

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001436-MR

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAM T. WRIGHT, III, JUDGE
ACTION NO. 03-CI-00438

FRANCES DIXON, ADMINISTRATRIX OF THE
ESTATE OF ALLEN WAYNE DIXON, DECEASED
AND ROBERT B. DIXON

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JONES, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Kentucky Farm Bureau Mutual Insurance Company appeals from Findings of Fact, Conclusions of Law and Summary Judgment of the Letcher Circuit Court. It argues that the trial court erred in holding that Robert B. Dixon's homeowner's insurance policy provided coverage for his act of shooting and killing

his brother-in-law. We conclude that genuine issues of material fact, or mixed questions of law and fact, remain for adjudication. These issues include whether Robert B. Dixon, who suffers from a mental disease or disability, was able to form the requisite intent to characterize the shooting as an intentional, and therefore uninsured, act and, if so, whether the victim was an innocent co-insured who died as a result of domestic violence. Accordingly, we Reverse and Remand the Judgment on appeal.

Kentucky Farm Bureau issued a homeowner's insurance policy providing coverage for Robert B. Dixon (hereinafter "R.B. Dixon") and his wife Jewell Dixon. On September 26, 2003, R.B. Dixon shot and killed his brother-in-law, Allen Wayne Dixon (hereinafter "A.W. Dixon"), at the home of R. B. Dixon. R.B. Dixon was later charged with one count of murder, and subsequently found to be permanently mentally incompetent to stand trial.¹

Thereafter, the Estate of A.W. Dixon, with his wife Frances Dixon as Administratrix, filed the instant action against R.B. Dixon seeking damages arising from the death of A.W. Dixon. On October 29, 2012, the Complaint was amended to include an action against Kentucky Farm Bureau seeking a Declaratory Judgment establishing coverage. Kentucky Farm Bureau responded that there was

¹ As noted at the oral argument, there is no trial record in this case because no record had been developed prior to the filing of the Motions for Summary Judgment. It was acknowledged by appellate counsel for both parties, for example, that the record fails to reveal even such salient and necessary facts as whether the shooting took place at the home of R.B. Dixon or A.W. Dixon. While appellate counsel are in agreement that the shooting took place at R.B. Dixon's home - a fact which apparently was established in the criminal action - they can cite to nothing in the civil record in support of this contention. As such, our recitation of the purported facts derives exclusively from the written and oral arguments, and may not necessarily correspond to any record which may be produced on remand.

no coverage under the policy because R.B. Dixon's intentional act of murder² did not constitute an "occurrence" under the policy, and because the policy excluded coverage for bodily injury which was expected or intended by one of the insureds.

The matter proceeded in Letcher Circuit Court, whereupon the Estate filed a Motion for Summary Judgment. As a basis for the Motion, the Estate sought a declaration that Kentucky Farm Bureau's homeowner's policy provided defense and indemnity coverage to R.B. Dixon. Kentucky Farm Bureau maintained that there was no such coverage under the instant facts, and it filed its own Motion for Summary Judgment.

On July 24, 2013, the Court rendered its Findings of Facts, Conclusions of Law and Summary Judgment in favor of the Estate. The Court found in relevant part that the policy's intentional loss exclusion does not apply because of the policy's innocent co-insured provision and the application of Kentucky Revised Statutes (KRS) 304.12-211(2)(b). Specifically, the Court determined that the victim of the shooting, A.W. Dixon, did not contribute to or cause his own murder and that the loss arose in the course of domestic violence for which the policy provided coverage. The Court also denied Kentucky Farm Bureau's Motion for Summary Judgment. This appeal followed.

Kentucky Farm Bureau now argues that the Letcher Circuit Court erred in sustaining the Estate's Motion for Summary Judgment. Specifically, it maintains that the trial court erred in holding that R.B. Dixon's homeowner's

² We use the term "murder" in the colloquial sense to denote R.B. Dixon's killing of A.W. Dixon.

insurance policy provided coverage for his act of murder. It claims that pointing and shooting a gun at someone does not satisfy an insurance policy's occurrence requirement, that the policy's intentional acts exclusion negates the possibility of coverage as a matter of law, and that the court improperly applied the innocent co-insured provision to the facts of this case. Kentucky Farm Bureau argues that a two-step analysis is required to determine if coverage is applicable to the facts herein. First, it maintains that there must be a claim against the insured for "bodily injury" or "property damage" caused by an "occurrence" to which the coverage applies. As defined by the policy at issue, it maintains that an occurrence means an "accident" during the policy period resulting in bodily injury. That is to say, it maintains that because the shooting was intentional, it was not an accident and therefore not an occurrence under the policy. Additionally, it contends that the policy coverage provisions exclude insurance coverage for bodily injury or property damage which is "expected or intended by one or more insureds." It argues that the plaintiff's Complaint on its face excludes coverage in this case as it alleges that R.B. Dixon's activities were willful, wanton and malicious. In sum, Kentucky Farm Bureau seeks an Order reversing the Summary Judgment in favor of Dixon.

