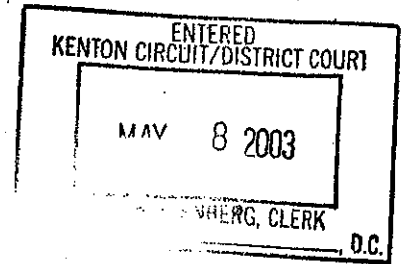


COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
THIRD DIVISION
CASE NO.: 98-CI-01511



KENTUCKY ASSOCIATION OF COUNTIES
ALL LINES FUND TRUST

PLAINTIFF

Vs.

KENTON COUNTY, KENTUCKY, et al

DEFENDANT

PARTIAL SUMMARY JUDGMENT

This matter is before the Court on the Motion for Partial Summary Judgment filed by the Plaintiff, Kentucky Association of Counties All Lines Fund Trust (KALF) seeking adjudication from the Court that KALF does not have an obligation to indemnify the County for claims asserted against it in the "Corporex"¹ litigation and for the recovery of unpaid premium assessments. The Plaintiff moves this Court to grant partial summary judgment with regard to the indemnification issue. KALF maintains that the policy of insurance issued to Kenton County excluded coverage for the intentional torts that were the focus of the Corporex case and that Kenton County failed to provide timely notice of the claim and subsequent settlement.

Kenton County opposes the summary judgment motion declaring that questions of fact exist concerning interpretation of the insurance policy and characterization of the tortious conduct exclusion. The County claims that a genuine issue of material fact exists as to whether it engaged in any intentional conduct or violation of statute or ordinance that would exclude it from receiving coverage under the policy. Kenton County also denies providing untimely notice to KALF.

¹ Wessels, et al v. Kenton County, et al, Kenton Civil Court Action No. 96-CI-02041.

FACTS

The Plaintiff, KALF, is a liability self-insured group providing insurance for political subdivisions of the Commonwealth of Kentucky. On August 3, 1998, KALF filed a Complaint for declaratory judgment asking this Court to declare that KALF has no obligation to indemnify the Defendants, Kenton County, for damages paid out in settlement of claims filed by Wessels Construction in the "Corporex" litigation (Kenton Circuit Court, Case No. 96-CI-02041). The underlying Corporex litigation arose out of a dispute concerning the procurement of contracts to build the Kenton County Justice Center. Wessels Construction, Carroll Properties, Inc., and Corporex Realty Investment Corporation all submitted invited bids for the project. In July of 1996, Kenton County awarded Corporex Realty Investment Corporation the contracts for the Justice Center project.

On October 30, 1996, Wessels Construction filed a Petition for Declaration of Rights against Kenton County alleging that the County had violated statutes, regulations, and ordinances in the contract procurement and award of the Justice Center project. Wessels sought an injunction to stop the contract with Corporex from proceeding, to require that the competitive bidding process be opened again, and to recover sums expended to prepare their proposal and pay their attorneys. During discovery in December of 1997, Wessels learned that former Kenton County Judge-Executive Middleton had engaged in misconduct by sharing the bids of Wessels and Carroll with Corporex, thereby enabling Corporex to amend its bid in order to be the low-bidder. Consequently, Wessels amended their petition to include claims of damages for lost profits, civil conspiracy, and collusion as a result of the misconduct of Judge Middleton.

Upon receipt of the Amended Complaint and a Motion to Intervene filed by Carroll, Kenton County notified KALF of the claims against it by a memo dated January 30, 1998. Kenton County asserts that it did not do so prior to the amendment of the Complaint because the original claims sounded in contract, not tort, and were therefore, precluded from coverage by KALF. On February 11, 1998, two weeks after notifying KALF of the amended suit, Kenton County settled the litigation with Wessels and Carroll for a net sum of \$400,000. KALF was not notified of the settlement negotiations until after the agreement was reached.

KALF argues in support of its motion that under Section V(A)2 of its insurance policy, entitled "Coverage Exclusions", insurance coverage does not apply. Section V(A) states:

"A. Coverage under this Agreement does not apply:

(1) to a claim arising out of the willful or intentional violation of a statute, ordinance or constitutional provision;

(2) to a claim resulting from an intentional tort or an act intended to cause injury or damages."

