its own legal analysis of the coverage issue, emphasizing that "the issue in a negligent hiring case is whether the employee was unfit for the job for which he was employed and whether his placement or retention in that job created an unreasonable risk of harm to the victim," which, "in a nutshell," is precisely the case here. In its view, KSBIT is obligated to defend the entire action "if even one allegation of the Complaint arguably falls with[in] the policy coverage."

Upon consulting with outside counsel again, KSBIT's position remained unchanged. With regard to its "duty to defend," KSBIT pointed out that "both the duty to defend and the duty to indemnify exist *only* where there is coverage under the insurance policy," reiterating that the express language of the subject exclusions operates to exclude Moore's claim. In closing, KSBIT noted that "arising out of" is interpreted broadly in Kentucky.

Due to the parties' inability to agree on the coverage issue, the Board filed a petition in Woodford Circuit Court seeking a declaration of rights. As correctly observed by the circuit court, the "issue in this case comes down to the definition of the words 'arising out of'" in the context of the coverage agreement between the parties. Agreeing with the Board that "Kentucky requires any ambiguity in an insurance contract

to be liberally construed and resolved in favor of coverage," the court viewed the threshold inquiry to be whether any ambiguity exists in the subject policy. Because the court concluded that the exclusionary language in question is ambiguous, the determinative issue became "whether the connection between the underlying events and the actual litigation are sufficient" to render the exclusions applicable.

In support of its theory that the exclusionary language must be interpreted expansively, KSBIT relied upon Corken v. Corken Steel Products, Inc.[10] and Kentucky School Boards Ins. Trust v. State Farm Mut'l Automobile Ins. Co.,[11] neither of which the court deemed persuasive. According to the court, Corken is

[10] Ky., 385 S.W.3d 949 (2002). In Corken, the Supreme Court concluded that the death of a salesman "arose out of" his employment for purposes of a workers' compensation claim, accepting the view "that causal connection [as opposed to proximate cause or foreseeability] is sufficient if the exposure results from the employment." Id. at 950.

[11] 21 F.3d 428 (6th Cir. 1994)(designated not for full text publication). At issue in KSBIT v. State Farm was whether the death of a student "arose from the use" of a school bus. Id. Citing Insurance Company of North America v. Royal Indemnity Co. 429 F.2d 1014, 1017 (6th Cir. 1970), the Sixth Circuit Court of Appeals observed that "arising out of the use of" in an automobile insurance policy are "'broad, general and comprehensive terms meaning 'originating from,' or 'having its origin in,' 'growing out of' or flowing from.'" Id. In concluding that the student's death "arose from the use" of the school bus, the Court held that only a causal connection between the injury and the use of the vehicle need be shown to come within the meaning of "arising out of the use of"; proximate causation is not required although the connection must be more than incidental. Id.

distinguishable since "it is clear from reading the opinion" that the Supreme Court expanded coverage in that context due to the unique nature of workers' compensation. With respect to State Farm, the court concluded that the Sixth Circuit Court of Appeals adopted an expansive view of the phrase "arising out of" "because of the requirement that liability insurance contracts are to be read in favor of inclusions rather than exclusions." In the court's view, however, "it is clear that the other side of the rule is that exclusions are to be narrowly drawn in order to provide coverage."

Guided by "the underlying policy of inclusion" adopted in Kentucky law, the court narrowly interpreted "arising out of" as excluding only those claims resulting from "direct actions by defendants" which, in turn, cause bodily, mental or emotional injury, or assault and battery. As Moore did not allege that the Board was directly responsible for any harm or injury he suffered, the court held that the exclusions were not implicated meaning KSBIT was obligated to defend the Board against his claim that it was negligent in hiring and failing to properly supervise Davis. KSBIT appeals from that determination.

