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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000724-MR

SONITROL OF LEXINGTON, INC. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CI-00806

GENERAL STAR INDEMNITY COMPANY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

NICKELL, JUDGE: Sonitrol of Lexington, Inc. has appealed from the March 12, 2008, order of the Fayette Circuit Court granting summary judgment in favor of General Star Indemnity Company. The underlying action involved a question of whether Sonitrol was entitled to insurance coverage under the policy it had obtained from General Star and whether General Star was obligated under the policy to defend Sonitrol in relation to a civil suit filed against it in the federal courts of Texas. The trial court found General Star was not obligated to defend

Sonitrol and that no coverage for the claims existed under the policy. After a careful review of the record, we affirm.

Sonitrol provides security alarm systems in Lexington, Kentucky. Sonitrol obtained a comprehensive general liability insurance policy from General Star on September 12, 2003. This policy contained coverage for bodily injury and mental injury, which were grouped together in the policy as "personal injury" and defined as follows:

> "Personal injury" means mental injury, anguish or shock which arises out of false arrest, detention or imprisonment; malicious prosecution or persecution; wrongful entry, eviction or other invasion of the right of private occupancy; humiliation; libel, slander, or the publication of defamatory or disparaging material; a publication that violates an individual's right of privacy.

Although such coverage was available, Sonitrol did not purchase a policy for "advertising injury" which would cover injury arising from publication of material that slanders or libels a person or organization or disparages a person's or organizations goods, services, or products. Such policies do not require a "personal injury" as a precursor to coverage.

On January 22, 2004, Interface Security Systems L.L.C., a franchisee of Sonitrol, filed suit against Sonitrol in the United States District Court for the Eastern District of Texas[1] alleging tortious interference with contract, interference with customer contract, misappropriation of trade secrets, tortious interference with

[1] *Interface v. Sonitrol*, E.D.Tx., Case No. 6:04cv23. For clarity and brevity purposes, we shall refer to this civil action as the *Interface* litigation.

prospective economic advantage, and trade disparagement. Interface alleged Sonitrol had made false and disparaging representations designed to further its own business and to harm Interface's business.

Nine months after the complaint was filed, Sonitrol tendered its defense to General Star and requested the insurer defend it in the action. General Star offered to defend Sonitrol only under a reservation of rights.[2] Sonitrol declined the representation and ultimately settled with Interface. Sonitrol then instituted the instant action requesting a declaratory judgment that General Star had a duty under the insurance policy to defend and indemnify Sonitrol in the *Interface* litigation, and claiming General Star had acted in bad faith and had violated the Unfair Claims Settlement Practices Act (UCSPA).[3]

Following a period of discovery, General Star moved for summary judgment on the bad faith and UCSPA claims. The trial court granted the motion on January 9, 2008, dismissing both claims with prejudice. No appeal was taken from that order.[4] On January 25, 2008, Sonitrol moved for summary judgment on

[2] When an insurer has a question regarding whether coverage exists for allegations made in a third party lawsuit, it may offer its insured a defense under what is commonly known as a reservation of rights. In such a situation, the insurer agrees to undertake the defense of its insured's interests in a third party or liability claim, but maintains the right to later contest coverage for the allegations raised in the claim based on the policy provisions or exclusions. It is not the equivalent of a denial of the claim, but rather is a step required of the insurer to avoid waiving coverage defenses. *See* Lori Massey Cliffe, *Representing Your Client Under a Reservation of Rights*, FOR THE DEFENSE, Jan. 1999, at 7. An insured is under no obligation to accept a defense under a reservation of rights. *Medical Protective Co. of Fort Wayne v. Davis*, 581 S.W.2d 25, 26 (Ky. App. 1979).

[3] Kentucky Revised Statutes (KRS) 304.12-230.

[4] Sonitrol successfully moved to have the "final and appealable" language removed from this order. However, no argument is made on appeal as to the dismissal of these two claims, and therefore no further discussion regarding them is warranted.

the sole remaining claim that General Star had a duty to defend it in the *Interface* litigation, as the claim against Sonitrol for trade disparagement constituted "personal injury" and was thus covered under the policy. General Star responded that the definition contained in the policy for "personal injury" did not cover trade disparagement claims and further contended the claim did not arise from an "occurrence" as that term was defined under the policy. Both parties agreed that no genuine issues of material fact existed. On March 12, 2008, the trial court granted summary judgment to General Star and dismissed the remaining claim against it, specifically holding the definitions contained in the policy "make it clear that the damages claimed in the Texas litigation were not 'personal injuries,' nor did they arise from an 'occurrence.'" This appeal followed.

