

NO. 37370-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ALLSTATE INSURANCE COMPANY,

Respondent/Plaintiff,

v.

NICHOLAS WAYNE THORNTON, an individual; DALE THORNTON and TAMMY THORNTON, husband and wife; and JOHN PETTY,

Appellant (Petty)/Defendants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN F. NICHOLS

APPELLANT PETTY'S BRIEF

GIDEON D. CARON
WSB #18707
Attorney for Defendant/Appellant
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

FILED
COURT OF APPEALS
DIVISION II
08 MAR 24 PM 5:52
STATE OF WASHINGTON
BY DEPUTY

PM 3-21-08

Table of Contents

INTRODUCTION 1

ASSIGNMENT OF ERROR 2

STATEMENT OF THE CASE..... 2

ARGUMENT 3

 I. Standard of Review..... 3

 II. Reckless Burning Does Trigger Exclusion. 3

CONCLUSION..... 7

Table of Authorities

Cases

Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 436, 932 P.2d 1244, 1252 (1997)..... 4, 5

Allstate Ins. Co. v. Raynor, 143 Wn.2d 469, 477, 21 P.3d 707, 712 (2001)4, 6

Van Riper v. Constitutional G'vnt League, 1 Wn.2d 642, 96 P.2d 588 (1939)..... 4

Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 952 P.2d 590 (1998)..... 3

Statutes

RCW 9A.08.010(b)..... 6

RCW 9A.08.040(1)..... 7

RCW 9A.48.040-50 3

Rules

CR 56 7

INTRODUCTION

This case involves a summary judgment obtained by Allstate Insurance Company denying coverage for John Petty's claims against Nicholas Thornton.

John Petty owns a barn in Clark County, Washington. On June 6, 2003, seventeen year old Nicholas Thornton was in the barn without permission and smoking a cigarette. It appears that some ash fell from the cigarette onto hay. It smoldered. Then a fire started and burned the barn. Mr. Thornton pled guilty to the charge of Reckless Burning.

Mr. Petty filed suit against Thornton for the damages from the fire. Thornton had homeowner's insurance coverage with Allstate, which brought a declaratory action to deny coverage under the intentional or criminal acts exclusion in the policy. The court granted Allstate's motion for summary judgment denying coverage

No facts were presented to the superior court that Thornton knew that the dropping of the ash would lead to the damage it did. Without proof of such a mental state, summary judgment should have been denied.

///

ASSIGNMENT OF ERROR

Did the trial court err in ruling that the Allstate policy excluded coverage for the barn damage, when there is no proof that the insured knew the damage would occur or intended that it occur?

STATEMENT OF THE CASE

While on property owned by John Petty, Nicholas Thornton allowed cigarette ash to fall on hay and then failed to fully extinguish the embers. The barn burned. [CP 21, lines 8-9]. In a criminal case involving the incident, Mr. Thornton signed a statement that he “recklessly damaged a barn by knowingly causing a fire in Ridgefield, Washington”. [CP 123].

Mr. Thornton was an insured pursuant to a Mobile Home insurance contract issued by Allstate, which required Allstate to pay damages due to destruction of tangible property (property damage) [CP 3]. An exclusion in the policy states:

We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person.

[CP 64]

Allstate filed a declaratory action to establish there was no coverage for the barn damage. The Clark County Superior Court granted Allstate's motion for summary judgment. [CP 132-133]. This appeal followed.

ARGUMENT

I. Standard of Review

This is a review of a summary judgment. As such, all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, and all questions of law are reviewed de novo. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1998).

II. Reckless Burning Does Trigger Exclusion.

Reckless Burning requires no intent and no reasonable expectation of specific damage. RCW 9A.48.040-50. Mr. Thornton did not intend to cause a fire. He did not intend to drop the ash from his cigarette into the hay. He did not intend for that to kindle a flame. He attempted to put the fire out but failed to completely do so and the barn burned.

Not every "criminal act" triggers the exclusion. The exclusionary clause applies to those acts that show "...serious criminal conduct done with malicious intent, from evil nature, or with a wrongful disposition to

harm or injure other persons or property.” *Van Riper v. Constitutional G’vnt League*, 1 Wn.2d 642, 96 P.2d 588 (1939); *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 477, 21 P.3d 707, 712 (2001).

Van Riper and *Raynor* precede the date of this policy. In *Raynor* the Supreme Court affirmed the *Van Riper* test is the law of the State. The policy must be read as conforming to the law.

“[W]hen a judicial construction is placed upon words or phrases prior to the issuance of a policy which uses those words and phrases, it is presumed that construction is intended by the parties.” *Queen City Farms, Inc. v. Central Nat’l Ins. Co. of Omaha*, 126 Wash.2d 50, 91, 882 P.2d 703, 891 P.2d 718 (1994) (citing 2 George J. Couch, *Insurance* § 15:20, at 195-96 (2d ed. rev.vol.1984)).

Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 436, 932 P.2d 1244, 1252 (1997).