On appeal, KSBIT frames the issue presented for review as follows:

> The bodily/mental injury and assault-and-battery exclusions in the [Board's] Coverage Document

> with KSBIT exclude coverage for claims "based upon or arising out of" bodily, mental, or emotional injury and assault or battery. In the underlying lawsuit, Dale Moore alleged that the [Board] negligently allowed a teacher to sexually assault him and cause him bodily, mental, and emotional injury. Considering these allegations, was the circuit court correct in holding that Moore's negligence claims against the [Board] did not arise out of an assault or out of a bodily, mental, or emotional injury?

According to KSBIT, Moore's claims fall within the policy exclusions "as a matter of plain English," the same result is dictated by both binding and persuasive authority, and the circuit court erred by holding otherwise. Citing Kemper National Ins. Cos. v. Heaven Hill Distilleries, Inc.,[12] KSBIT argues that the circuit court materially altered the "bargain" between KSBIT and the Board by inserting the word "directly" into the two exclusions thereby violating the fundamental principle that a policy should be enforced as written when the terms are clear and unambiguous as is the case here.

[12] Ky., 82 S.W.3d 873 (2002).

Relying upon Minnesota case law,[13] KSBIT contends that "arising out of" requires only a causal connection between the negligence claim and the alleged assault or battery as opposed to proximate cause in order for coverage to be excluded because the "focus is on the origin of the damages, not the legal theory."[14] As further support for this position, KSBIT cites Wayne Township Bd. of School Commissioners v. Indiana Ins. Co.[15] and Foreman v. Continental Casualty Co.,[16] both of which involved the sexual assault of a student with coverage being denied pursuant to exclusions which, in large part, parallel those in question. In each of the aforementioned cases, however, the subject exclusion contained modifying language absent here.[17]

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[13] Roloff v. Taste of Minnesota, 488 N.W.2d 325 (Minn. App. 1992); Ross v. City of Minneapolis, 408 N.W.2d 910 (Minn. App. 1987).

[14] Continental Casualty Co. v. McAllen Independent School District, 850 F.2d 1044, 1046 (5th Cir. 1988); Ross, id., at 913.

[15] 650 N.E.2d 1205 (Ind. App. 1995).

[16] 770 F.2d 487 (5th Cir. 1985).

[17] In Roloff, the policy excluded coverage for assault and battery "whether or not committed by or at the direction of the Insured." Supra, n. 13, at 326. Likewise, the relevant exclusion in Ross applied to any "claims for bodily injury or death caused by or arising directly or indirectly out of or from an assault or batter of any nature whatsoever whether or not committed by or at the direction of the insured." Id. at 912. In McAllen, the policy excluded coverage "[f]or any damage, direct or consequential, arising from bodily injury, sickness, disease or death of any person." Supra, n. 14, at 1046. Similarly, in Wayne Township the policy excluded coverage for

"Just as the trial court did in Foreman," KSBIT contends, the circuit court "improperly focused on the nature of Moore's allegations against the [Board] (negligence)" rather than on the sexual assaults allegedly perpetrated by Davis or the injuries allegedly suffered by Moore and its decision must therefore be reversed.

The Board argues to the contrary that under Kentucky law, "this Court must look to the pleadings of Moore's complaint - not the underlying facts to determine whether the policy [affords protection to the Board] in this matter." As authority for this proposition, the Board relies on Board of Public Educ. of the School Dist. of Pittsburgh v. National Union Fire Ins. Co.[18] and James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co..[19] According to the Board, it is entitled to protection based on the "plain language" of the policy, its "reasonable expectations" and the ambiguity of the exclusions

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any damages, "whether, direct, indirect, or consequential, arising from, or caused by, bodily injury, personal injury, sickness, disease or death . . . ." were excluded. Supra, n. 15, at 1211. In Foreman, the insurer was not liable for any loss in connection "with any claim against the Assureds (3) for any damages, direct or consequential, arising from bodily injury, sickness, disease or death of any person . . . ." Supra, n. 16, at 488.

[18] 709 A.2d 910 (Penn. 1997).

[19] Ky., 814 S.W.2d 273 (1991).

upon which KSBIT relies which "must be narrowly construed in favor of coverage" and, further, its position is supported by "[c]ontrolling case law." In its view, the case law upon which KSBIT relies "demonstrates the kind of qualifying language it could have used" to eliminate any ambiguity.

Since Kentucky has "repeatedly looked to Pennsylvania law for guidance"[20] in deciding insurance cases and Pennsylvania has consistently adhered to the rule set forth in James Graham Brown, the Board argues that it is "appropriate and in fact necessary" to apply Pennsylvania law here. While relying heavily upon District of Pittsburgh, the Board also observes that both North Carolina and New York have reached the same result.[21]

Kentucky Rules of Civil Procedure (CR) 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is

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[20] As examples, the Board cites Ronalco, Inc. v. Home Ins. Co., Ky., 606 S.W.2d 160 (1980), and Simpsonville Wrecker Service, Inc. v. Empire Fire and Marine Ins. Co., Ky. App., 793 S.W.2d 825 (1990).

[21] Durham City Board of Educ. v. National Union Fire Ins. Co., 109 N.C. App. 152, 426 S.E.2d 451 (1993); Watkins Glen Central School Dist. v. National Union Fire Ins. Co., 732 N.Y.S.2d 70, 286 A.D.2d 48 (App. Div. 2001).

entitled to a judgment as a matter of law." Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[22] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[23] In ruling on a motion for summary judgment, the circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[24]

On appeal from a summary judgment, we must determine "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."[25] Since no factual findings are at issue, deference to the trial court is not required.[26]

Although KSBIT is appealing from the summary judgment granted in favor of the Board, it is likewise appealing from the

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[22] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

[23] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

[24] Steelvest, supra, n. 22, at 480.

[25] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

[26] Id.

denial of its own motion for summary judgment. Under CR 56.03, the general rule is that such a denial is, "first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact."[27] However, there is an exception to the general rule that applies when, as is the case here, the following criteria are met: "(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom."[28]

"Interpretation and construction of an insurance contract [coverage document] is a matter of law for the court."[29] In Kentucky, the proper standard to apply in analyzing an insurance contract is a subjective one.[30] Said another way, the terms of an insurance contract "have no technical meaning in law and are to be interpreted according to the usage of the average man and as they would be read and understood by him in the light

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[27] Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Leneave, Ky. App., 751 S.W.2d 36, 37 (1988).

[28] Id.

[29] Kemper, supra, n. 12, at 871.

[30] James Graham Brown, supra, n. 19, at 279 (citation omitted).

of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured."[31]

Although an insurance policy should be liberally construed in favor of the insured, an insurance policy will be enforced as written if its terms are clear and unambiguous.[32] Exclusions operate to restrict and shape the coverage otherwise afforded.[33] Under Kentucky law, clearly drafted exclusions which are not unreasonable are enforceable.[34] Because coverage exclusions are "contrary to the fundamental protective purpose of insurance," however, they are "strictly construed against the insurer" and will not be extended beyond their "unequivocal meaning."[35] But, that strict construction should not overcome "plain, clear language resulting in a strained or forced construction."[36] Guided by these general principles, we turn our attention to the issue of whether KSBIT was obligated to defend the Board against the claim brought by Moore which necessarily involves a determination of whether his claim is "based upon or

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[31] Id. See also Eyler v. Nationwide Mut'l Fire Ins. Co., Ky., 824 S.W.2d 855 (1992) and Ronalco, supra, n. 20, at 163.

[32] Kemper, supra, n. 12, at 873 (citation omitted).

[33] Id. at 871.

[34] Id. at 873.

[35] Id. (Citation omitted).

[36] Id.

arises out of" bodily, mental, or emotional injury or assault and battery.

As correctly observed by both parties and the circuit court, this is a case of first impression in Kentucky. However, we are not without guidance. In James Graham Brown, the Kentucky Supreme Court conclusively resolved the dispute as to whether the allegations or the underlying facts are controlling in favor of the Board:

> The insurer has a duty to defend if there is any allegation which potentially, possibly or might come within the coverage of the policy. The insurance company must defend any suit in which the language of the complaint would bring it within the policy coverage regardless of the merit of the action. The determination of whether a defense is required must be made at the outset of the litigation. The duty to defend continues to the point of establishing that liability upon which plaintiff was relying was in fact not covered by the policy and not merely that it might not be.[37]

[37] James Graham Brown, supra, n. 19, at 279 (internal citations omitted). See also Simpsonville Wrecker Service, supra, n. 20.

