[Cite as *Black v. Richards,* 2010-Ohio-2938.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
ALPHA BLACK, et al.,	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiffs-Appellants	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case Nos. 08 CA 19, 09 CA 4, 09 CA
	:	12 & 09 CA 13
	:	
KENNETH RICHARDS, et al.,	:	
	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Perry County Court of Common Pleas Case Nos. 08 CV 00089 & 08 CV 00132
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 18, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
ROBERT P. RUTTER One Summit Office Park, Ste. #650 4700 Rockside Road Independence, Ohio 44131	DAVID A. CABORN Cabron & Butauski Co., LPA 765 South High Street Columbus, Ohio 43206
PATRICK J. O'MALLEY Keis & George LLP Central Mutual Insurance Company 55 Public Square #800 Cleveland, Ohio 44113	SUSAN S. R. PETRO William & Petro Co., LLC 338 S. High Street 2nd Floor Columbus, Ohio 43215

Edwards, P.J.

{¶1} Plaintiffs-appellants, Alpha Black and Ronald Black, appeal from the November 25, 2008 Entries and the July 15, 2009, Nunc Pro Tunc Order issued by the Perry County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 12, 2006, John Hillyard, age 15, and Kenneth Richards, age 14, went to property owned by appellants to look for kittens that Hillyard had seen a few days earlier. The two entered the property through a hole in the bottom of a rear wooden door. While in the house, Richards set fire to curtains at the bottom of a landing. After Hillyard pulled the curtains down, causing them to fall partly on a box, the two attempted to stomp the fire out. However, the fire was not entirely out and three adjoining buildings owned by appellants were damaged.

{¶3} Richards entered a plea of admission to a charge of complicity to engage in arson and was adjudged delinquent by the Perry County Juvenile Court. Hillyard entered a plea of admission in Perry County Juvenile Court to complicity to engage in arson and breaking and entering. He was adjudged delinquent by the trial court in January of 2007.

{¶4} At the time of the fire, Richards was an insured under a homeowner's insurance policy covering his father, Robert Richards, that was issued by appellee United Ohio Insurance Company and Hillyard was an insured under a homeowner's insurance policy issued by appellee State Automobile Mutual Insurance Company to his father, Robin Hillyard.

{¶5} On February 22, 2008, appellants filed a complaint (Case No. 08-CV-00089) against Kenneth Richards, Robert Richards, Nikki Baisden (Kenneth Richards' mother), John Hillyard, Robin Hillyard and Anita Hillyard (John Hillyard's mother). Appellants, in their complaint, alleged that the juveniles were negligent and that their parents were liable for the juveniles' actions under R.C. 3109.09 and for negligent supervision.

{¶6} On March 18, 2008, appellee State Automobile Mutual Insurance Company filed a declaratory judgment action in Case No. 08-CV-00132, seeking a declaration that it had no duty to defend or indemnify John or Robin Hillyard. Appellee State Automobile Mutual Insurance Company filed a motion in Case No. 08-CV-00089 for leave to intervene on March 31, 2008.

{¶7} Thereafter, on April 3, 2008, appellee United Ohio Insurance Company filed a Motion to Intervene in Case No. 08- CV-00089. The motion was granted pursuant to an Entry filed on April 14, 2008. As memorialized in Judgment Entries filed in both cases on April 22, 2008, appellee State Auto's Motion to Intervene in Case No. 08-CV-00089 and to consolidate the two cases for purposes of discovery was granted.

{¶8} On April 25, 2008, Central Mutual Insurance Company, appellants' insurance carrier, filed a Motion to Intervene in Case No. 08-CV-00089 on the basis that it had reimbursed appellants $249,660.00 for personal property damaged in the fire and was subrogated to any right of recovery against "any responsible third party."

{¶9} Appellee United Ohio Insurance Company, on April 28, 2008, filed a Complaint for Declaratory Judgment in Case No. 08-CV-00089 against appellants, Keith Richards, John Hillyard, Robert Richards, Nikki Baisden, Robin Hillyard, Anita Hillyard

and Central Mutual Insurance Company. Appellee United Ohio, in its complaint, sought a declaration that the homeowner's insurance policy that it had issued to Robert Richards did not provide any liability coverage for Kenneth Richards and/or Robert Richards and that it was not required to defend or indemnity Kenneth Richards and/or Robert Richards.

{¶10} On May 2, 2008, appellants voluntarily dismissed Nikki Baisden and Anita Hillyard in Case No. 08-CV-0089.

