RENDERED: May 26, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001209-MR

LANHAM INSULATION — APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE STEPHEN FRAZIER, JUDGE
ACTION NO. 96-CI-00222

WESTFIELD INSURANCE COMPANY;
MICHAEL SMITH; CORBETT SMITH;
and HON. STEPHEN N. FRAZIER,
Special Judge, Knott Circuit Court — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, Chief Judge; COMBS and MILLER, Judges.

COMBS, JUDGE: The appellant, Lanham Insulation, appeals from an order of the Knott Circuit Court denying its motion for Declaratory Relief, Contribution, and Indemnity. Having carefully reviewed the record on appeal, we affirm the decision of the circuit court.

On June 6, 1995, Michael Smith and Corbett Smith were involved in automobile accident in Wilmington, Delaware. The two men are brothers, and they are both employed by Lanham. Michael and Corbett were travelling from Knott County, Kentucky, to a job site in Pennsylvania. Corbett had been in Kentucky for two-

weeks' duty in the National Guard, and Michael had taken a co-worker home to Knott County. The car that they were driving was furnished to them by their employer, Lanham. As a result of the accident, Michael sustained severe injuries to his head and neck.

On August 29, 1995, Michael filed a civil action against Corbett and State Farm Mutual Insurance Company. He alleged that the accident and his injuries were the caused by Corbett's negligent operation of a motor vehicle. Michael twice amended his complaint to include an action by his wife, Shannon Smith, for loss of consortium and to name Lanham and Westfield as defendants. Lanham had insured the car under a policy issued by Westfield.

In addition to the civil action, Michael filed a claim for Workers' Compensation Benefits on December 5, 1995, maintaining that the automobile accident occurred during the course and scope of his employment and seeking benefits accordingly. On May 7, 1996, the Administrative Law Judge (ALJ) rendered an opinion denying Michael workers' compensation benefits on the ground that the automobile accident did not occur within the course of Michael's employment. The ALJ found that both men had been in Knott County for personal reasons and that neither of them had left the job site in Pennsylvania for reasons related to employment. Their trip did not benefit or service their employer. The ALJ's decision was not appealed.

In response to the civil action initiated by Michael, Westfield contended that the automobile accident of June 10, 1995, was not covered under the terms of the insurance policy

that it had issued to Lanham. It maintained that at the time of the accident, the Smiths were acting within the course and scope of their employment and that, therefore, coverage for the accident was expressly excluded by the terms of the insurance policy -- leaving Michael's only remedy for any injuries that he may have sustained to the exclusive coverage of the Kentucky Workers' Compensation Act.

> **B. EXCLUSIONS**
>
> This insurance does not apply to any of the following:
>
> **3. WORKERS COMPENSATION**
>
> Any obligation for which the "insured" or the "insureds" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.
>
> **4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY**
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> "Bodily injury" to:
>
> a. An employee of the "insured" arising out of and in the course of employment by the "insured;" or
>
> b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph **a.** above.
>
> This exclusion applies:
>
> **(1)** Whether the "insured" may be liable as an employer or in any other capacity; and
>
> **(2)** To any obligation to share damages with or repay someone else who must pay damages because of the injury.

5. FELLOW EMPLOYEE

"Bodily injury" to any fellow employee of the "insured" arising out of and in the course of the fellow employee's employment. (Emphasis added).

Westfield Companies Commercial Insurance Coverage Policy, Commercial Auto Coverage Part, Business Auto Coverage Form, Section II — Liability Coverage, page 3 [Form # CA 00 01 12 93]

On October 18, 1996, Westfield filed a declaratory action against Lanham, Michael and Shannon, Corbett, and State Farm to determine whether the accident of June 10, 1995, was covered under Lanham's insurance policy. State Farm was ultimately dismissed from the declaratory action.

After conducting some discovery, Michael and Westfield filed respective motions for summary judgment. Shortly thereafter, Lanham filed a motion for declaratory relief, contribution, and indemnity. Lanham sought indemnification from Westfield for the legal costs that Lanham had incurred with regard to its defense in the civil action brought by Michael and Shannon and in the declaratory action filed by Westfield.

During the pendency of the declaratory judgment action, the civil case proceeded on to trial. The jury returned a verdict in favor of Michael, finding Corbett and Lanham 80% liable for the accident. Following this verdict, on April 4, 1998, the court entered judgment in the declaratory judgment action. Basing its conclusion upon the same reasoning as that of

the ALJ in the workers' compensation claim, the court held that the accident of June 10, 1995, did not occur within the course and scope of Michael's employment. The court granted summary judgment in favor of Michael and Shannon, denied Westfield's motion for summary judgment, and denied Lanham's motion for relief, contribution, and indemnification. This appeal followed.

