IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

October 10, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

ALLSTATE INSURANCE CO.,)
Plaintiff/Appellant) Shelby Circuit No. 52586 T.D.
VS.)
RITA GARTH,) Appeal No. 02A01-9409-CV-00201
Defendant) .
And)
EDDIE JOY DOBBINS, individually and as next friend for **MARK DOBBINS**, a minor, deceased)
Intervening Defendant/Appellee)

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE WYETH CHANDLER, JUDGE

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AFFIRMED AND REMANDED

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

<u>O P I N I O N</u>

This is an action for a declaratory judgment by Allstate against its insured, Rita Garth, that no coverage was afforded her under a homeowner's policy. The trial judge held otherwise and we have the case for disposition.

On January 28, 1992, Ms. Garth attended a play at the Orpheum Theater in Memphis. She was carrying a clutch purse with a shoulder strap. In the purse was a loaded pistol, not further described. During intermission, an unknown person brushed against the plaintiff and dislodged the purse which fell to the floor. The pistol discharged, and the bullet struck another patron, Mark Dobbins, in the chest, killing him.

We skip over certain procedural aspects of the case as being unnecessary to the resolution of the dispositive issue of whether a policy of insurance purchased by Ms. Garth from Allstate afforded her liability protection under the recited circumstances.

The trial judge held that the insured was guilty only of mere negligence and that neither exclusion was applicable. He thereupon rendered a summary judgment on the precise issue. There are no material facts in dispute.

The policy contained two exclusionary provisions which Allstate argues were applicable to the undisputed facts. Under Section II, headed as Family Liability and Guest Medical Protection, the policy provides:

> I. We do not cover bodily injury or property damage resulting from:
>
> (a) An act or omission intended or expected to cause bodily injury or property damage. This exclusion applies even if the bodily injury or property damage is of a different kind or degree, or is sustained by a different person or property than that intended or expected.
>
> 2. We do not cover bodily injury or property damage resulting from:
>
> (a) a criminal act or omission; this exclusion applies regardless of whether the insured person is actually charged with or convicted of a crime.

It is settled in this jurisdiction that in order to find that an intended or expected acts exclusion applies, it must be established that the insured intended the act and

also intended or expected an injury would occur. *Tennessee Farmers Mut. Ins. Co. vs. Evans*, 814 S.W.2d 49 (Tenn. 1991). As observed in *Evans*, these are discrete inquiries because many intentional acts produce unexpected results and comprehensive liability insurance often would be valueless if protection were precluded merely because the requisite harmful intent was unnecessary to be proved.

It is conceded that Garth did not intend to shoot Dobbins; neither did she expect that someone would jostle her and dislodge her purse or that the pistol would discharge when it struck the floor. Since the insured Garth did not intend the act and did not intend or expect an injury would occur, it is clear to us that *Evans* controls insofar as the first exclusion is concerned.

It is the second exclusion which gives us concern. That Garth committed a criminal act in carrying a concealed pistol was conceded during argument, and we need not discuss the criminality feature. Do the acts of the defendant fit within the parameters of the policy provision excluding coverage for bodily injury "resulting from a criminal act or omission?" *Evans* does not address this issue. *Allstate Ins. Co. v. Brooks*, 810 S.W.2d 937 (Tenn. App. 1990) offers some guidance; the insured believed he was shooting an animal that was rooting around garbage containers when he shot a garbage collector. His policy excluded coverage for "bodily injury . . . which may reasonably be expected to result from intentional or criminal acts of an insured person or which are in fact intended by an insured person." Holding that the insured was not protected from the consequences of his own wilful and deliberate wrong, even though the injury sustained by the collector was accidental, the judgment was reversed and the case dismissed.

The appellee argues that the death of Dobbins did not result from a criminal act because (1) there was no requisite criminal intent and (2) the shooting was caused by the intervening act of a third party. The appellant argues that the concealment of the pistol on her person by the insured, admittedly a criminal act,

was the proximate and underlying cause of Dobbins' death. We think the language "resulting from" should be given its ordinary meaning, that is, that the discharge of the pistol was the consequence or effect of its being dropped on the floor when the insured was jostled by a third party.

In *North Carolina Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992), the insured intentionally pushed an elderly woman causing her to fall. The homeowners' policy excluded coverage for injuries intended or expected. It was held that the insured's act did not rise to the level of demonstrating an intent to harm which would have obviated coverage.

Ms. Garth admittedly intended no harm to Dobbins, unless it can be said that, in carrying the pistol, she was deemed to have assumed all possible risks inherent in doing so. As in *Stox*, which involved an assault, we do not think it may logically be said that Ms. Garth's possession of the pistol rose to the level of demonstrating her intent to harm. The death of Dobbins did not result from any positive act of the insured, but from the intervening act of a third party. As stated in *Evans*, the purpose of such exclusionary language is to prohibit the use of insurance to provide indemnity for civil tort liability that results from an insured's intentional wrongdoing. It is true, as appellant argues, that "but for" the possession of the pistol, the jostler would not have dislodged it and "but for" its dislodgement, it would not have struck the floor and discharged, but the policy provision is not couched in language which enables us to construe it so favorably to the issuer. The intervening act was not attributable to the insured, and it was the efficacious and underlying cause of the incident. Doubtless the insured facilitated the act by possessing the pistol in the first place, but this merely begs the question. We cannot add language to the policy provision.

We pretermit a discussion of the issue of notice in view of the remarks made at argument.

The judgment is affirmed, at the cost of appellant.

William H. Inman, Senior Judge

Concur:

Alan E. Highers, Judge

David R, Farmer, Judge