[Cite as *Reed v. Davis*, 2013-Ohio-3742.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alex Reed,	:	
Plaintiff-Appellant,	:	No. 13AP-15
v.	:	(C.P.C. No. 12CV 007455)
Kyle Davis et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 29, 2013

The Law Firm of Frank E. Todaro Co., L.P.A., and *Frank E. Todaro*, for appellant.

Joyce V. Kimbler, for appellee Nationwide Property and Casualty Insurance Company.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Alex Reed ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, wherein the trial court entered summary judgment in favor of defendant-appellee Nationwide Property & Casualty Insurance Co. ("Nationwide"). The court found that Nationwide was not contractually obligated to defend and indemnify its insured, defendant-appellee Kyle E. Davis ("Davis"), for any damages that might be awarded in a tort action filed against Davis by appellant. In our de novo review of the record, however, we find that the parties' arguments concern the interpretation of policy language that appears nowhere in the record before us. In view of this circumstance, we reverse the summary judgment entered in Nationwide's favor and remand the case for further proceedings.

{¶ 2} The facts in this case are straightforward and undisputed. Appellant and Davis were college roommates who shared a house with several other individuals. At approximately 1:00 a.m. on March 30, 2012, the two men were together with other acquaintances in a bar and began arguing. In deposition testimony, Davis described their conversation as being about "stupid things and just stupid stuff that guys argue about * * * something about who lifts more and [whose] girlfriend is better looking; * * * [i]t was just me being drunk, horseplay." (Davis depo., 10.) The exchange continued, however, and appellant began pinching or grabbing Davis in the stomach while commenting about Davis's physique. Davis acknowledged that he then hit appellant; they exchanged a few more words; Davis left the bar with his girlfriend; and they went home in a cab. Davis further testified that he "had no idea how hard [he] hit [appellant]" at the time and did not know whether appellant had suffered any injury. (Davis depo., 11.) Davis acknowledged being intoxicated and stated that he threw only one punch. He did not recall whether appellant had fallen to the floor but did remember him "kind of bending over and covering his face." (Davis depo., 18.) Davis also acknowledged that he had overreacted in striking appellant. He testified that he had no intention of harming appellant to the point that appellant would need medical care.

{¶ 3} Appellant filed suit against Davis in the Franklin County Court of Common Pleas and asserted that Davis had struck him one time in the face causing serious injuries and past and future medical expenses. On June 29, 2012, Davis filed an answer to the complaint.

{¶ 4} On August 3, 2012, Nationwide moved the court for leave to intervene in the action and proffered an intervening complaint. Nationwide asserted in the complaint that it had issued a liability policy to Davis and had a substantial interest in the litigation. Nationwide sought, inter alia, a declaration concerning the respective rights, responsibilities, and obligations of all the parties to the proceeding.

{¶ 5} Nationwide attached to the proferred complaint as Exhibit A numerous pages of a tenant's insurance policy, which it claimed to have issued to Davis. The policy pages were submitted under cover of a one-page "certification" signed by an individual who identified herself as a "duly authorized Nationwide Insurance staff member entrusted with oversight of the system of record from which this copy was produced." The

certification, although purportedly made upon information and belief rather than personal knowledge and "under the penalty of perjury," was signed and dated but was not notarized or acknowledged by any other individual. The certification further stated that the "attached copy of policy number 92 34 HP 887096 was made at or near the time of certification, as part of regularly conducted business activities, and is a true and accurate copy of the official record kept as part of regular business activities." (Aug. 3, 2012 Intervening Complaint, Exhibit A.)

{¶ 6} Appellant supported Nationwide's intervention, and the trial court granted its motion to intervene. Nationwide thereafter filed a motion for summary judgment. It attached to its motion relevant excerpts from the transcript of Davis's deposition and several printouts of appellate decisions. It did not, however, attach an affidavit or any other evidence to prove its allegation that it had issued a tenant's liability policy to Davis, or the content of any such policy. In fact, Nationwide attached no affidavits to its motion for summary judgment

{¶ 7} The trial court, with very little discussion and no reference to the exact language considered, granted Nationwide summary judgment, finding that Nationwide had no obligation to provide Davis liability coverage. The trial court included in an amended entry of summary judgment its conclusion that there was no just reason for delay. Neither Nationwide nor appellant disputes that the entry of summary judgment in favor of Nationwide was a final and appealable judgment. *See* Civ.R. 54(B).

{¶ 8} Appellant has timely appealed and has presented three assignments of error, as follows:

> I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT BY APPLYING THE INFERRED INTENT DOCTRINE IN THE INSTANT CASE WHEN APPELLANT'S ACT DOES NOT NECESSARILY RESULT IN HARM.
>
> II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT BY FINDING THAT THE EXCLUSIONARY LANGUAGE CONTAINED WITHIN APPELLEE'S POLICY ENTITLES APPELLEE TO

> JUDGMENT AS A MATTER OF LAW ON THE INTENT OF ITS INSURED TO CAUSE HARM AND THE RESULTING INJURY THAT FOLLOWED AS A MATTER OF LAW
>
> III. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT IN FINDING THAT DEFENDANT KYLE DAVIS'S CONDUCT WAS INTENTIONAL AND/OR WILLFUL IN LIGHT OF HIS ADMITTED DEGREE OF CONSUMPTION OF ALCOHOL AND RESULTING IMPAIRED JUDGMENT.