Sonitrol contends the trial court erred in granting summary judgment in favor of General Star as the trade disparagement claim in the *Interface* litigation "potentially, possibly, or might" have come under the protection of the insurance policy, thus requiring General Star to defend it in the suit under the mandates set forth in *O'Bannon v. Aetna Cas. & Sur. Co.*, 678 S.W.2d 390, 392 (Ky. 1984). Sonitrol argues the trade infringement claim falls under the "personal injury" definition of the policy, the alleged injury resulted from an "occurrence," and the trial court erred in not so finding. General Star maintains that it owed no coverage to Sonitrol under the policy for the *Interface* litigation and that the trial court was correct in granting summary judgment in its favor.

The standard of review for the grant of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Since factual findings are not in issue, we owe no deference to the trial court's decision, *id.* (citing *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992)), and we review the trial court's legal conclusions *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky. App. 1998). In the case *sub judice*, because the parties agreed that there were no genuine issues of material fact, the determination to be made by this Court is whether the trial court correctly applied the law to those undisputed facts in granting summary judgment.

The overriding theme of this litigation is whether General Star owed a duty to defend Sonitrol in the *Interface* litigation under the terms of the insurance policy it issued. To properly resolve that issue, two questions must be answered: 1) did the complained of acts amount to a "personal injury" as defined in the policy; and 2) if there was a "personal injury," did that injury result from an "occurrence"? If both questions are answered in the affirmative, coverage was due and summary judgment in favor of General Star was improper. Conversely, if the answer to even one of the questions is in the negative, no coverage was owed and summary judgment was proper. After a careful review of the record and the arguments of the parties, we believe the latter to be true.

Sonitrol contends the claims for trade disparagement arose from "the publication of defamatory or disparaging material" and that they are thus covered under the policy definition for "personal injury." It argues the definition contained in the policy is facially ambiguous and that all ambiguities must be resolved in its favor, citing *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 227 (Ky. 1994), *Wolford v. Wolford*, 662 S.W.2d 835, 838 (Ky. 1984), and *Mutual Ben. Health & Acc. Ass'n v. Webber*, 187 S.W.2d 273, 275 (Ky. 1945). General Star counters that no ambiguities exist and that making disparaging remarks about a competitive company cannot result in the "mental injury, anguish or shock" required by the plain language of the definition for "personal injury" contained in the policy as business organizations cannot experience such emotional injuries. We agree with General Star.

A plain reading of the definition for "personal injury" reveals that coverage for publication of disparaging or defamatory remarks is triggered only by the "mental injury, anguish or shock" arising from such publication. Sonitrol's argument that the requirement of "mental injury, anguish or shock" applies only to personal injuries arising from "false arrest, detention or imprisonment" and not to any of the other categories of injury enumerated in the definition for "personal injury," is logically and grammatically incorrect. We see no ambiguity in the definition for "personal injury" and we will not "stretch the allegations beyond reason to impose a duty on the insurer." *Holloway Sportswear, Inc. v. Transportation Ins. Co.*, 58 Fed.Appx. 172, 175 (6th Cir. 2003) (citation omitted).

It is well-settled that courts will give insurance contracts "a practical and common sense construction, not a strained or technical one." *General Acc., Fire & Life Assur. Corp. v. Louisville Home Tel. Co.*, 193 S.W. 1031, 1033 (Ky. 1917). "We must give the policy its plain meaning and are constrained from enlarging the risks contrary to the natural and obvious meaning of the insurance contract." *Walker v. Economy Preferred Ins. Co.*, 909 S.W.2d 343, 346-47 (Ky. App. 1995).

The reading urged upon this Court by Sonitrol is untenable as such a reading would trigger coverage based upon a cause alone, and not upon the resulting damage such as "mental injury, anguish or shock." Further, the coverage Sonitrol seeks would clearly fall under a provision for "advertising injury," a coverage it did not purchase. Were we to accept Sonitrol's reading of the instant policy, we would be granting it coverage for which it had not contracted. We refuse to do so. As the trial court correctly found, the trade disparagement claims raised in the *Interface* litigation did not constitute a "personal injury."

Since we have held the trade disparagement claims were not covered under the "personal injury" provision of the insurance policy, we need not address Sonitrol's argument concerning the requirement that the injuries result from an "occurrence." There was no coverage and the trial court correctly granted summary judgment in favor of General Star.

We must note Sonitrol's arguments that General Star admitted the disparagement claims fell under the policy definition of "personal injury" and resulted from an "occurrence" are without merit and are based on a faulty reading

of a letter explaining General Star's position regarding providing a defense only under a reservation of rights. Thus, these arguments warrant no further discussion.

Therefore, for the foregoing reasons the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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