Accordingly, the circuit court did not err in focusing on the nature of the allegations rather than the underlying facts as asserted by KSBIT. To the contrary, the circuit court used the approach dictated by both binding and persuasive authority.[38] Since KSBIT concedes that the subject claims sound in negligence which constitutes a "wrongful act" as defined in the policy, the applicability of the exclusions hinges on the meaning of "arising out of." Although there appears to be no Kentucky case directly on point, the Supreme Court did confront this question in Eyler, albeit in a different context.

At issue in Eyler was a provision that excluded personal liability and medical payments for an occurrence "arising out of premises owned or rented to an insured but not an insured location."[39] In concluding that the "other premises" exclusion did not defeat coverage for personal injuries sustained by Eyler on the premises of the insured, the Court engaged in the following analysis:

> Immediately, this phrase suggests the necessity for a causal connection between the premises and the injury. Ordinarily, "arising out of" does not

[38] Id. See also Westfield Ins. Co. v. Tech Dry, Inc.; 336 F.3d 503 (6th Cir. 2003); District of Pittsburgh, supra, n. 18; Durham City Bd. of Educ., supra, n. 21; Watkins Glen School Dist., supra, n. 21.

[39] Supra, n. 31.

> mean merely occurring on or slightly connected with but connotes the need for a direct consequence or responsible condition. As we view it, to satisfy the "arising out of" exclusion in the policy, it would be necessary to show that the premises apart from the insured's conduct thereon, was causally related to the occurrence.[40]

In light of the foregoing, the circuit court correctly interpreted the exclusionary language in question as implicitly requiring that the claim result directly from the assault and battery or resulting bodily/mental injury in order for the exclusion to apply. However, our decision in Kentucky Farm Bureau Mut'l Ins. Co. v. Hall,[41] in which the question to be decided was "whether Hall's injury arose out of the use of a motor vehicle under Kentucky's no-fault insurance law," seemingly conflicts with Eyler in that regard. In upholding the award of basic reparation benefits to Hall, we held that the causal connection requirement is satisfied "if the injury is

[40] Id. at 857. It is noteworthy that Eyler recognizes a distinction in the construction given to "arising out of" for purposes of workers' compensation law thereby validating the circuit court's position that Corken is limited in its application.

[41] Ky. App., 807 S.W.2d 954 (1991).

reasonably identifiable with the normal use or maintenance of a vehicle and is reasonably foreseeable."[42]

Acknowledging the implications of Hall, the Board agrees that "when a policy's general *coverage* or insuring clause uses terms like 'arising out of' and 'based upon,'" we must liberally construe those terms to see if "virtually any causal connection exists [so] as to trigger coverage in favor of the insured." Likewise, the Board contends, when exclusionary provisions are at issue we must narrowly construe those terms to accomplish the same controlling purpose of rendering insurance effective consistent with the lesson of Eyler. While we agree with this logic and believe that Hall and Eyler can be reconciled in this manner, our analysis does not end there.

Recently, the Sixth Circuit Court of Appeals applied Kentucky law in resolving a related issue of first impression. In Westfield, the Court was called upon to predict how the Kentucky Supreme Court would decide the question of whether negligent hiring and retention of an employee constitutes a qualifying "occurrence" in the context of a general liability policy.[43] Upon making the initial determination that the term "occurrence" was not ambiguous in the subject policy, the Court

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[42] Id. at 956.