{¶11} On July 7, 2008, a Motion for Partial Summary Judgment was filed by Robert Richards in Case No. 08-CV-00089. Robert Richards, in such motion, sought summary judgment on appellants' negligent supervision claim. On July 18, 2008, appellee State Auto filed a Motion for Summary Judgment in both cases. The negligent supervision claim against Robert Richards was voluntarily dismissed on July 23, 2008.

{¶12} Subsequently, on August 8, 2008, appellants filed a combined Motion for Summary Judgment against appellee State Auto and brief in opposition to appellee State Auto's Motion for Summary Judgment in both cases. As memorlized in an Entry filed on August 26, 2008, Central Mutual Insurance Company's Motion to Intervene was granted.

{¶13} A Motion for Summary Judgment was filed in Case No. 08-CV-00089 by appellee United Ohio Insurance Company on September 3, 2008 and in both cases by Robin Hillyard on September 5, 2008.

{¶14} Pursuant to an Entry filed in both cases on November 25, 2008, the trial court granted the Motion for Summary Judgment filed by appellee United Ohio Insurance Company. The trial court, as memorialized in Entries filed in both cases on

November 25, 2008, denied appellants' Motion for Summary Judgment, granted Robin Hillyard's Motion for Summary Judgment, and granted the Motion for Summary Judgment filed by appellee State Auto.

{¶15} On December 15, 2008, appellants filed a Notice of Appeal from the November 25, 2008, Entries. Such case was assigned Case No. 08-CA-19.

{¶16} Appellants filed a Dismissal Entry on April 2, 2009, in both cases, dismissing their claims against Kenneth Richards, John Hillyard and Robin Hillyard without prejudice.[1] The Dismissal Entry indicated that the claims against appellee State Auto and United Ohio Insurance Company remained pending. On April 13, 2009, appellant Central Mutual Insurance Company filed a Notice of Voluntary Dismissal of its claims in Case No. 08-CV-00089 without prejudice.

{¶17} On April 17, 2009, appellant Central Mutual Insurance Company filed a Notice of Appeal, appealing from the trial court's November 25, 2008, Entries. The appeal was assigned Case No. 09-CA-4.

{¶18} On July 15, 2009, the parties filed a joint motion in Case No. 08-CV-00089 asking the trial court for a nunc pro tunc order "supplementing and clarifying the November 25, 2008, Entries disposing of Motions for Summary Judgment in this matter." The motion was filed pursuant to Civ.R. 60(A). The trial court issued a Nunc Pro Tunc Order on July 15, 2009.

{¶19} Appellants then filed a Notice of Appeal on August 6, 2009, appealing from the trial court's November 25, 2008, Entries and the trial court's July 15, 2009, Nunc Pro Tunc Order. The appeal was assigned Case No. 09-CA-12.

[1] The Dismissal and Entry was in accordance with stipulations filed with the trial court on March 26, 2009.

{¶20} On August 12, 2009, appellant Central Mutual Insurance Company filed a Notice of Appeal, appealing from the trial court's November 25, 2008, Entries and the trial court's July 15, 2009, Nunc Pro Tunc Order. The appeal was assigned Case No. 09-CA-13.

{¶21} Pursuant to a Judgment Entry filed on October 30, 2009, this Court granted appellants' Motion to Consolidate all four cases.

{¶22} Appellants now raises the following assignments of error in Case No. 08-CA-19:

{¶23} "I. THE TRIAL COURT ERRED IN GRANTING STATE AUTO'S MOTION FOR SUMMARY JUDGMENT REGARDING JOHN HILLYARD.

{¶24} "II. THE TRIAL COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST STATE AUTO REGARDING JOHN HILLYARD.

{¶25} "III. THE TRIAL COURT ERRED IN GRANTING UNITED OHIO'S MOTION FOR SUMMARY JUDGMENT REGARDING KENNETH RICHARDS.

{¶26} "IV. THE TRIAL COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST UNITED OHIO REGARDING KENNETH RICHARDS.

{¶27} "V. THE TRIAL COURT ERRED IN GRANTING STATE AUTO'S MOTION FOR SUMMARY JUDGMENT REGARDING ROBIN HILLYARD."

{¶28} With the exception of assignment of error number V, appellant Central Mutual Insurance Company raises the same assignments of error in Case No. 09-CA-4.

{¶29} No appellate briefs have been filed in Case Nos. 09-CA-12 or 09-CA-13.