Lanham argues on appeal that the court erred in denying its motion for contribution and indemnification. It contends that Westfield is liable for the expenses which Lanham was forced to incur to defend itself in the civil action brought by Michael and Shannon and in the declaratory action filed by the insurer.

We will first address the issue of whether Lanham is entitled to recover the costs it incurred defending the civil action. An insurance company owes its insured the duty to defend "any suit in which the language of the complaint would bring it within policy coverage regardless of the merit of the action." Wolford v. Wolford, Ky., 662 S.W.2d 835, 838 (1984). The insurer's duty to defend arises out of the liability insurance contract and is separate and distinct from the obligation to provide coverage and to pay. Cincinnati Insurance Company v. Vance, Ky., 730 S.W.2d 521, (1987).

> [I]f the insurer has elected not to provide a defense wrongfully or erroneously because it is later determined that the policy provided coverage, the insurer then would have breached the terms of its policy and the aggrieved party then would be entitled to recover all damages naturally flowing from the breach irrespective of policy limits.

Cincinnati Insurance Company v. Vance, Ky., 730 S.W.2d 521, 523 (1987).

In cases where there is a question as to coverage, the insurer may elect to defend the putative insured under a reservation of rights agreement -- postponing but preserving its right to litigate the issue of coverage at a future date. However, an insured is not required to accept a defense offered by the insurer under a reservation of rights.

> When the insurer has the obligation to pay the judgment, it surely is entitled to control the defense of the claim. But when the insurer reserves a right to assert its nonliability for payment there is little or no reason to require the insured to surrender defense of the claim to a company which asserts that it has no obligation to satisfy the claim. Under such conditions the insured has the right to refuse the proffered defense and conduct his own defense.
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> . . . .
>
> That an insured may seek to defend himself without counsel after refusing to accept a defense offered under a reservation of rights is one of the risks an insurer must take when it elects to offer a defense under a reservation of rights. If it is correct in its position that the policy does not afford coverage or has been breached in some way, then it prevails regardless of whether the insured accepts the defense — but it offers such a defense at its peril, because if the insured refuses to accept it and elects to defend himself, the company is found [sic] by the result, in the absence of fraud or collusion, unless it can establish that the policy did not afford coverage or was breached by the insured.

Medical Protective Co. of Fort Wayne v. Davis, Ky., 581 S.W.2d 25, 26-27 (1979).

In the case before us, the court held that Michael was not acting within the course or the scope of his employment at the time of the accident, rejecting Westfield's claim that the

accident was not covered under Lanham's insurance policy. While the court made extensive findings on this issue, it did not make specific findings as to the issue of whether Lanham was entitled to recover costs expended in defending either the civil action or the declaratory action. Based upon the court's finding that the accident was not within the scope of employment, coverage existed under the policy and Westfield had a duty to defend Lanham in the underlying civil action.

Without specific findings on this issue, however, we have no indication as to the court's basis for denying Lanham's motion. In its brief to this court and in the memorandum contained in the record, Westfield claims that it offered to provide Lanham with a defense in the civil action. It states that it defended Corbett in the civil action and that it offered to extend the same defense to Lanham but that Lanham rejected the offer. Conversely, Lanham claims that it gave Westfield the opportunity to provide a defense and that Westfield failed to do so.

As we have already stated, the court's order unfortunately omits any discussion of these issues and factual disputes. The court summarily denied Lanham's motion for contribution and indemnification without indicating its reasoning for so doing. CR 52.01 requires that in all actions tried upon the facts without a jury, the court is to make specific findings of fact and to state its conclusions of law. However, CR 52.04 mandates that:

> A final judgment shall not be reversed or remanded because of the failure of the trial

> court to make a finding of fact on an issue essential to the judgment unless the failure is brought to the attention of the trial court by written request for a finding on that issue or by a motion pursuant to Rule 52.02. (Emphasis added).

The failure of a party to request the court to make specific findings of fact constitutes a waiver of the error. Cherry v. Cherry, Ky., 734 S.W.2d 423 (1982).

In case before us, the court's failure to comply with the directive of CR 52.01 drastically limits our ability to fully review and consider the issues raised on appeal. Nonetheless, absent a request for such findings, we must presume that the trial court elected to believe Westfield's contention that it offered to provide a defense and that Lanham rejected this offer -- resulting in its conclusion that Westfield did not breach its contractual duty to defend.

We now turn our attention to the issue of whether Lanham should be allowed to recover the costs resulting from the declaratory action that Westfield initiated. We cannot agree that Lanham is entitled to recover the costs it incurred in defending the declaratory action. It has failed to assert or establish any breach of the insurance contract which would serve as a predicate for entitlement to such damages. The insured and the insurer both have the right to seek a declaration of rights regarding a question of coverage. Any suspected abuse of the legal process with regard to bringing a declaratory action would be more properly addressed by a motion pursuant to CR 11 or in an action for bad faith.

We affirm the decision of the circuit court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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