In *Van Riper* a life insurance policy excluded death from criminal acts of the insured. It was undisputed that the insured drove recklessly and his conduct violated many traffic laws. His bad driving killed him so no charges were filed. The insurer tried to avoid coverage. The court held that the criminal acts exclusion did not apply to every criminal act and formulated the test set forth above. Thus, Allstate knew when it wrote the policy that not only did the damage have to be reasonably expected but not every criminal act was excluded.

The next “criminal acts” case to reach the court was *Allstate Ins. Co. v. Peasley, supra*. Allstate’s insured admitted that he... “recklessly discharged a firearm in a manner which caused substantial risk of bodily injury or death to Ardis Parker”, 131 Wn.2d at 437. The insured and the victim claimed the discharge was an accident. Trial on assault charges ended in a mistrial and the insured pled guilty to reckless endangerment. In doing so he made the foregoing statement on plea of guilty. Allstate relied on the exclusion to deny coverage and an appeal ensued.

Peasley is important for its affirmation of *Van Riper* but also for the effect of a guilty plea under this exclusion. Not every criminal act triggers the exclusion.

There is considerable authority that a guilty plea, as opposed to a conviction following a full-fledged trial, is not conclusive in a subsequent civil proceeding. *See, e.g., Safeco Ins. Co. of Am. v. McGrath*, 42 Wn.App. 58, 708 P.2d 657 (1985) (citing cases and holding specifically that *Alford*-type plea is not conclusive); Restatement (Second) of Judgments § 85 cmt. b (1980); *but see, e.g., State Farm Fire & Cas. Co. v. Sallak*, 140 ORAPP 89, 914 P.2d 697, *review denied*, 324 OR 18, 920 P.2d 551 (1996) (citing cases). There is, however, no question that a guilty plea may be admissible as an admission.

Allstate Ins. Co. v. Peasley, supra.

Thornton admitted to the following:

“Recklessly damaging a barn by knowingly causing a fire.”

That admission does not establish “serious criminal conduct done with malicious intent, from evil nature, or with a wrongful disposition to harm or injure other persons or property,” so as to meet the *Van Riper* test.

The issue in this appeal is whether Allstate showed that Thornton’s crime was such a serious offense as to fall under the “criminal” definition.

In *Allstate v. Raynor, supra*, Raynor was mentally disturbed, shot his neighbor, her daughter, another girl and himself. It was undisputed that two counts of intentional murder were committed, however, Raynor killed himself so no charges were filed. Allstate again raised its criminal acts exclusion. The court stated the test as follows:

There, we held that a criminal act exclusion does not apply to *all* acts technically classified as crimes, but only to serious criminal conduct “done with malicious intent, from evil nature, or with a wrongful disposition to harm or injure other persons or property.” *Id.* at 642, 96 P.2d 588. We apply the *Van Riper* standard here.

Allstate Ins. Co. v. Raynor, supra. The court held that intentionally shooting four people was “serious criminal conduct” and intentional at that, invoking the exclusion.

Knowingly under RCW 9A.08.010(b) can simply mean being aware of the results defining an offense. In this case, this simply may

mean that Mr. Thornton was aware that as a result of the ash falling on the hay, a fire started. While technically a crime under the reckless burning statute, RCW 9A.08.040(1), this simply does not arise to the sort of serious crime for the insurance exclusion to apply as defined in the *Van Riper* test.

Under CR 56, the trial court was required to view the facts in the light most favorable to the non-moving party. The only facts before the court those contained in the admission made in the plea agreement. Based on the statutory definition of “knowingly,” when Thornton “knowingly caused a fire”, this means simply that he knew that a fire **resulted** from his foolishness in having matches and ashes in a hay-filled barn.

This is far different from the sort of serious criminal conduct as in reported cases where denial of coverage was upheld, all of which involved shootings. Indeed, none of the reported cases involve mere property damage only as does this case.

CONCLUSION

As a matter of law, the trial court erred in determining that there were sufficient facts presented to prove that Mr. Thornton committed serious criminal conduct.

The court erred in granting Allstate's motion for summary judgment and in not granting Mr. Petty's cross-motion for summary judgment.

RESPECTFULLY SUBMITTED this 21 day of MARCH,
2008.



GIDEON D. CARON, WSB #18707
Of Attorneys for Appellant John Petty

NO. 37370-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ALLSTATE INSURANCE COMPANY,

Respondent/Plaintiff,

v.

NICHOLAS WAYNE THORNTON, an individual; DALE
THORNTON and TAMMY THORNTON, husband and wife; and
JOHN PETTY,

Appellant (Petty)/Defendants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN F. NICHOLS

AFFIDAVIT OF MAILING

GIDEON D. CARON

WSB #18707

Attorney for Defendant/Appellant

Caron, Colven, Robison & Shafton .

900 Washington Street, Suite 1000

Vancouver, WA 98660

(360) 699-3001

08 MAR 24 PM 1:53
STATE OF WASHINGTON
BY *K. [Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