{¶30} As an initial matter, before addressing the merits of appellants' arguments, we must determine if the trial court had jurisdiction to issue its July 15, 2009, Nunc Pro Tunc Order. In essence, we must determine whether or not the same was a Nunc Pro Tunc Order.

{¶31} Civ.R. 60(A) provides: "(A) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

{¶32} A *nunc pro tunc* order can be used to supply information which existed but was not recorded, and to correct typographical or clerical errors. *Jacks v. Adamson* (1897), 56 Ohio St. 397, 47 N.E. 48. "However, nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide." *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164, 1995-Ohio-278, 656 N.E.2d 1288.

{¶33} In *Doe v. Catholic Diocese*, 158 Ohio App.3d 49, 2004-Ohio-3470, 813 N.E.2d 977, the appellant argued that an administrative judge erred when he issued *nunc pro tunc* journal entries providing explanations for previously entered orders reassigning the case. The appellant argued that that the trial court had no jurisdiction to issue the same because the appellant's appeal, which was pending at the time the nunc pro tunc entries were filed, divested the trial court of all jurisdiction inconsistent with

that of the appeals court to modify, reverse, affirm, or review its judgment. The Court of Appeals disagreed, noting that the nunc pro tunc entries did not change the substance of the previous orders reassigning the case and simply added additional information concerning what happened in the trial court that led to the reassignments. The Court of Appeals also noted that the appellant did not dispute that the entries accurately reflected what happened. On such basis, the Court of Appeals held that that the trial court had jurisdiction to enter the nunc pro tunc entries and they were proper.

{¶34} In the case sub judice, at the joint request of the parties, the trial court issued the July 15, 2009 Nunc Pro Tunc Entry. Such entry did not change the substance of the trial court's November 25, 2008, Judgment Entries, but merely provided the trial court's reasons for ruling as it did on the Motions for Summary Judgment. We find, therefore, that the trial court had jurisdiction to enter the July 15, 2009, Nunc Pro Nunc Entry.

First and Second Assignments of Error in Case Nos. 08-CA-19 and 09-CA-4

{¶35} Appellants Alpha and Ron Black and Central Mutual Insurance Company, in their first and second assignments of error, argue that the trial court erred in granting appellee State Automobile Mutual Insurance Company's Motion for Summary Judgment regarding John Hillyard and in overruling appellants' Motion for Summary Judgment regarding John Hillyard.

{¶36} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C) which provides, in pertinent part: "Summary

judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written 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. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶37} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶38} At issue is whether or not appellee State Automobile Mutual Insurance Company had a duty to defend and/or indemnify John Hillyard. An insurer's duty to defend is separate and distinct from its duty to indemnify and the duty to defend is

broader than the duty to indemnify. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155 at paragraph 19. The scope of the allegations in a complaint against an insured determines whether an insurance company has a duty to defend the insured. *Motorist Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, 294 N.E.2d 874. An insurer has a duty to defend the insured, '[w]here the allegations state a claim that falls either potentially or arguably within the liability insurance coverage. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094. If the complaint brings the action within the policy's coverage, the insurer is required to defend its insured regardless of the ultimate outcome of the underlying action. *Motorists Mutual* at paragraph two of the syllabus.

{¶39} The homeowner's policy issued by appellee State Automobile Mutual Insurance Company provides coverage for suits brought against an insured for damages because of bodily injury or property damage caused by an "occurrence." The policy defines an "occurrence" as follows:

{¶40} "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:"

{¶41} "a. Bodily injury; or

{¶42} "b. Property damage."

{¶43} The policy further states as follows:

{¶44} "Section II - Exclusions

{¶45} "1. Expected or Intended Injury

{¶46} "'Bodily injury' or 'property damage' which is expected or intended by an 'insured' even if the resulting 'bodily injury' or 'property damage'"

{¶47} "a. Is of a different kind, quality or degree than initially expected or intended; or

{¶48} "b. Is sustained by a different person, entity, real or personal property, than initially intended or expected."