The basis of KALF's motion is that its policy excludes from coverage claims for damages resulting from violations of a statute or an ordinance, and any claims resulting from an intentional tort or act. Consequently, KALF argues that where the conduct that formed the basis of the Corporex litigation was Judge Middleton's tortious conduct, for which he has pled guilty to official misconduct and has also admitted violating various statutes and ordinances, then the insurance exclusions apply.

Alternatively, Kenton County asserts that *it* has not engaged in any tortious misconduct nor has *it* violated any statute or ordinance. Kenton County acknowledges

that Judge Middleton would be exempt from coverage, but argues that since Kenton County did not engage in tortious conduct nor did it violate any statutes or ordinances, coverage should be provided. KALF counters this argument by citing to the "Definitions" section of the Agreement, defining intentional tort as "...any action or inaction by the member *or its employees...*" (emphasis added) and by the terms of the Corporex settlement agreement where Kenton County acknowledged that "...all requirements of the Kenton County Procurement Code were not strictly followed...".

KALF further argues that Kenton County prejudiced them by failing to give timely notice of the claim and, in fact, settled the matter two weeks after notifying KALF but without their participation in or approval of the settlement. Kenton County contends, conversely, that KALF was not notified of the underlying Corporex litigation because the original contract claims sounded in contract but were only later amended to include tort claims stemming from Judge Middletown's admissions during discovery.

I.

Kenton County relies on James Brown Foundation v. St. Paul Fire & Marine Insurance, Ky., 814 S.W.2d 273 (1991), for the proposition that summary judgment is improper where there are questions of fact regarding the interpretation of exclusionary language for intentional acts. In the Brown Foundation case, the Kentucky Supreme Court held that summary judgment was inappropriate where questions existed regarding whether the insured intended the consequences of their actions. The insured in Brown Foundation sought coverage and a defense from their insurance carriers for environmental cleanup actions brought pursuant to the strict liability provisions of CERCLA.

The lower court granted summary judgment to the insurance companies finding that there was no coverage because of the terms of the policy. The lower court and the Court of Appeals deemed that, under the policy, coverage is not provided for "occurrences", defined as "accidents..., which result in... damage[s]... that are expected or intended." The Kentucky Supreme Court reversed holding that a determination of the insured's intent is a question of fact and therefore summary judgment was inappropriate.

Kenton County proposes that under Brown "an insured must actually and subjectively intend the act as well as the resulting injury in order for the liability coverage to be excluded on the basis of the insured's intentional conduct." Since KALF has not established that Kenton County "actually and subjectively intended" the harms to Wessels and Carroll, Kenton County concludes that summary judgment is inappropriate.

This reliance is misplaced for several reasons. First, the Kentucky Supreme Court's decision rests on the exclusionary language at issue in the Brown case. That language is different from the language in the policy issued to Kenton County. The Kenton County policy excludes coverage:

- (1) to a claim arising out of the willful or intentional violation of a statute, ordinance or constitutional provision;
- (2) to a claim resulting from an intentional tort or an act intended to cause injury or damages." (Emphasis added)

Whereas the Brown decision hinged on the exclusion of "damage[s]...that are expected or intended", the case *sub judice* deals with a claim arising from a willful or intentional violation of a statute or ordinance or for a claim arising from an intentional tort such as tortious interference, conspiracy, or collusion.

Second, the claim in the case at bar arises out of a willful or intentional violation of a statute or ordinance as evidenced by the court hearing and guilty plea of former Judge Executive Middleton. The issue of intent that was in dispute in Brown is not dispositive here. Under these facts, the intent of Judge Middleton is not disputed by Kenton County and has, in fact, already been established in the criminal case against Judge Middleton. Therefore, this case is distinguishable from Brown.

Third, the issue for the court in Brown centered on whether the insured "expected or intended all the damage for which" the original claim was brought. Board members of the insured denied that they intended or expected harm to occur. After examining the record, the court found that intent to cause the damages that actually occurred, was a disputed issue of fact and that the record did not compel only "one reasonable inference." Additionally, the Brown court stated that where the controlling facts are not in dispute, then summary judgment can be proper.

Conversely, under the exclusionary provisions at bar, an act intended to cause the harm is only one of the areas in which coverage is excluded. Section V(A)(2) of the policy provides that coverage does not apply "to a claim resulting from an intentional tort or an act intended to cause injury or damages" (emphasis added). Therefore, the crucial disputed factor used by the court in Brown is not controlling under these facts. Furthermore, unlike the case in Brown, the record here reflects only one reasonable inference: that Judge Middleton intended to provide copies of the competitors' bids to allow Corporex to be the low bidder. Nothing in the record suggests inadvertence or negligence on Judge Middleton's part. To the contrary, his testimony and plea during his

criminal proceedings showed a deliberate intent to reveal the bids and to knowingly engage in illegal conduct.

In summation, where the facts are undisputed that former Judge Executive Middleton committed acts leading to claims arising from his "willful or intentional violation of a statute, ordinance or constitutional provision" or to claims arising from his intentional torts, the exclusion applies. Where a contract for insurance has an unequivocal, conspicuous and clear manifestation to exclude coverage, then the exclusion will be upheld. American National Bank and Trust v. Hartford Accident & Indemnity, 442 F.2d 995 (6th Cir., 1971); See, also, Masler v. State Farm, Ky., 894 S.W.2d 693 (1995).

II.

Kenton County next argues that, although the exclusionary provisions may apply to former Judge Executive Middleton, Kenton County did not commit a "willful or intentional violation of a statute, ordinance or constitutional provision...or an intentional tort or an act intended to cause injury or damages." Thus, the County argues that coverage should be provided, or in the alternative, that this presents an issue for the jury. To support the aforementioned propositions, Kenton County relies again on the Brown decision, and also on American Hardware Mutual Insurance Company v. Mitchell, 870 S.W.2d 783 (Ky. 1993).

First, Kenton County asserts that Brown is applicable because the court there decided that one who is vicariously liable by statute does not possess the requisite intention to cause harm, and therefore, the exclusionary provisions of the insurance contract which defined non-covered occurrences as those "accidents...which result in...

damage[s]... that are expected or intended” do not apply. This argument is without merit as the above arguments show. In the case at bar, there is no statutory vicarious liability being imposed and the two exclusionary provisions differ between the cases.

Second, American Hardware is also inapplicable to the facts at bar. In American Hardware, a husband was charged, but later acquitted of, deliberately setting fire to the house he owned with his wife. The insurance company denied the wife’s claim for insurance because the husband’s conduct was deemed intentional and, therefore, fell under the exclusionary provisions for intentional acts. The Court held that the innocent wife should receive coverage where she had not engaged in any intentional conduct. Kenton County asserts that, under this principle, the county should receive coverage due to its “innocence”.

However, Kenton County’s argument ignores the nature of the relationship between the County and Judge Middleton. In American Hardware, the wife and the husband were both insureds under the contract and each had coverage independent of the other. The facts of this case are quite different. As the employer and principal of Judge Middleton, Kenton County clothed Middleton with actual authority to act as agent of the County. Since the County can only act through its agents, the obligations of the County, and its right to coverage under the Plaintiff’s policy depend upon the conduct of Judge Middleton.

Arguably, for the principal to be liable, the agent must have been acting within the scope of his authority. Kenton County insists that Judge Middleton’s actions in showing the other’s bids to Corporex were done in excess of his authority. However, under these facts, Judge Middleton’s acts with regard to the bidding process were of a

kind that he was authorized to perform and were done in furtherance of the principal's interests: to obtain a lower bid. Here, Judge Middleton was soliciting bids and dealing with the bidders as per his authority when he engaged in the action leading to Corporex's claim. Therefore, Judge Middleton was acting within the scope of his authority and his principal, Kenton County, can be held liable for his actions.

Lastly, Kenton County's argument here fails to acknowledge that the Coverage Agreement includes Kenton County and its employees under the Definitions section on intentional torts:

“...a tort...committed with the knowledge that committing the action was wrong or expected to produce a wrongful act...Intentional tort means additionally any action...by a member or its employees, in violation of any ordinance, statute, or constitutional provision.”

Whereas, Judge Middleton stated at his plea hearing that at the time he showed the bids to Corporex he knew it was wrong, the Coverage Agreement specifically excludes coverage for Kenton County for Judge Middleton's torts.

In conclusion, where the contract language specifically and unequivocally excludes coverage for the claims at issue, and there exists no genuine factual dispute regarding the exclusions, summary judgment is appropriate.

III.

KALF claims that the notice provided by Kenton County in January of 1998 for claims originally filed in late 1996 prejudiced them. Kenton County disputes this assertion by stating that the original Complaint sounded in contract and therefore no notice was given until the Complaint was amended to include an action for damages sounding in tort. The facts however, prove otherwise. The original Complaint asked for

an injunction and attorney's fees, but also for costs expended in the preparation of the bids. By virtue of the Coverage Agreement, Kenton County had a duty to inform KALF of the Complaint whether or not coverage ultimately was provided. In accordance with Section VI(D) of the Coverage Agreement, a member (Kenton County) is required to give written notice to KALF as soon as practicable after claim or suit is brought. Moreover, a member shall "as soon as is practicable after the claim or suit is brought, give written notice thereof to KALF." Moreover, paragraph 3 states that the member shall: "Neither admit any liability, make any payment, assume any obligation, nor incur any expense related to such claim or suit, except with written consent of KALF." Finally, in section VI(E), the Agreement recites that full compliance with all provisions of the agreement is a condition precedent to an action against KALF.

Kenton County claims the standard for notice, as provided in Jones v. Bituminous Casualty Co., Ky., 821 S.W.2d 798 (1991), is that late notice will not defeat coverage unless it substantially prejudiced the insurer. However, this is a misstatement of Jones. The court there held that the insurer need only prove that it was *reasonably probable* that the insurer was substantially prejudiced by the delay. Id. at 803. - The Kentucky Supreme Court adds that summary judgment on this issue is proper if it is conclusive from the facts that prejudice was reasonably probable. Id.

Under these facts, Kenton County had an obligation under the Agreement terms to notify KALF of the original claim. They did not do so. Furthermore, Kenton County had knowledge in early December of the tortious nature of Judge Middleton's conduct but still did not notify KALF until late January 1998 when Corporex amended the Complaint to include the additional claims. Additionally, Kenton County settled the matter 14 days

later by admitting liability and agreeing to a settlement without notifying, involving, or obtaining consent from KALF and in direct contravention of the Agreement. In light of the late notice and the subsequent settlement of the claim by the County shortly thereafter, this Court finds that the Plaintiff was substantially prejudiced by the delay in giving notice as required by the policy.


CONCLUSION

Summary judgment in favor of KALF is warranted where the conduct giving rise to the underlying litigation falls within the express and unequivocal exclusionary language of the Coverage Agreement. Therefore, KALF is under no duty to indemnify Kenton County for the settlement reached in the Corporex litigation. Alternatively, even if the above were not true, coverage would be precluded due to the lack of timely notice and involvement of KALF in the settlement proceedings.

Accordingly, finding that there is no genuine issue as to any material fact and that the Plaintiff is entitled to Summary Judgment as a matter of law;

IT IS HEREBY ORDERED that the Plaintiff's Motion for Partial Summary Judgment is **SUSTAINED**.

Dated this 7th day of May, 2003.



JUDGE GREGORY M. BARTLETT
KENTON CIRCUIT COURT
THIRD DIVISION

Copies to:
Robert E. Maclin, III
Mark G. Arnzen
Garry L. Edmondson

CERTIFICATION

02-CR-02494

I, MARY ANN WOLTENBERG, CLERK OF THE KENTON CIRCUIT COURT,
DO HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE PARTIAL
SUMMARY JUDGMENT HAS BEEN MAILED THIS 8TH^D DAY OF MAY, 2003 TO
HON. ROBERT E. MACLIN, III 201 W. SHORT ST. LEXINGTON, KY 40507, HON.
GARRY EDMONDSON 28 W. FIFTH ST. COVINGTON, KY 41011 AND TO HON.
MARK ARZEN 600 GREENUP ST. P.O. BOX 472 COVINGTON, KY 41012-0472.

THIS 8TH DAY OF MAY 2003.

MARY ANN WOLTENBERG, CLERK

BY: Betty Hensley