[Cite as *Gilliam v. Johnson*, 2014-Ohio-993.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Sandy L. Gilliam, etc.	Court of Appeals No. E-13-007
Appellee	Trial Court No. 2008-CV-0620
v.	
Andrew D. Johnson, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: March 7, 2014

* * * * *

Andrew D. Johnson, pro se.

James L. Glowacki, James J. Imbrigiotta and William H. Kotar,
for appellee Selective Insurance Company of the Southeast.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of a judgment of the Erie County Court of Common Pleas on the issue of liability insurance coverage. In the judgment, the trial court determined that Selective Insurance Company ("Selective"), appellee, has no duty to defend or indemnify Andrew D. Johnson, appellant, under a Selective homeowners insurance

policy against claims by the Estate of Gerald Boyd Gilliam, deceased. Appellant is incarcerated and appears pro se. He is serving a six year prison term on a conviction for involuntary manslaughter, a violation of R.C. 2903.04(A), arising from the death of Gerald Gilliam. Appellant pled guilty to the offense.

{¶ 2} The estate filed a civil action for wrongful death and survivorship against appellant on July 3, 2008, alleging that on July 7, 2007, appellant shot Gerald Gilliam with a firearm causing personal injuries to Gilliam, conscious pain and suffering by Gilliam prior to death, and Gilliam's death, hours later. The estate subsequently amended its complaint to add Selective Insurance Company as a defendant and to assert a claim for insurance coverage for the estate's claims under the homeowners policy.

{¶ 3} Selective answered the complaint and subsequently filed an amended answer and counterclaim/cross-claim for declaratory judgment. In the declaratory judgment counterclaim/cross-claim, Selective contended that it did not owe appellant any duty to defend or indemnify him from the estate's claims due to appellant's intentional acts in killing Gilliam.

{¶ 4} Selective filed a motion for summary judgment in the declaratory judgment action contending a lack of insurance coverage. Appellant did not oppose the motion. The trial court granted Selective's motion in an order filed on October 25, 2012. The court filed a Civ.R. 54(B) certification of no just cause for delay on January 15, 2013, thereby making the order a final appealable order. Appellant filed a timely appeal of the judgment to this court.

The Case

{¶ 5} The insurer argued in the trial court that coverage was lacking for the shooting death of Gerald Gilliam because the assault was not an "occurrence" as defined in the homeowners insurance policy and further that liability coverage in the policy was excluded under an exclusion of bodily injury coverage for bodily injury "which is intended or expected by one or more insureds." A copy of the homeowners insurance policy issued by Selective and in effect at the time of the shooting of Gerald Gilliam on July 7, 2007, was filed in support of the motion for summary judgment.

{¶ 6} The policy definition of the term occurrence provides:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in:
>
> a. "Bodily injury", or
>
> b. "Property damage."

{¶ 7} Section II, Coverage E of the policy provides for liability coverage. Section II, under the heading Exclusions (as modified by endorsement F-1145 06 02), excludes liability coverage for bodily injury that is expected or intended:

> **Section II – Exclusions**
>
> **Coverage E – Personal Liability and Coverage F – Medical Payments to Others** do not apply to "bodily injury" or "property damage":
>
> **a.** Which is expected or intended by one or more "insureds",

{¶ 8} Selective submitted affidavits and exhibits in support of its motion for summary judgment. These materials included the criminal indictment brought against Johnson arising out of the shooting death of Gerald Gilliam, a transcript of Johnson's guilty plea to Count 3 of the indictment, and the transcript of the sentencing hearing in the prosecution.

{¶ 9} R.C. 2903.04(A) defines the offense of involuntary manslaughter:

> (A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.

{¶ 10} Count 3 of the indictment (to which appellant pled guilty and was convicted) charged appellant with the death of Gerald Gilliam as a proximate result of attempting to commit felonious assault or aggravated assault:

> That on or about the 7th day of July, 2007, at Erie County, Ohio, Andrew D. Johnson did cause the death of Gerald Gilliam, as a proximate result of Andrew D. Johnson's committing or attempting to commit a felony, to wit: Felonious Assault or Aggravated Assault, in violation of O.R.C. §2903.04(A). (F-1) (INVOLUNTARY MANSLAUGHTER)

{¶ 11} Count 3 also included a firearm specification.

{¶ 12} The elements of aggravated assault are identical to those of felonious assault, except to the extent aggravated assault contains the additional mitigating element of provocation. *State v. Deem*, 40 Ohio St.3d 205, 210-211, 533 N.E.2d 294 (1988);

State v. Schofield, 6th Dist. Lucas No. L-93-008, 1994 WL 30506, *4 (Feb. 4, 1994). The mens rea element for both felonious assault and aggravated assault is knowingly. R.C. 2903.11(A) (felonious assault); R.C. 2903.12(A) (aggravated assault).

{¶ 13} The statutes provide:

> **2903.11 Felonious assault**
>
> (A) *No person shall knowingly* do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance. (Emphasis added.)
>
> **2903.12 Aggravated assault**
>
> (A) *No person*, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, *shall knowingly*:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code. (Emphasis added.)

{¶ 14} The trial court considered in its judgment whether intent by appellant to harm Gerald Gilliam is inferred as a matter of law under the doctrine of inferred intent so

as to exclude insurance coverage under the intentional act exclusion in Selective's insurance policy. The court considered and applied the analysis of the Ohio Supreme Court in *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, 942 N.E.2d 1090, in reaching its judgment. The trial court held:

> In the case at bar, the harm, i.e. bodily injury and death is intrinsically tied to the act of knowingly assaulting another person with a .38 caliber firearm. To convict Johnson of involuntary manslaughter one had to first prove all the elements of the underlying assault statute, i.e., knowingly causing bodily injury. Then the State had to prove that death was proximately related to Johnson knowingly causing bodily injury in order to get the involuntary manslaughter guilty plea. Therefore, under these circumstances the doctrine of inferred intent is applicable.

Appeal

{¶ 15} Appellant did not make assignments of error in his appellate brief as required under App.R. 16(A)(3). He has not challenged the trial court's determination that intent to harm the decedent is inferred as a matter of law under the doctrine of inferred intent. Rather appellant argues facts, setting forth in his own statement of what occurred in the incident including a claim that he did not intend to harm Gilliam. However, appellant did not oppose the motion for summary judgment in the trial court and, consequently, did not submit an affidavit with the trial court setting forth any of the claimed facts that he now asserts on appeal.

{¶ 16} The Ohio Supreme Court has recognized that "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. Accordingly we decline to consider facts raised by appellant in his brief, as they are not part of the record of trial court proceedings. We find appellant's argument on appeal not well-taken.

{¶ 17} We find that justice has been afforded the party complaining and affirm the judgment of the Erie County Court of Common Pleas. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE