

March 31, 2020

# Traub Lieberman Partners Michael S. Knippen and Jason M. Taylor Obtain Summary Judgment in Favor of Insurer Client on “Assault and Battery” Exclusion

Related Attorneys: Michael S. Knippen, Jason Taylor

On March 23, 2020, Partners Michael S. Knippen and Jason M. Taylor were successful in obtaining summary judgment in favor of their insurance company client in a declaratory judgment action pending in the the U.S. District Court for the Western District of Kentucky. The underlying matter involved the shooting death of David Litsey Jr. outside the Raywick Bar and Grill in 2012.

Defendant David Litsey, Sr. sued Gribbins, the Raywick Bar & Grill, and Broken Spoke LLC dba Raywick Bar & Grill in Kentucky court, alleging that Gribbins had either negligently or willfully caused Litsey, Jr.’s death (the “Kentucky Suit”). The carrier agreed to defend under a reservation of rights and sought a declaratory judgment in Kentucky Federal Court arguing that the shooting death did not constitutes an “occurrence” under the policy or was otherwise barred by the policy’s “assault and/or battery” exclusion.

A Kentucky jury later convicted Gribbins of the wanton murder of Litsey, Jr. During Mr. Gribbins’s criminal trial, the jury heard sworn testimony from several eyewitnesses to the shooting who testified that Gribbins confronted Litsey in a crowd outside the bar where Gribbins “pistol whipped” Litsey. “During that assault, the gun discharged killing Litsey.” In his defense, Gribbins testified that Litsey confronted him outside the bar in an aggressive manner and that he drew his handgun to protect himself. He admitted that the gun was in his right hand when he placed his right hand on Litsey’s chest. While the handgun was aimed at Litsey it discharged, killing him. After weighing all the testimony and physical evidence, the jury found Gribbins guilty of “Wanton Murder.”

Gribbins’ conviction was upheld on appeal to the Kentucky Supreme Court. *Gribbins v. Commonwealth*, 483 S.W.3d 370, 373 (Ky. 2016). However, even after the appeal Gribbins continued to argue that the shooting was “accidental” and that he was acting in self-defense, and threatened filing additional appeals where the deadline had not yet passed.

Ultimately the District Court found that the policy's "expected or intended injury" and "assault and/or battery" exclusions barred coverage. While the underlying lawsuit alleged Gribbins was merely "negligent" and Gribbins himself continued to claim that the shooting was "accidental" or in "self-defense," the carrier argued that Gribbins was collaterally estopped from arguing "facts" inconsistent with the underlying conviction. Under Kentucky law, for example, a criminal conviction may in certain circumstances be used for purposes of collateral estoppel in later civil proceedings. Estoppel is appropriate when a judgment in a former action estops re-litigation of those matter necessarily involved and decided in the previous action. The District Court agreed. Additionally, the court agreed with the carrier that the pendency of an appeal does not destroy the finality of the judgment for the purposes of issue preclusion under Kentucky or Sixth Circuit law. Therefore, the conviction estopped Gribbins from asserting any facts inconsistent with the jury's finding in his criminal case (such as "self-defense" for example).

In turning to the policy exclusions, the carrier argued that the conviction established that Gribbins acted wantonly, and "[o]ne can and should expect injury from wanton conduct." As such, Gribbins could not argue that he did not expect that his actions would harm Litsey, Jr. And because it is immaterial under the "expected or intended injury" exclusion whether Gribbins intended to kill Litsey, Jr., the incident was excluded from the Policy. Similarly, because the Kentucky jury found that Gribbins had wantonly killed Litsey, Jr. and death is a form of physical injury arising out of Gribbins's assault, Gribbins was estopped from arguing that he did not wantonly cause Litsey, Jr.'s physical injury. Accordingly, Gribbins's assault led to Litsey, Jr.'s death, also excluding the incident under the policy.