In examining this issue, the Letcher Circuit Court addressed Kentucky Farm Bureau's contention that the shooting of A.W. Dixon was an intentional act, and therefore is excluded under the policy of insurance. The dispositive inquiry for it was, 1) whether the shooting was an act committed with the intent to cause a

loss (i.e., an intentional and therefore excluded act), and, if so then 2) whether the intentional loss exclusion did not apply under the instant facts because A.W. Dixon was an innocent co-insured who did not contribute to his own death and the loss arose out of an act of domestic violence.

The Court ultimately determined that the policy's intentional loss provision was inapplicable for two reasons: first, Paragraph 8(b) provides that the intentional loss provision will not apply to co-insureds whose loss arose out a pattern of criminal domestic violence, and the perpetrator was criminally prosecuted for the loss. Second, KRS 304.12-211(2)(b) provides in relevant part that if a “property or casualty insurance policy excludes property coverage for intentional acts, the insurer shall not deny payment to an innocent co-insured if the loss arose out of a pattern of domestic violence and abuse and the perpetrator of the loss is criminally prosecuted for the act[.]”

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to

produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a 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*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Kentucky Farm Bureau and resolving all doubts in its favor, we cannot conclude that Summary Judgment in favor of the Estate was warranted. Because R.B. Dixon was found to be mentally incompetent to stand trial, it is not clear from the record whether he was able to have formed the requisite intent to characterize the shooting as an intentional act. If the shooting were found to be an intentional act, it may not be an "occurrence" under the policy. However, even if the act were found to be intentional, the policy and the statutory law bar non-coverage if the victim was an innocent co-insured who suffered a loss as a result of criminal domestic violence. The Letcher Circuit Court found that A.W. Dixon was an innocent co-insured who died as a result of domestic violence. It is unclear from the record, however, how this can be the case as it appears that he was not an "insured" at all. That is to say, R.B. Dixon and his wife Jewell Dixon - but not A.W. Dixon - were the named insureds on the homeowner's policy at issue. Additionally, and *arguendo*, even if A.W. Dixon was a co-insured, the further question arises as to whether the

shooting of a brother-in-law with whom one apparently does not reside can be characterized as "domestic violence" for purposes of Paragraph 8(b) and KRS 304.12-211(2)(b).

We cannot resolve these questions herein. Rather, we are bound to view the record in a light most favorable to Kentucky Farm Bureau and to resolve all doubts in its favor. *Steelvest, supra*. Any of these issues, taken alone, is sufficient to overcome the Estate's Motion for Summary Judgment. Taken collectively and when viewed in a light most favorable to Kentucky Farm Bureau, we cannot conclude that Summary Judgment in favor of the Estate was warranted. For the same reasons, we find unpersuasive Kentucky Farm Bureau's argument that it was entitled to prevail on its own Motion for Summary Judgment.

Finally, the parties devoted considerable time at the oral argument to whether the legal theory of inferred intent is applicable to the instant facts. Much discussion was given to whether the trier of law could infer from R.B. Dixon's purported act of pointing a loaded gun at A.W. Dixon and pulling the trigger that he intended to injure or kill A.W. Dixon. Given the paucity of the record, this issue is wholly premature. While a judicial determination was allegedly made that R.B. Dixon was not mentally competent to stand trial in the criminal proceeding, no determination has been made as to his mental capacity at the time of the alleged shooting. The issue of intent, whether general or inferred, was never raised or adjudicated in the instant civil proceeding, and is not now ripe for appellate review.

For the foregoing reasons, we Reverse the Letcher Circuit Court's Summary Judgment in favor of the R.B. and Frances Dixon, and Remand the matter for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marcia L. Wireman
Jackson, Kentucky

ORAL ARGUMENT FOR
APPELLANT:

Mike Risley
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE FRANCES DIXON:

Daniel F. Dotson
Whitesburg, Kentucky