{¶49} Thus, appellee State Automobile Mutual Insurance Company only has a duty to defend or indemnify if there is an "occurrence." The policy defines an "occurrence" as an "accident." The Ohio Supreme Court also stated that the word "occurrence" when defined as "an accident" is "intended to mean just that-an unexpected, unforeseeable event." *Randolf v. Grange Mut. Cas. Co.* (1979), 57 Ohio St.2d 25, 29, 385 N.E.2d 1305. Under Ohio law, when a term in an insurance contract is not defined by the policy, the term is to be given its ordinary meaning. *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.* (C.A.6 1993), 990 F.2d 865, 872. As noted by the court in *Morner v. Giuliano*, 167 Ohio App.3d 785, 2006-Ohio-2943, 857 N.E.2d 602, ¶ 25, "[t]he ordinary meaning of the term 'accident' in an insurance policy refers to 'unintended' or 'unexpected' happenings."

{¶50} The trial court, in the case sub judice, found that the fire started from John Hillyard's intentional acts, as opposed to an accident, and that, therefore, appellee State Automobile Mutual Insurance Company had no duty to defend and/or indemnify him. Appellants now argue that John Hillyard did not commit an intentional act (the fire), but rather that he was negligent in his attempt to put out the fire that was intentionally set by Kenneth Richards. Appellants contend that, therefore, appellee State Automobile

Insurance Company had a duty to defend and indemnity John Hillyard because the policy covers negligent acts.

{¶51} The Ohio Supreme Court's recent decision in *Safeco Ins. Co. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426 is instructive. In such case, Benjamin White, age 17, attacked and stabbed Casey Hilmer. Benjamin White, who lived with his parents at the time, pleaded guilty to attempted murder and felonious assault.

{¶52} The Hilmers then sued Benjamin and the Whites on numerous claims, including battery against Benjamin and negligent supervision and negligent entrustment against the Whites. At the time of the attack, the Whites had a homeowner's insurance policy and a separate umbrella policy issued by Safeco Insurance Company. Safeco refused to defend and/or indemnify the Whites and filed a declaratory judgment action, seeking a declaration that it had no duty to defend or indemnify the Whites based on the intentional act of their son. Safeco argued that, under the language in its policies, the intentional act was not an "occurrence". The policies defined an "occurrence" as an "accident."

{¶53} After the trial court entered a declaratory judgment in favor of the Whites, finding that Safeco was required to defend and indemnify the Whites in connection with the underlying action, Safeco appealed. The First District Court of Appeals affirmed the decision of the trial court, holding that the Whites' negligence constituted an "occurrence."

{¶54} The matter then was appealed to the Ohio Supreme Court. The Ohio Supreme Court affirmed the decision of the Court of Appeals. The Ohio Supreme Court

held that the stabbing by the insured's son was an "occurrence" within the meaning of the policies and that the insureds were entitled to coverage for the negligence claims asserted against them. The Ohio Supreme Court held that "when a liability insurance company defines an 'occurrence' as an 'accident,' a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, e.g., supervision, qualifies as 'occurrence.'" Id. at paragraph 27. The court held that while the stabbing was an intentional act committed by the son, "neither Lance nor Diane intentionally injured Casey Hilmer. From their perspective, the injury was accidental, and thus the act that caused her injury constitutes an 'occurrence" as defined in the policies that they purchased from Safeco." Id at paragraph 27.

{¶55} The Ohio Supreme Court, in *White*, further held that the intentional act exclusions in the policies did not apply to the negligence claims asserted against the insureds arising out of the stabbing by the insured's son because the injuries caused by the insured's negligence were distinct from the injuries caused by their son's intentional act.

{¶56} The issue thus becomes whether or not, from John Hillyard's perspective, the injury to the property was accidental, and thus the act that caused the injury constituted an "occurrence." In the case sub judice, John Hillyard, in 2007, entered a plea of admission to, and was found delinquent of, the crime of complicity to arson in violation of R.C. 2909.03(A)(1) and R.C. 2923.03(A)(2). R.C. 2909.03(A)(1) states as follows: (A) No person, by means of fire or explosion, shall knowingly do any of the following:(1) Cause, or create a substantial risk of, physical harm to any property of another without the other person's consent." In turn, R.C. 2923.03(A)(2) states as

follows: “A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:…(2) Aid or abet another in committing the offense.” Pursuant to R.C. 2901.22(B), “ A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

{¶57} “[T]he Ninth District Court of Appeals found that a conviction involving the mental state of ‘knowingly’ is sufficient to establish an intent to injure and trigger an intentional acts exclusion, as long as the exclusion is not restricted only to intentional acts, but also includes the expected results of one's acts. * * * Thus, a conviction for felonious assault, because it involves the mental state of ‘knowingly,’ is sufficient to trigger an intentional acts exclusion. *Lengyel v. Lengyel* (May 31, 2000), Summit App. Nos. 19460, 19479. See, also, *Phillips v. Rayburn* (1996), 113 Ohio App.3d 374, 383, 680 N.E.2d 1279.” *Baker v. White,* Clermont App. No. CA2002-08-065, 2003-Ohio-1614, ¶ 10 (citations omitted). See, also, *Campobasso v. Smolko* (July 24, 2002), Medina App. No. 3259-M, 2002-Ohio-3736; *Woods v. Cushion* (Sept. 6, 2000), Summit App. No. 19896, 2000 WL 1257806; *Westfield Ins. v. Barnett,* Noble App. No. 306, 2003-Ohio-6278; *Wight v. Michalko*, Portage App. No. 2004-P-0038, 2005-Ohio-2076, and *State Farm Fire & Cas. Co. v. Harpster,* Cuyahoga App. No. 90012, 2008-Ohio-3357, 2008 WL 2612617.

{¶58} In the case sub judice, John Hillyard admitted to complicity to engage in arson. Thus, from his perspective, the fire was intentional rather than an accident or the result of negligence. This is not a situation such as in *White* involving a negligent act

predicated on the commission of an intentional tort by another person. We find, therefore, that there was no accidental conduct that could constitute an occurrence under the policy.

{¶59} We further find that John Hillyard was not entitled to coverage or indemnification based on the intentional acts exclusion. In *Adkins v. Ferguson*, Ashland App. No. 02 CA 34, 2003-Ohio-403, Adam Ferguson fatally shot Jeremy Adkins. After the Administrator of Adkins's Estate filed a wrongful death action against Ferguson and his parents, the homeowners' insurer brought a declaratory judgment action, seeking a declaration that it had no duty to defend or indemnify Adam Ferguson in the tort action. The insurance policy excluded coverage for bodily injuries resulting from intentional or criminal acts. The trial court granted the insurer's Motion for Summary Judgment and the Administrator appealed.

{¶60} On appeal, the Administrator argued that the trial court had erred in finding that the insurer had no duty to defend or indemnify Adam Ferguson after the court presumed that Adam Ferguson intended to commit a battery and/or assault upon Jeremy Adkins. In overruling the appellant's assignments and affirming the judgment of the trial court, this Court stated, in relevant part, as follows: "Finally, at least one court has found that a criminal conviction, in and of itself, may conclusively establish intent for purposes of applying an intentional-acts exclusion. *Campobasso v. Smolko,* Medina App. No. 3259-M, at 2, 2002-Ohio-3736; *Allstate Ins. Co. v. Cole* (1998), 129 Ohio App.3d 334, 336, 717 N.E.2d 816; *Allstate Ins. Co. v. Hevitan* (Jan. 4, 1996), Medina App. No. 2443-M, at 2. In the case sub judice, Adam was found delinquent for the crime of murder by the Ashland County Juvenile Court. Therefore, because Adam was found

delinquent for the crime of murder, Allstate's intentional-acts exclusion applies since the act of murder requires purposeful intent." Id at paragraph 33.

{¶61} As is stated above, John Hillyard admitted to complicity to engage in arson. Such crime encompasses the mental state of knowingly. John Hillyard's admission, therefore, is sufficient to trigger the intentional acts exclusion.

{¶62} Based on the foregoing, we concur with appellees that John Hillyard's adjudication of delinquent on criminal charges precludes the finding of an "occurrence" under the policy. As noted by appellee, State Automobile, "there was no accidental conduct that could not constitute an occurrence, and the policy's expected or intended exclusion bars coverage for the claims being asserted." We further find that there is no coverage under the intentional act exclusion. We find, therefore, that the trial court did not err in granting appellee State Automobile's Motion for Summary Judgment regarding John Hillyard and in overruling appellants' Motion for Summary Judgment regarding John Hillyard.

{¶63} Appellants' first and second assignments of error are, therefore, overruled.

Third and Fourth Assignments of error in Case Nos.

08-CA-19 and 09-CA-4

{¶64} Appellants, in their third and fourth assignments of error, argue that the trial court erred in granting appellee United Ohio Insurance Company's Motion for Summary Judgment regarding Kenneth Richards and in overruling appellants' Motion for Summary Judgment against appellee United Ohio Insurance Company regarding Kenneth Richards.