Consideration of Exhibit A pursuant to Civ.R. 56

{¶ 9} We begin our analysis by acknowledging the applicable standard of review. " '[A]ppellate review of summary-judgment motions is de novo.' " *Geczi v. Lifetime Fitness*, 10th Dist. No. 11AP-950, 2012-Ohio-2948, ¶ 8, quoting *Capella III* at ¶ 16, citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." (Internal citations omitted.) *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9. "We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard." *Heider v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-115, 2012-Ohio-3771, ¶ 9. Summary judgment is appropriate when, looking at the evidence as a whole: (1) there is no genuine issue as to any material fact, and (2) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Moreover, the party seeking summary judgment, in this case Nationwide, initially bears the burden of informing the trial court of the basis for the motion and identifying portions *of the record* demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996).

{¶ 10} We also acknowledge that the Supreme Court of Ohio has specifically observed, in a case requiring judicial interpretation of several intentional-act exclusions, that "[a]lthough the central question is whether intent to harm should be inferred as a matter of law under the circumstances of this case, *insurance coverage is finally determined by the policy language*." (Emphasis added.) *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, ¶ 10. Moreover, in *Campbell*, the court observed

that exclusionary language in one policy in the case before it differed significantly from exclusionary language in three other policies at issue in the case, producing a different disposition of the issue whether the intentional-act exclusion applied. *Id.* at ¶ 60-61. Accordingly, a court may not determine whether insurance coverage exists under a policy, or whether an intentional-act exception applies, without examining the text of that policy. *See also Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36 ("Coverage is provided if the conduct falls within the *scope of coverage defined in the policy*, and not within an exception thereto." (Emphasis added.))

{¶ 11} In this case, as discussed above, the only insurance policy text provided to the court was that found in Exhibit A to Nationwide's intervening complaint. Exhibit A is a multi-page document. The first page of Exhibit A is the unsworn certification by a Nationwide employee discussed above which asserted that the "attached copy of policy number 92 34 HP 887096" was a true and accurate copy of Davis's policy and had been kept as part of Nationwide's regular business activities. (Intervening Complaint, Exhibit A.) Following the certification page is a three-page declarations statement identifying Davis as the insured under policy No. 92 34 HP 887096 and declaring the coverage limits and the premium under the policy. The third page of the declarations statement, captioned "Forms and Endorsements Made Part of Policy," indicates that, on September 7, 2011, several forms and endorsements were made part of the policy, including an "amendatory endorsement" labeled "Fire 3939-A." The next relevant part of Exhibit A[1] consists of some, but not all, of the pages of a Nationwide tenant's policy, i.e., pages 1, 2, 3, 10, 11; and an additional single page that is numbered at the bottom left as "Page 4 of 7" and labeled at the bottom right as "Fire 3939-A."

{¶ 12} Appellant did not object to the trial court's consideration of Exhibit A, nor has he raised an issue in this court as to our consideration of it on de novo review of the issue. We observe, however, that Civ.R. 56(C) specifies the materials that a trial court may consider in ruling on a summary judgment motion:

> Summary judgment shall be rendered forthwith if the *pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written*

[1] Exhibit A includes two pages relative to a change of the insurer under the policy from Nationwide Mutual Fire Insurance Company to the Nationwide Property and Casualty Insurance Company. These pages do not appear to impact the issues raised in this appeal.

> *stipulations of fact, if any, timely filed in the action,* show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

(Emphasis added.)

{¶ 13} Exhibit A was not an affidavit supporting the attached insurance policy excerpts because the certification that accompanied the excerpts does not contain a statement that the certification was sworn before a person authorized by law to administer oaths. See *Clodgo v. Kroger Pharmacy*, 10th Dist. No. 98AP-569 (Mar. 18, 1999), citing, e.g., *Tokles & Son, Inc. v. Midwestern Indemn.*, 65 Ohio St.3d 621, 630 (1992), fn. 3. Moreover, " '[a]ffidavits to be used as evidence must consist of statements positively made, and not merely of statements made upon information and belief' "; *State ex rel. Anderson v. Obetz*, 10th Dist. No. 06AP-1030, 2008-Ohio-4064, ¶ 18, quoting *Ins. Co. of N. Am. v. Mall Builders, Inc.*, 2d Dist. No. 7756 (Oct. 28, 1982). An unsworn certification made upon information and belief, such as that present in Exhibit A, does not appear in the Civ.R. 56(C) list of acceptable materials, and Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

{¶ 14} Nevertheless, this court has recognized that "failure to move to strike or otherwise object to documentary evidence submitted in opposition to a motion for summary judgment may waive any error in considering the evidence under Civ.R. 56(C)." *Clodgo*, *citing Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78 (8th Dist.1987). *Accord Hillman v. Edwards*, 10th Dist. No. 10AP-950, 2011-Ohio-2677, ¶ 21 ("a court may consider evidence other than the types enumerated in Civ.R. 56 where the opposing party does not object to the submitted evidence on that basis," citing *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶ 17). Similarly, the Supreme Court of Ohio has recognized that a court, in determining a motion for summary judgment, "may consider evidence other than that listed in Civ.R. 56 when there is no objection, *[but] it need not do so.*" (Emphasis added.) *State ex rel. Spencer v. East Liverpool Planning Comm.*, 80 Ohio St.3d 297, 301 (1997). *Accord Dunigan v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 03CA008283, 2003-Ohio-6454, ¶ 15-16 (finding, in an insurance coverage case, that the trial court *had discretion* to

consider on summary judgment review an insurance policy supported by a *notarized* certification of an employee of the issuer).

{¶ 15} In summary, we are therefore required to conduct a de novo review to determine whether Nationwide is entitled to summary judgment in its favor on the issue of coverage. In conducting that review, we may, but are not required to, consider Exhibit A because it is a document of a type not identified in Civ.R. 56(C). In determining the appropriate exercise of that discretion, we first examine Exhibit A in the context of the parties' arguments as presented in their briefs.

Policy Language Inconsistencies

{¶ 16} In the memorandum that Nationwide submitted in support of its motion for summary judgment, Nationwide quoted the following text and characterized it as being the *original* intentional-act exclusion in the policy it issued to Davis:

> Section II – EXCLUSIONS: 1. Coverage E – Personal Liability, and Coverage F – Medical Payments to Others do not apply to bodily injury or property damage: a. *which is expected or intended by the insured.*

(Emphasis added.) (Motion for Summary Judgment, 3.)

{¶ 17} Nationwide asserts, and appellant has not contested, that this intentional-act exclusion was subsequently reformulated by virtue of the following policy amendment:

> In all policies, under Section II – Exclusions for Personal Liability and Medical payments to Others, paragraph 1.a. is deleted and replaced by the following: 1.a. *caused intentionally by* or at the direction of an insured, *including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct.*

(Emphasis added.) (Appellee Nationwide's brief, 4.)

{¶ 18} We have repeatedly reviewed the original record as submitted to this court and conclude that the only amendment to Davis's tenant's policy included in the record is found on the final page of Exhibit A, i.e., the "Fire 3939-A" page. However, the text of the intentional-act exclusion stated in the Fire 3939-A amendment differs from the intentional-act exclusion argued by the parties in this case. The Fire 3939-A amendment provides:

> In all policies, *the Section I–Exclusion* pertaining to intentional acts, is deleted and replaced by the following:
>
> Intentional or criminal acts, meaning loss resulting from *an act* committed by or at the direction of an *insured that may reasonably be expected to result from such acts, or is the intended result from such acts.* Such an act excludes coverage for all insureds.

(Emphasis added.)

{¶ 19} It is apparent that implementation of this Fire 3939-A amendment results in an intentional-act exclusion that is different from the exclusion argued by the parties in both the trial court and this court. The policy language argued to the courts (the "argued exclusion") provided for exclusion of coverage for acts "the result of which the insured knows or ought to know will follow from the insured's conduct." The intentional-act exclusion found in the record (the Fire 3939-A exclusion) operates to exclude coverage for loss resulting from an insured's act "that may reasonably be expected to result from such acts or is the intended result from such acts," and does not include the "knew or ought to have known" language which is the focus of the parties' arguments.

{¶ 20} Moreover, the text of the Fire 3939-A endorsement operates so that the *"Section I-Exclusion* pertaining to intentional acts, is deleted and replaced by" the new language stated in the Fire 3939-A endorsement. (Emphasis added.) (Intervening Complaint, Exhibit A.) But, in the tenant's policy contained in the record as Exhibit A, the intentional-act exclusion is in *Section II*, rather than Section *I*. Arguably on the basis of the record before us, the original exclusion in Davis's tenant's policy was, therefore, never deleted and replaced; i.e., Nationwide never actually amended the original intentional-act exclusion.

{¶ 21} We find that the ambiguity present in the record as to the text of the applicable intentional-act exclusion in effect at the time of Davis's alleged tortious conduct weighs against our considering Exhibit A, an unsworn document, in determining whether the trial court justifiably entered summary judgment. Without considering Exhibit A, the record is devoid of evidence of the applicable policy language.

{¶ 22} We will not speculate as to whether the original intentional-act exclusion, the Exhibit A version, or the version argued by the parties was in effect on the date of

Davis's alleged tortious conduct, and we further decline to interpret any of these three intentional-act exclusions. We refuse to resolve the question of Nationwide's contractual obligation to defend and indemnify Davis in the absence of competent and reliable evidence of the terms of the policy at the time of the alleged tortious conduct. For us to do otherwise would be equivalent to our issuing an advisory opinion as to the correct legal interpretation of a contractual provision that may or may not be relevant to the case at bar.

{¶ 23} We find that a genuine issue of material fact exists as to the text of the intentional-act exclusion in effect on the date of the alleged tortious conduct. We therefore sustain appellant's three assignments of error to the extent they assert that the trial court improperly granted summary judgment to Nationwide. Accordingly, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

BROWN and O'GRADY, JJ., concur.