[43] Westfield, supra, n. 38, at 508.

observed that most policies exclude coverage for injuries "expected or intended from the standpoint of the insured."[44]

Relevant for present purposes, the Court concluded that: "When courts deny coverage in negligent hiring cases, they arguably transform an employer's negligent acts into intentional acts, dissolving the distinction between negligent and intentional conduct."[45] To avoid that problem, the Court looked to the actions of the insured and not the perpetrator of the intentional act in determining whether the subject policy afforded coverage to the employer for the alleged negligent hiring and retention of its employee.[46] Noting the Kentucky Supreme Court's recognition that the term "occurrence" is to be broadly and liberally construed in favor of providing coverage, the Sixth Circuit Court of Appeals predicted that the Court would hold that the employer "is entitled to coverage because [its] negligent hiring and retention of the employee constitutes an 'accident,' and therefore, an 'occurrence' under the plain meaning of the governing policy."[47] While not determinative, Westfield strengthens the position of the Board and is

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[44] Id.

[45] Id. at 509.

[46] Id. at 510.

[47] Id.

consistent with both Kentucky case law and foreign jurisprudence which parallels that of Kentucky in the realm of insurance law.

As previously recognized, other jurisdictions have directly addressed the issue presented with conflicting results. In our estimation, District of Pittsburgh not only represents the sounder view but is a logical extension of both James Graham Brown and Westfield. In that case, a complaint was filed on behalf of a minor student alleging, in relevant part, that various enumerated shortcomings of the Board enabled an officer of a school's parent-teacher organization to sexually molest the student in violation of the student's civil rights.[48] When the Board informed its insurer, National Union, of the allegations and requested that National Union provide a defense on its behalf, National Union disclaimed coverage and refused to defend the Board, citing the following exclusions:

> The policy does not apply:
>
> to any claim involving allegations of . . .
>
> criminal acts . . .
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> to any claims arising out of . . . (3) assault or battery . . .

[48] District of Pittsburgh, supra, n. 18, at 911.

> to any claim arising out of bodily injury to . . . any person . . . .[49]

After setting forth general principles of policy construction, the court observed that an "insurer's duty to defend is distinct from, and broader than, its duty to indemnify an insured."[50] Consistent with James Graham Brown, the Court also clarified that "an insurer is not obligated to defend all claims against its insured; its duty is determined by the nature of the allegations in the underlying complaint."[51] More precisely, if the underlying complaint alleges facts which, if true, would actually or potentially bring the claims within the

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[49] Id. at 912. Under the policy, National Union agreed to provide coverage for "Any Wrongful Act (as herein defined) . . ." and to "defend any action or suit brought against the Insured alleging a Wrongful Act, even if such action or suit is groundless, false or fraudulent." Id. at 913. Significantly, the "Defense, Investigation and Settlement of Claims" section of the policy issued by KSBIT contains identical language:

> As respects such coverage as is afforded by this Coverage Document, the Trust shall:
>
> a. Have the right and duty to select counsel and to defend any suits against the Members seeking damages for Loss, even if any of the allegations are groundless, false or fraudulent. (Emphasis supplied).

[50] Id. at 913 (citation omitted).

[51] Id.

policy coverage, the insurer must defend its insured.[52] Such is the case here.

As emphasized by the Court: "An insurer who refuses to defend its insured from the outset [as KSBIT did] does so at its peril, because the duty to defend remains with the insurer until it is clear the claim has been narrowed to one beyond the terms of the policy."[53] Further, an insurer who disclaims its duty to defend based on a policy exclusion "bears the burden of proving the applicability of the exclusion."[54] KSBIT has failed to meet that burden here.

Just as KSBIT does in the instant case, National Union argued that allegations of assault and battery and personal injury cannot be separated from underlying allegations of negligence in failing to prevent the assault and battery or personal injury.[55] Upon determining that the allegations were clearly "wrongful acts" under the policy, the court examined the allegations set forth in the complaint. Since the complaint included allegations of negligence and the policy did not expressly exclude coverage for claims of negligent supervision, control or hiring, or for civil rights violations, the Court

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52 Id.

53 Id.(Citation omitted).

54 Id.

55 Id.

reasoned there was "a legitimate prospect that negligence, rather than intentional assault or battery caused the injury."[56] Therefore, the exclusion did not excuse the insurer's duty to defend, and the Court declined to "supply exclusionary terms neither bargained for nor agreed to by the parties," as do we.[57]

With respect to the exclusion regarding "criminal acts," the Court concluded that the "criminality alleged is one party removed from the insured; it is not alleged the claim involved criminality by the insured [Board] itself."[58] In rejecting National Union's position that the claim against the Board "involve[d]" criminal acts because its negligence allowed the officer's criminal acts to occur and the student suffered thereby, the Court demonstrated the flaw in this reasoning:

> Thus the insurer, to avail itself of this exclusion, would interpret the policy to mean "We will defend you against claims of your own negligence, and claims your negligence allowed others to cause injury negligently, but if by reason of that identical negligence any other person acts criminally, you're on your own."[59]

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[56] Id. at 914.

[57] Id.

[58] Id. at 915.

[59] Id.

Although the exclusions in question do not refer to "criminal acts," we find this reasoning equally applicable to assault and battery and bodily injury. Of particular significance here, the Court went on to reject the construction of "arising out of" proposed by National Union in relation to the assault and battery exclusion and bodily injury exclusion:

> The injuries arise, according to the pleadings, to which we are restricted, from the [Board's] negligent acts and omissions; the omissions and negligence (the "claim") did not arise from the molestation. That is, [Davis's] acts "arose out of" the failings of [the Board], not the other way around. The complaint of [Moore] challenged the improper tending of the garden from which the weeds of [Davis's] misconduct grew, but it is clearly the latter which arose from the former. The weeds give proof of the bad gardening, but the claim, the ability to hold the gardener responsible, arises from the acts and omissions of the gardener, not the mere presence of the weeds. Likewise, [Davis's] acts alone do not create or give rise to a claim against appellants; that claim cannot stand on allegations of assault

alone. It arises, if at all, from other facts, grounded in negligence.[60]

Because we find this reasoning dispositive, the same outcome must follow. As observed by the Court, however, recent cases in other jurisdictions have involved errors and omissions policies[61] with exclusionary language paralleling that in question with opposite results, a review of which further validates the reasoning we have adopted.

Just as KSBIT does here, National Union cited Winnacunnet Cooperative School Dist. v. National Union Fire Ins. Co.[62] in support of its position. In Winnacunnet, three high school students pled guilty to the murder of the husband of the school's media director, Pamela Smart, who had enlisted their help in planning and executing the murder.[63] Despite the fact that the underlying complaints did not allege such acts, the U.S. Court of Appeals for the First Circuit held that National Union had no duty to defend the school district based on the

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[60] Id. at 916.

[61] As explained in Watkins Glen Central School Dist., an errors and omissions policy is "intended to insure a member of a designated calling against liability arising out of the mistakes inherent in the practice of that particular profession or business" and such policies are common in the field of education. Supra, n. 21, at 72 (citation omitted).

[62] 84 F.3d 32 (1st Cir. 1996).

[63] Id. at 33.

exclusions precluding recovery for claims arising out of assault and battery and bodily injury or death of "any person."[64] In reaching that conclusion, the First Circuit Court of Appeals interpreted the concept embodied in the phrase "arising out of" as being even more comprehensive than proximate cause and looked "beyond the conclusory pleadings to determine the applicability of the disputed exclusions."[65]

As noted in District of Pittsburgh, however, the First Circuit looked well beyond the pleadings in determining that the exclusions precluded coverage in Winnacunnet and, under Pennsylvania law, "an insurer's duty to defend is determined solely by the allegations of the underlying complaint."[66] Since the same approach is required under Kentucky law, we agree that this distinction is critical. Likewise, we disagree with the First Circuit's determination that the negligence arises from the subsequent crime and share the opposing view espoused in District of Pittsburgh that when negligence allows a crime to occur, the claim against the negligent party arises from the negligence rather than the criminality.[67]

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64 Id. at 38.

65 Id. at 35.

66 Supra, n. 18, at 916.

67 Id. at 917.

In contrast to Winnacunnet, the Court in Durham City Bd. of Educ. concluded that the relevant exclusion was inapplicable based on policy language that, in relevant part, mirrors that at issue in District of Pittsburgh and here.[68] In that case as in District of Pittsburgh, National Union refused to defend the school board against allegations of negligence following the rape of a student by a basketball coach.[69] Distinguishing between omnibus clauses in automobile insurance policies and exclusionary clauses in errors and omissions insurance policies, the court concluded that the policy reasons for interpreting "arising out of" broadly in the former category of cases is not present in the latter and, thus, employed a strict construction of the exclusionary language.[70]

Because the allegations against the Board employees were "for money damages suffered as a result of their negligent supervision" and did not "arise out of" an assault and battery

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[68] Id. For a discussion of why Texas law dictates a result contrary to that reached in Durham City Bd. of Educ., see Canutillo Independent School Dist. v. National Union Fire Ins. Co., 99 F.3d 708 (5th Cir. 1996). See Amos v. Campbell, 593 N.W.2d 263 (Minn. App. 1999)(affirming Roloff and Ross, supra, n. 13) for a discussion of why both District of Pittsburgh and Durham City Bd. of Educ. are "distinguishable and unpersuasive" under Minnesota law. Id. at 268. In Amos, the Court acknowledges that the duty of the insurer to defend could have been triggered by the facts of the case but only the more narrow duty to indemnify was at issue. Id.

[69] Durham City Bd. of Educ., supra, n. 21, at 155.

[70] Id. at 161.

or bodily injury, the Court, like the Court in District of Pittsburgh, held that the exclusionary language did not preclude coverage for the Board.[71] We agree with the District of Pittsburgh court that this reasoning is more persuasive than the Winnacunnet decision. Although an assault and battery allegedly occurred, it was not the act of the Board. "To deny the [Board] a defense against claims that do not allege excluded conduct by the [Board] would be intolerable."[72]

> The purpose of an errors and omissions policy is to protect an insured who commits an act of professional negligence. If an act of professional negligence causes actionable damage to another, but [] the insured's right to protection depends not on the nature of the act but rather on the nature of the resulting damage, we believe that the stated policy objective would be substantially nullified.[73]

Consistent with the foregoing, we conclude that the negligence and civil rights claims brought by Moore did not "arise out of" an assault and battery or bodily injury. Because

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[71] Id. For

[72] District of Pittsburgh, supra, n. 18, at 917.

[73] Id. (Citation omitted).

the alleged liability of the Board is predicated upon its conceptually independent negligent supervision, application of the subject exclusions would "effectively eviscerate the errors and omissions policy altogether"[74] contrary to Kentucky law. Accordingly, the judgment declaring that KSBIT has a duty to defend the Board in the underlying action under the terms of the governing policy is affirmed.

EMBERTON, Chief Judge, CONCURS.

McANULTY, Judge, DISSENTS by separate opinion.

McANULTY, Judge, DISSENTING: Respectfully, I dissent. I believe the plain language of the policy is not ambiguous and that neither coverage nor indemnification is required. In my opinion, the reliance by the trial court and the majority on the allegation of negligent hiring creating both the duty to defend and the duty to indemnify is misplaced. If that is true, a clear exclusion may be eviscerated by pleading a theory of coverage that allows coverage when not contracted for by these sophisticated parties. See Winnacunnet Co-op. School Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 84 F.3d 32, 35 -36 (1st Cir. 1996) ("While a duty to defend may be found solely on the facts pleaded in the cause of action, a court may inquire into the underlying facts 'to avoid permitting the pleading

[74] Watkins Glen Central School Dist., supra, n. 21, at 74.

strategies, whims, and vagaries of third party claimants to control the rights of parties to an insurance contract.'"). In this case, Dale Moore's injuries are entirely related to the sexual relationship between Moore and Patricia Davis, such injuries being excluded from coverage under the coverage document.

Apparently, the coverage at issue would have been available under a general liability policy, however the WCBE did not obtain that coverage from KSBIT. Because I believe the trial court's decision materially altered the bargain between WCBE and KSBIT, I would reverse the ruling below with instructions to enter judgment in favor of KSBIT.

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