{¶65} The policy issued by United Ohio Insurance provides liability coverage for accidental occurrences. The policy excludes coverage for:

{¶66} "'Bodily injury' or 'property damage' which is expected or intended by an 'insured' even if the resulting 'bodily injury' or 'property damage':

{¶67} "c. Is of a different kind, quality, or degree than initially expected or intended; or

{¶68} "b. Is sustained by a different person, entity, real or personal property, than initially expected or intended."

{¶69} Appellants do not dispute that Kenneth Richards intentionally set the fire and that the United Ohio Insurance policy excludes coverage for expected or intentional injuries. Rather, they argue that he did not intend to burn the building down and that, before the fire spread, he and John Hillyard tore the curtains down and stomped on them until they thought that the fire was out. According to appellants, these actions broke the chain of causation flowing from Richards' intentional act. In short, appellants contend that the juveniles' negligence in failing to fully put out the fire and in failing to contact the fire department was an intervening cause of the fire and broke the causal connection between the intentional act of setting the fire and the resulting damages.

{¶70} In *Catalfamo v. Lehman Awning Co*. (June 7, 1999), Stark App. No. 98CA00233, 1999 WL 437019, this Court stated, in relevant part, as follows: "In *Queen City Terminal v. General American Transportation Corp.* (1995), 73 Ohio St.3d 609, 653 N.E.2d 661, the Ohio Supreme Court explained the affirmative defense of intervening cause. The Supreme Court noted the causal connection between a defendant's act or

omission and the damage or injury occasioned may be broken by an intervening event, *Queen City* at 69 (sic),[2] citing *R.H. Massey* (sic)[3] *& Company v. Otis Elevator Company* (1990), 51 Ohio St.3d 108, 554 N.E.2d 1313. However, an intervening cause is not present if the alleged intervening cause was reasonably foreseeable by the one who is guilty of the negligence, *Id.,* citing *Neff Lumber Company v. First National Bank of St. Clairsville* (1930), 122 Ohio St. 302, 171 N.E. 327.

{¶71} "The *Queen City* court noted an intervening cause is foreseeable to the original negligent actor if the original and successive acts may be joined together as a whole, linking each of the actors to the liability. By contrast, the original negligence is excused if there is a new or independent act which intervenes and breaks the causal connection. The term 'new' means the second act could not reasonably have been foreseen by the original actor, *Queen City at 69* (sic)[4]." Id at 4. The term "independent" means the absence of any connection or relationship of cause and effect between the original and subsequent acts. *Queen City* at 620.

{¶72} In the case sub judice, there was a connection or relationship of cause and effect between the original fire and the subsequent acts. As noted by appellee United Ohio in its brief, "[f]ailing to adequately stomp the fire out, failing to check the box for smoldering embers, failing to douse the curtains and box and contents with water, and failing to call the fire department would not have resulted in [appellants'] damages absent the original fire that Defendant Kenneth Richards intentionally set." Moreover, it was foreseeable that failing to fully put out the fire would lead to the building burning down.

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[2] The correct page number is 619.
[3] The correct citation is to *R.H. Macy & Co., Inc. v. Otis Elevator Co*…
[4] The actual page number from *Queen City* is 620.

{¶73} Based on the foregoing, we find that the trial court did not err in granting appellee United Ohio Insurance Company's Motion for Summary Judgment regarding Kenneth Richards and in overruling appellants' Motion for Summary Judgment against appellee United Ohio Insurance Company regarding Kenneth Richards.

{¶74} Appellants' third and fourth assignments of error are, therefore overruled.

Fifth Assignment of Error in Case No. 08-CA-19

{¶75} Appellants, in their fifth assignment of error in Case No. 08-CA-19, argue that the trial court erred in granting appellee State Automobile's Motion for Summary Judgment regarding Robin Hillyard.

{¶76} On March 27, 2009, appellants filed a "Dismissal of Assignment of Error Number 5" with this Court. Pursuant to a Judgment Entry filed on April 10, 2009, this Court dismissed such assignment of error. Appellants' fifth assignment of error is, therefore, moot.

{¶77} Accordingly, the judgment of the Perry County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES

JAE/d0325

[Cite as *Black v. Richards*, 2010-Ohio-2938.]

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ALPHA BLACK, et al.,	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
KENNETH RICHARDS, et al.,	:	
Defendants-Appellees	:	CASE NOS. 08 CA 19, 09 CA 4, 09 CA 12 & 09 CA 13

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Perry County Court of Common Pleas is affirmed. Costs assessed 50% to appellants, Alpha and Ronald Black, and 50% to Central Mutual Insurance Company.

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES