COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

SHIRLEY A. MAFFETT, ADMINISTRATOR
OF THE ESTATE OF RICHARD W. MAFFETT, SR.

PLAINTIFF-APPELLANT **CASE NO. 3-99-11**

v.

MOYER'S AUTO WRECKING, INC., ET AL. **O P I N I O N**

DEFENDANTS-APPELLEES

SHIRLEY A. MAFFETT, ADMINISTRATOR
OF THE ESTATE OF RICHARD W. MAFFETT, SR.

PLAINTIFF-APPELLANT **CASE NO. 3-99-12**

v.

MOYER'S AUTO WRECKING, INC., ET AL. **O P I N I O N**

DEFENDANTS-APPELLEES

CHARACTER OF PROCEEDINGS: Civil appeals from Common Pleas Court

JUDGMENTS: Judgments reversed and causes remanded

DATE OF JUDGMENT ENTRIES: June 7, 2000

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BRYANT, J. This appeal is taken by Plaintiff / Appellant, Shirley A. Maffett, administratrix of the estate of Richard Maffett, Sr., from the judgment of the Court of Common Pleas of Crawford County denying her motion for partial summary judgment and granting summary judgment on all counts in favor of Defendant / Appellee, The Travelers Indemnity Co. (hereinafter "Travelers").

On March 11, 1994, Richard Maffett, Sr., an employee at Moyer's Auto Wrecking, Inc. (hereinafter "Moyer's") at the time, was injured when a cable

attached to a wrecker-boom system snapped, causing a suspended vehicle to fall and trap him underneath. Maffett died later that night as a result of the injuries he sustained to his head, chest and pelvis. As administratrix of Maffett's estate, Appellant then filed a complaint for wrongful death and survivorship on June 7, 1994, against Moyer's, and its operators, Terry and Donald Moyer. Appellant claimed that because the Defendants had ignored the obvious risk that the cable was unsafe, Maffett's death was a "substantial certainty". In the meantime, while the original wrongful death matter was pending, Appellant filed a complaint for declaratory judgment on October 2, 1997, requesting the court to determine the rights and obligations of the existing defendants, as well as Travelers, Moyer's insurance company, under a commercial general liability insurance policy.

The record demonstrates that the parties prepared for these cases to go to trial. However, on January 26, 1998, the parties involved in the wrongful death action reached a settlement whereby Moyer's and its alleged operators would be jointly and severally liable for $350,000 in compensatory damages. Although the court adopted the settlement agreement and entered judgment accordingly, Travelers failed to satisfy the judgment within 30 days, claiming that the language of the insurance policy unambiguously excluded the incident from coverage. Thus, on February 26, 1998, Appellant, now aligned in interest with Moyer's and Terry and Donald Moyer, filed a supplemental complaint to the original wrongful

death action against Travelers, seeking to have the $350,000 judgment enforced. At this point, the declaratory judgment action was still pending. We note that the trial court eventually consolidated these two cases upon Appellant's request. Likewise, the cases have been joined for the purposes of this appeal.

Thereafter, on October 23, 1998, Travelers filed a motion for summary judgment, primarily arguing that it was entitled to judgment as a matter of law due to the language contained in the policy exclusion provisions. Appellant responded by opposing the motion and filing her own motion for partial summary judgment on the issue of the policy exclusions. Appellant maintained that the language of the policy, coupled with the relevant case law interpreting similar insurance provisions, did not bar coverage for the death of Richard Maffett, Sr..

Without citation to authority, the trial court declared the rights of the parties in a memorandum issued on December 7, 1998. The court stated:

> **"As respects the claims of Plaintiff, this ruling is a final appealable order for which Plaintiff has exceptions. No entry is necessary as this memorandum is sufficient"**

The memorandum overruled Appellant's motion for partial summary judgment while, at the same time, granting Travelers' motion based upon the finding that the clear language of the policy excluded coverage. The memorandum stated in pertinent part:

> **It is quite clear that the policy of insurance issued by Travelers provides exclusions for claims expected or intended from the**

> **standpoint of its insured; that the claim arose out of and in the course of employment of the Plaintiff's decedent; and that the claim arose out of employment related practices, policies, acts or omissions. The Ohio Workers Compensation laws apply.**

On appeal from that order Appellant makes the following four assignments of error:

1. **The trial court erred in granting Appellee Travelers' motion for summary judgment and in overruling Appellant Adm. Maffett's motion for partial summary judgment on liability policy exclusion grounds.**

2. **The trial court erred in entering summary judgment in favor of Appellee Travelers on Appellant Adm.'s alternative claims for recovery based upon legal theories of waiver, estoppel, breach of contract, promissory estoppel, deceit and negligence and upon her independent bad faith claim assigned from Travelers' insureds.**

3. **The trial court erred and abused its discretion in considering portions of the Snyder Affidavit over Appellant Adm.'s objections.**

4. **The trial court erred and abused its discretion in systematically ignoring rule days and other deadlines (established by Civ.R. 7 and 56(B) and by the Pretrial Order entered per Civ.R. 16) incident to entering a series of rulings adverse to Appellant Adm.**

Appellant's initial assertion is that the trial court erred when it granted summary judgment in favor of Travelers based upon the conclusion that liability had been successfully excluded from the policy issued by Travelers to the Moyers. However, the Appellant actually asserts several reasons why it was error for the trial court to award Travelers summary judgment under this initial assignment of error.

First, Appellant claims the trial court erred because it obviously misinterpreted applicable case law regarding exclusionary provisions contained within insurance policies and their applicability to tortious employer conduct. Morever, Appellant argues that even had the trial court interpreted Ohio case law correctly, Travelers' summary judgment motion should still have been overruled because the exclusions were not plead as affirmative defenses as required by law and, as a result, have been waived. The second argument is without merit. As a result, our review will focus solely on Maffet's initial claim that Traveler's liability has not been excluded.

It is well-settled that when reviewing summary judgment, we review the judgment independently and without any deference to previous determination by the trial court. *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App. 3d 6, 536 N.E. 2d 411. The standard of review in this court is *de novo*. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990) 50 Ohio St. 3d 157, 553 N.E. 2d 597.

Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most favorably in the light of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving

party. Civ.R. 56(C); *Bostic v. Connor* (1988), 37 Ohio St. 3d 144, 524 N.E. 2d 881.

The moving party bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that it believes demonstrate that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*(1986), 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265.

Once the moving party meets its burden, the nonmoving party then has a reciprocal burden to set forth specific facts showing that there is a genuine issue of material fact for trial. *A. Doe v. First Presbyterian Church (USA)* (1998), 126 Ohio App.3d 358, 364; Civ. R. 56(E). The nonmoving party may not rest on the mere allegations of her pleading. *State ex rel. Burns v. Athens Cty. Clerk of Courts*(1998) 83 Ohio St.3d 523, 524 citing *Mootispaw v. Eckstein*(1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197, 1199; Civ.R. 56(E).

Once again, Appellant's initial assertion under her first assignment of error is that the trial court misinterpreted the relevant case law regarding insurance exclusions in employer settings when tortious conduct occurs.

As stated above, our review of summary judgment is *de novo*, therefore, we will give no deference to the decision of the trial court and shall review the

circumstances of the case and the record before us on appeal independently. It must be noted that neither party disputes the genuine character of the insurance contract and the sole question before this court is whether or not the exclusionary provisions of Travelers' insurance policy apply to the case at bar.

The exclusionary provisions of the policy issued by Travelers to the Moyers states in pertinent part:

> **2. Exclusions.**
>
> > **This insurance does not apply to:**
> > **a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured *****
> > *******
> > **e. "Bodily injury" to :**
> > **(1) an employee of the insured arising out of and in the course of employment by the Insured;*****
> > *******
> >
> > **o. "Bodily injury" arising out of any :**
> > **(1) Refusal to employ;**
> > **(2) Termination of employment;**
> > **(3) Coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions.**

For purposes of clarity and organization this court will address each exclusionary section separately. Should one be found applicable then the decision of the trial court to grant summary judgment was proper. However, should the exclusionary provisions be found wholly inapplicable the decision of the trial

court to grant summary judgment in favor of Traveler's was improper and summary judgment should have been granted to Maffet instead.

A. Bodily injury that is "expected" or "intended"

In *Blankenship v. Cincinnati Milacron Chemicals* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, the Supreme Court of Ohio held that "neither the Ohio Constitution nor the workers' compensation laws preclude an employee from enforcing common-law remedies against his employer for an intentional tort." In *Wedge Products v. Hartford Equity Sales Co.* (1987), 31 Ohio St.3d 65, the Supreme Court went on to define the concept of "intentional tort". It stated:

> **"The *Jones* definition of 'intentional tort' consists of a two-prong test. If a tort-feasor commits an act with (1) the *intent* to injure another or (2) the belief that such injury is substantially certain to occur, then an intentional tort has been committed."**

In *Wedge*, the Supreme Court went on to hold that an employer may not insure against an intentional tort allegedly committed by it against its employee, as a matter of public policy and thus the provisions of the policy stating "expected" or "intended" bodily injury did indeed exclude intentional torts from coverage.

Later, in *Harasyn v. Normandy Metals Inc.*, (1990), 49 Ohio St.3d 173, the Supreme Court modified this ruling by defining an employer's insurable conduct differently. It differentiated the levels of an insurable intentional tort as that from which injury is substantially certain to occur, in contrast to the employer's

deliberate intent to injure. The court held that "public policy does not prohibit an employer from securing insurance against compensatory damages sought by an employee in tort where the employer's tortious act was one performed with the knowledge that the injury was substantially certain to occur."

The Supreme Court went on to hold in *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, that:

> **In order to avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expected or intended.** *Id*. at syllabus.

Therefore, in order for an exclusion concerning bodily injury that was "expected" or "intended" to apply the worker's death must be shown to have been deliberately intended by the employer. It may not simply arise from employer conduct that was substantially certain to occur.

The record before us presents evidence confirming that injury sustained by Appellant's deceased husband was indeed substantially certain. As outlined above Appellant claimed in her original complaint that the injury was "substantially certain" to occur and the Moyers settled that complaint admitting liability. Therefore, as a matter of law, the exclusionary provision for "expected" or "intended" injuries contained in the policy issued by Traveler's does not apply to the case at hand because the death of the Appellant's husband was not shown to

have been deliberately intended. To the contrary, the injury was found to be "substantially certain".

Appellees argue that *Swanson* is inapplicable and that *Wedge* still controls because *Swanson* is not an employer-employee tort case and the Court did not explicitly overrule *Wedge*. However, nothing in *Swanson* indicates that the syllabus is not a general statement of law or that it does not apply to employer-employee tort cases.

B. Injury "arising out of and in the course of employment".

The Supreme Court of Ohio has held that an intentional tort, whether it be one with injury that was deliberately intended or one whose conduct was substantially certain to occur, "necessarily occurs outside the employment relationship." *Brady v. Safety-Kleen Corp.*(1991), 61 Ohio St.3d 624, paragraph one of the syllabus. Therefore, it goes without saying, as stated above, since Appellant has settled the underlying wrongful death action and the Moyers have admitted their liability for an injury which was "substantially certain" to occur this exclusionary provision is inapplicable.

C. **Miscellaneous Bodily Injury**

Appellee's urged in the motion for summary judgment at the trial court level and here on appeal that the catch-all portion of their exclusions concerning "other employment-related practices" excludes coverage of Appellant's claim

even if the other provisions do not. However, considering the Supreme Court authority outlined above, we are unable to agree with the Appellees that intentional torts despite the fact that they "necessarily occur outside the course of employment" are in someway included in "other employment-related practices". The policy behind their exclusion from the course of employment set forth by the Supreme Court in *Brady* would be thwarted and the holding would be rendered meaningless.

In summary, the case law outlined above, does, in fact, support Appellant's arguments for recovery and that the exclusionary provisions of the policy issued by Travelers are, indeed, wholly inapplicable. Appellant's first assignment of error is sustained. The remaining assignments of error have been rendered moot. The judgment of the Court of Common Pleas of Crawford County is reversed and remanded for further proceedings in accordance with this opinion.

Judgments reversed and causes remanded.

SHAW, J., concurs.

WALTERS, J. Because I do not agree that *Swanson* is the controlling authority in this matter, I must respectfully dissent from the majority's conclusion that the exclusionary provisions contained in the instant insurance policy are wholly inapplicable.

Initially, I would note that the Supreme Court of Ohio did not overrule or modify the holding contained in *Wedge* when rendering its subsequent opinion in the *Swanson* case. I believe that if the Court had intended to overrule its prior case law, it would have done so explicitly. See, e.g. *Skidmore & Hall v. Rottman* (1983), 5 Ohio St.3d 210, syllabus, overruling a previous case and all others inconsistent with the most recent decision.

In order to reconcile the holdings in *Swanson* and *Wedge*, it is imperative to find a logical distinction between these two seemingly conflicting cases. With this in mind, I would adopt the Seventh District Court of Appeals' explanation of the relationship between these cases as expressed in *Desiato v. McRae* (Sept. 23, 1998), Mahoning App. No. 96-C.A.-30, unreported.

In *Desiato*, the court concluded that although *Swanson* posits the general rule of law, stating that "in order to rely on an exclusion for intentional tort, an insurer must prove that the type of harm caused (and not merely the act) was expected or intended * * *" this rule is irrelevant in the context of an employer-employee intentional tort action. This is especially true in a situation where the liability policy contains both the "expected or intended" exclusion and an exclusion based upon worker's compensation. The court reasoned that the presence of both exclusions necessarily precludes coverage on either level regardless of the nature of the employer's intent:

> **If the act or harm was intentional, the policy unambiguously excludes coverage; if the act or harm was unintentional, the policy contains a worker's compensation exclusion that applies to exclude coverage.**

Desiato, at **6.

In reaching the decision rendered here today, the majority ignores the fact that the policy in this case contains a worker's compensation exclusion in addition to the "expected and intended" exclusion. It is my belief that with both exclusions, coverage should be precluded no matter what Moyer's intent may have been. Therefore, based upon the foregoing, I believe that no genuine issue of fact remains to be litigated and that Travelers is entitled to judgment as a matter of law on the issue of the "expected or intended" policy exclusion.

Consequently, I do not find that the remaining assignments of error have been rendered moot. For purposes of brevity, I will not provide a full analysis on each of these arguments; however, I find that Appellant's third and fourth assignments of error are generally without merit.

With regard to Appellants' second assignment of error, the record demonstrates that although the trial court granted summary judgment as to all claims asserted against Travelers, it is clear that Travelers did not argue or even address the allegations of promissory estoppel, breach of contract or bad faith. "It is well established that a trial court has no authority to grant summary judgment on claims that were not particularly argued in the supporting motion or

memorandum." *Clark v. Herman-Thompson* (May 19, 1999), Allen App. No. 1-98-79, unreported, citing *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 94. Therefore, I would sustain the second assignment of error insofar as it relates to these claims and remand the matter for further proceedings.

Based upon the state of the record, I would reverse the judgment in part and remand the matter for further proceedings.