

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
DIVISION NO. ONE
CASE NO. 20-CI-00489

ENTERED
CAMPBELL CIRCUIT/FAMILY/DISTRICT
MAR - 8 2022
TAUNTA NOLAN JACK, CLERK
BY *[Signature]* D.C.

WESTPORT INSURANCE COMPANY

PLAINTIFF

V.

CITY OF NEWPORT, et al.

DEFENDANTS

ORDER

This matter is before the Court on the Plaintiff Westport Insurance Company's Motion for Summary Judgment. Defendants Westport and Virgil also filed motions for summary judgment as well as responses to Westport's motion for summary judgment. Westport replied. Oral argument was heard by this Court on February 24, 2022. Based on the briefs and oral argument, Westport Insurance Company's Motion for Summary Judgment is sustained, and Defendants' motions are overruled.

Facts of the Case

The facts of this case are undisputed. William Virgil was wrongfully convicted for the 1987 murder of Retha Welch. The murder trial commenced in 1988, and Virgil was sentenced to twenty-eight (28) years in prison. Mr. Virgil was later exonerated after the case was reversed on appeal and the Campbell County Grand Jury returned a no true bill. Virgil then filed suit against Newport and several police officers under 42 USC §1983.

During the 28 years that Virgil was incarcerated, Newport had several insurance policies, including three from Westport Insurance Company (previously Coregis Insurance Company) that

spanned from July 1, 1997 – July 1, 2000. These policies became effective approximately ten years after Virgil’s trial. The question in this case is whether Westport has a duty to defend or indemnify Newport in Virgil’s 42 USC §1983 lawsuit.

The Law Enforcement Liability policy purchased by Newport from Westport included the following language:

We will pay those sums that the insured is legally obligated to pay as damages because of “bodily injury,” “property damage,” or “personal injury” to which his insurance applies. We will have the right and duty to defend any “suit” seeking those damages.

This insurance applies to “bodily” injury,” “personal injury,” “property damages” and only if:

- (1) The “bodily injury,” “property damage” or “personal injury” is caused by an “occurrence” that takes place in the “coverage territory”; and
- (2) The “bodily injury,” “property damage” or “personal injury” occurs during the policy period.

The policy defines “occurrence” as:

- a. An accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in “bodily injury” or “property damage”, or
- b. An offense that results in personal injury.

The policy defines “personal injury” as “njury, other than “bodily injury” arising out of one or more of the following offenses:

- a. Assault and battery but only for injury neither expected nor intended from the standpoint of the insured. This does not apply to “personal injury” resulting from use of reasonable force to protect persons or property;
- b. False arrest, detention or imprisonment;
- c. Malicious prosecution;

- i. Violation of civil rights, including but not necessarily limited to violations of the Federal Civil Rights Act and similar laws.

Summary Judgment Standard

Summary judgment is appropriate “if the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. The Supreme Court of Kentucky has repeatedly advised that courts should cautiously grant summary judgment. *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). A Court must review a record “in a light most favorable to the party opposing the motion for summary judgment and [resolve] all doubts . . . in [its] favor.” *Id.* Summary judgment will only be used “to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Id.* at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (1985)).

Discussion

Westport argues that its policies are only triggered by an occurrence of a personal injury that is inflicted during the policy periods of July 1, 1997 to July 1, 2000. According to Westport, the policies in this case were not triggered because the occurrence in question was Virgil’s wrongful arrest, prosecution, and incarceration for Ms. Welch’s murder that occurred in 1988, nearly 10 years prior to the purchase of the policy. Westport reasons that the ‘personal injury’, as defined by the policies, occurs simultaneously with the wrongful prosecution versus occurring every day Virgil was incarcerated.

Newport and Virgil assert that Westport had a contractual obligation to defend and indemnify Newport for the defense and any judgment that flows from Virgil’s §1983 lawsuit. The Defendants rely primarily upon *St. Paul Guardian Insurance Company v. City of Newport*, 804 F. App’x 379 (6th Cir. 2020), a case which arose from Virgil’s §1983 case as well. As is the case with the Westport policies, the St. Paul policy covered Newport for a period of time that did not

include the arrest, trial, and initial incarceration of Virgil, but was in effect during a time that Virgil was incarcerated as a result of the prosecution. St. Paul Insurance brought a declaratory judgment action in federal court to determine whether they were liable for damages arising from Virgil's prosecution and incarceration. The Federal Court found in *St. Paul* that the insurance policy covered injuries resulting from malicious prosecution and featured an injury-based, not act-based trigger. The Court concluded that Virgil had suffered continuous and ongoing injury each and every day that Virgil was incarcerated and that St. Paul's coverage was triggered by that ongoing injury.

"The interpretation of an insurance contract is a matter of law...." *Marshall v. Kentucky Farm Bureau Mut. Ins. Co.*, 618 S.W.3d 499, 502 (Ky. Ct. App. 2020), review denied (Mar. 17, 2021) "A court must give clear and unambiguous terms in an insurance policy their plain and ordinary meaning." *Edwards v. Carlisle*, 179 S.W.3d 257, 259 (Ky. Ct. App. 2004) "Where the terms of an insurance policy are clear and unambiguous, the policy will be enforced as written." *Reynolds v. Travelers Indem. Co. of Am.*, 233 S.W.3d 197, 201 (Ky. Ct. App. 2007), citing *Kemper Nat. Ins. Companies v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 874 (Ky. 2002).

Here, the language of the Law Enforcement Policies issued by Westport is clear and unambiguous. Westport agreed to "pay those sums that the insured is legally obligated to pay as damages because of ... 'personal injury' to which this insurance applies." (emphasis added). The "insurance applies to ... 'personal injury' and only if the ... 'personal injury' is caused by an 'occurrence' that takes place in the 'coverage territory'; and [t]he ... 'personal injury' occurs during the policy period." "Personal injury" is defined by the policy as "injury, other than "bodily injury," arising out of ... false arrest, detention or imprisonment, malicious prosecution...[or the] [v]iolation of civil rights, including but not necessarily limited to violations of the Federal Civil

Rights Act and similar laws.” The parties do not disagree that the personal injury suffered by Virgil occurred within the coverage territory. The parties, likewise, do not disagree that Virgil suffered damages as a result of malicious prosecution and other civil rights violations that occurred due to his arrest, trial, and imprisonment. However, the parties disagree as to when the personal injury occurred.

“An ‘occurrence’ policy protects the policyholder from liability for any act done while the policy is in effect, whereas a ‘claims made’ policy protects the holder only against claims made during the life of the policy.” *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535, 98 S. Ct. 2923, 2927, 57 L. Ed. 2d 932 (1978). In reviewing the language of the Westport policies, they are clearly occurrence policies as opposed to claims-made policies. The question then becomes, when do torts occur? “The vast majority of courts ... have concluded that although injury must be suffered before an insured can be held liable, the number of occurrences for purposes of applying coverage limitations is determined by referring to the cause or causes of the damage and not to the number of injuries or claims.” *Michigan Chem. Corp. v. Am. Home Assur. Co.*, 728 F.2d 374, 379 (6th Cir. 1984). The conclusion that a tort occurs when the alleged injury first manifests is supported by Kentucky law. See *Davis v. Kentucky Farm Bureau Mutual Insurance Co.*, 495 S.W.3d 159, 166-187 (Ky. App. 2016) (Multiple acts of negligence were a single occurrence that lead to injury.) The elements of a malicious prosecution claim Kentucky are: 1) institution or continuation of original judicial proceedings; 2) by or at the insistence of the plaintiff; 3) termination of the proceedings in Defendant’s favor; 4) malice in instituting the proceeding; 5) lack of probable cause for the proceeding; and 6) damages suffered as a result of the proceeding. *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597, 602. (internal citations omitted). Except for the termination of the proceedings in Virgil’s favor, all of the elements of malicious

prosecution took place at the time of Virgil's arrest, trial, and initial incarceration. All of the tortious conduct that lead to Virgil's §1983 claim took place in 1987-1988. Virgil's damages were caused by an occurrence (his arrest, wrongful prosecution, and incarceration), that occurred outside of the Westport policies' coverage period.

After a careful review of the Westport policies, this Court believes Virgil's personal injury took place simultaneously with the occurrence when he was prosecuted and arrested for the murder of Ms. Welch. In similar cases that involve malicious prosecution, courts have found that the tort is complete and the injury occurs at the time the prosecution commences or the lawsuit is filed. *Royal Indem. Co. v. Werner*, 979 F. 2d 1299, 1300 (8th Cir. 1992), *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 896 (8th Cir. 2012).¹ Virgil's humiliation, damage to reputation, and deprivation of civil liberties were evident at the time that he was prosecuted. The Court finds these cases persuasive. The damages that flowed from Virgil's prosecution continued every day he remained incarcerated. However, the Westport policies are clear that coverage applies to personal injury that occurs during the policy period. Since, Virgil's personal injury occurred outside of the coverage period, Westport is not liable for the damages that flowed from that injury.

This case differs from *St. Paul*, where the policy agreed to pay for injury *or damage* that occurred during the policy period. There can be no doubt that Virgil suffered damages during the

¹ *Coregis Ins. Co. v City of Harrisburg*, 2006 WL 860710, (M.D.Pa. Mar. 30, 2006), the 3rd Circuit addressed a case nearly identical to the matter sub judice. The case involved the malicious prosecution of Crawford who was convicted of murder and was later exonerated. Crawford filed a suit pursuant to 42 USC §1983. The court was tasked with determining if insurance coverage under the Coregis (predecessor of Westport) policy was triggered when Crawford's arrest, prosecution, and initial incarceration happened outside of the coverage period. The language of the insurance policy was very similar to the language of the policy in the instant case. The court found that Crawford's injuries were first manifest at the time of his arrest and prosecution and the tort was complete at that time. Although the effects of the injury continued into the Coregis policy coverage period, the court found that the injury occurred prior to the Coregis policy going into effect, and the Coregis coverage was not triggered. While this case is not binding, the Court finds it persuasive.

28 years that he was incarcerated. *See, H.S. Leyman Co. v. Short*, 214 Ky. 272, 283 S.W. 96, 98 (1926) (“Humiliation and mortification are simply phases of mental anguish. In an action for malicious prosecution, mental pain and suffering is an element of actual damages....”) The St. Paul policy clearly stated that the *damages* must occur during the policy period, not simply the personal injury. Because the damages accrued during the policy period, the St. Paul policies were triggered.

Wherefore,

IT IS ORDERED that Plaintiff, Westport’s Motion for Summary Judgment is **SUSTAINED**, and Defendants’ Motions are overruled.

BEING NO JUST CAUSE FOR DELAY THIS IS A FINAL AND APPEALABLE ORDER.

DATED: 3-4-22



JULIE REINHARDT WARD, Judge

CC: Counsel of Record
Parties of record