

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WEST AMERICAN INSURANCE COMPANY,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 98-765
	:	
GILBERT KLEIN, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J.

JUNE 29, 1998

The Plaintiff brought this declaratory judgment action to determine whether or not it must defend and indemnify Defendant Gilbert Klein in a state court wrongful death action. Before the Court is the Plaintiff's motion for summary judgment. For the reasons that follow, the Motion will be granted.

I. Background

This litigation arose from an incident that occurred on March 13, 1995. On that date, Klein was inside a building he owned at 401-403 North 59th Street in Philadelphia, renovating the premises which he intended to open as a restaurant. Klein heard noises in the alley behind his property and thought that individuals were entering his property to steal some of his equipment.

Klein exited his property and, holding a gun, ran to the alley behind his property where he shot and killed William

Walker.¹ On June 26, 1997, a jury found Klein guilty of third-degree murder and he was sentenced to six to fifteen years imprisonment. Klein's conviction and sentence are currently on appeal.

Subsequently, Walker's parents brought wrongful death and survival claims against Klein in the Court of Common Pleas of Philadelphia. At the time of Walker's death, Klein was an insured under a homeowners insurance policy providing personal liability coverage. The policy, which covered Klein's home in Bala Cynwyd, Pennsylvania, provides that the Plaintiff will defend and indemnify the insured "If a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies." Pl.'s Mot. for Summ. J., Ex. 1-D at p. 13. The term "occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in (a.) 'Bodily injury'; or (b.) 'Property damage.'" Id. at p. 1. Further, the policy specifically excludes coverage for "bodily injury" or "property damage" that "is expected or intended by the 'insured.'" Id. at p. 13.

¹Klein disputed this fact at his criminal trial and continues to do so now. His testimony was that he saw an individual running down the alley and that as he was yelling to the individual, another individual came over a wall in front of him. This caused Klein to lose his balance and his gun accidentally fired, causing Walker's death.

Since the commencement of the civil suit against Klein, the Plaintiff has provided his defense subject to a reservation of rights. The Plaintiff filed this action requesting the Court to declare that it has no legal duty to defend or indemnify Klein against the lawsuit.

II. Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party cannot rest on the pleading, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324. Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

III. Discussion

The Plaintiff argues that the incident in which Walker died could not be an "occurrence" under the policy because, based on Klein's criminal conviction, it was not an accident. Under Pennsylvania law, criminal convictions are admissible in civil actions arising from the same operative facts and circumstances.

Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 952 (Pa. Super. 1992), appeal denied, 637 A.2d 290 (Pa. 1993). Further, "the victim of a criminal act is precluded from litigating the issue of the insured actor's intent where that intent has been established by independent evidence in the prior criminal proceedings." Id. at 954.

In the instant case, Klein was convicted of third-degree murder. In Pennsylvania, murder is defined as follows:

(a) Murder of the first degree. A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree. A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or accomplice in the perpetration of a felony.

(c) Murder of the third degree. All other kinds of murder shall be murder of the third degree.

18 Pa. C.S. § 2502. Third-degree murder consists of a killing done with legal malice but without the specific intent to kill required in first-degree murder. Commonwealth v. Hill, 629 A.2d 949, 951 (Pa. Super. 1993), appeal denied, 645 A.2d 1313 (Pa. 1994). It can involve the specific intent to harm a victim as long as the intent falls short of the specific intent to kill. Commonwealth v. Pitts, 404 A.2d 1305, 1308 (Pa. 1979). Malice exists where there is a wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences, and a mind regardless of social duty. Commonwealth v. Young, 431 A.2d 230, 232 (Pa. 1981). It may be inferred from the use of a deadly weapon upon a vital part of the body. Commonwealth v.

Pigg, 571 A.2d 438, 441 (Pa. Super. 1990), appeal denied, 581 A.2d 571 (Pa. 1990). Malice may also exist where the accused "acts in gross deviation from the standard of reasonable care, failing to perceive that such actions might create a substantial and unjustifiable risk of death or serious bodily injury." Stidham, 618 A.2d at 951.

The Plaintiff argues that Klein's conviction conclusively establishes that the shooting of Walker was an intentional tort and, therefore, could not have been an accident. See Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 247 (Pa. 1988). The Defendants argue that Klein's conviction is not conclusive, and that an issue of fact remains as to his intent at the time of the shooting. This argument is based upon Klein's testimony at his criminal trial that he neither intentionally nor consciously fired the gun: "The gun went off when I fell when the fellow came off the wall in front of me and either I lost my balance or I stepped backwards and tripped on something." Defs.' Reply, Ex. A at pp. 64-65. In support of this contention, the Defendants rely on Stidham. In Stidham, the insured shot and killed a man while he was intoxicated. The insured then entered a guilty plea to the crime of third-degree murder. In a subsequent civil proceeding, the superior court held that the insured's guilty plea did not conclusively establish his intent for purposes of his insurance policy coverage. Stidham, 618 A.2d at 952-53.

But this case is distinguishable from Stidham. In

Stidham, the insured's guilty plea was insufficient evidence of his intent. In contrast, at Klein's criminal trial, the judge charged the jury as follows with regard to third-degree murder:

Malice in murder of the third degree is the malicious design to do harm, but not to kill. Third-degree murder is, therefore, the unlawful taking of a human life with malice aforethought with no specific intention to kill, but with an intention to inflict grievous bodily harm and not to take human life, yet as a result of the inflicting injury death occurs.

Pl.'s Mot. for Summ. J., Ex. 1-B at pp. 21-22. Thus, when the jury returned a guilty verdict it was with the finding that Klein possessed "an intention to inflict grievous bodily harm." In reaching this verdict, it was necessary for the jury to reject Klein's testimony that his gun fired when he fell. The jury also rejected a lesser charge of involuntary manslaughter. Thus, Klein's conviction was based on a jury's finding that he intentionally shot Walker, and the shooting could not have been an accident.

Similarly, the Plaintiff is not required to defend and indemnify Klein based upon the exclusion in the policy for bodily injury "expected or intended by the insured." The superior court, interpreting a similar policy exclusion, has held that "[a]n insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result." United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 989 (Pa. Super. 1986), appeal denied, 528 A.2d 957 (Pa. 1987). In Klein's criminal case, the jury found that Klein acted intending to

inflict grievous bodily harm. Based upon this finding and the above analysis, it has been conclusively established that Klein intended the bodily injury to Walker and, therefore, his act is excluded from coverage by the policy.

The fact that the wrongful death Complaint in this case alleges that Klein negligently shot Walker does not bring the claim within the coverage of the insurance policy. A plaintiff cannot dress up a complaint for the purpose of avoiding an insurance exclusion. Agora Syndicate, Inc. v. Levin, 977 F. Supp. 713, 715 (E.D. Pa. 1997). Where, as here, the facts clearly sound in intentional tort, mere use of the word "negligence" will not trigger an insured's duty to defend. Id.; Federal Ins. Co. v. Potamkin, 961 F. Supp. 109, 111-12 (E.D. Pa. 1997). Despite any allegations of negligence in the wrongful death Complaint, the Plaintiff owes no duty to defend and indemnify Klein.

Further, Pennsylvania's public policy prohibits insurance coverage for intentional torts or criminal acts. Agora, 977 F. Supp. at 716; Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1175 (Pa. Super. 1991), appeal denied, 612 A.2d 985 (Pa. 1992). Klein was convicted of the crime of third-degree murder based upon his intentional shooting of Walker. He should not be allowed to avoid financial responsibility for his criminal act. Therefore, requiring the Plaintiff to provide Klein with coverage under these circumstances would violate the public policy of Pennsylvania.

An appropriate Order follows.

