

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

Westfield Insurance Company

Court of Appeals No. E-09-050

Appellee

Trial Court No. 2008 CV 0789

v.

Dale Trent, et al.

DECISION AND JUDGMENT

Appellants

Decided: December 3, 2010

* * * * *

Richard M. Garner, for appellee.

Terry J. Dunn, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Dale Trent, Craig Carr, and Lake Fish Co., Inc. ("Lake Fish"), appellants, appeal a July 22, 2009 judgment of the Erie County Court of Common Pleas in a dispute over insurance coverage under a commercial general liability insurance policy issued by Westfield Insurance Company ("Westfield"), appellee. The dispute concerns whether

under the commercial general liability policy Westfield owes a duty to defend and indemnify appellants as to claims made against them in the case entitled *Szuch et al. v. King, et al.*, case No. 2006-CV-614, filed in the Erie County Court of Common Pleas ("underlying litigation").

{¶ 2} Edward J. Szuch, Jr. and Buck's Fishery LLC filed the suit against appellants and others on July 24, 2006. On August 22, 2008, Westfield filed this declaratory judgment action and sought a court declaration that it had no duty to defend or indemnify appellants under the insurance policy for claims made in the case. Both actions were filed in the Erie County Court of Common Pleas.

{¶ 3} In the July 22, 2009 judgment, the trial court granted a motion for summary judgment filed by Westfield and declared that the insurer owed no duty to defend or indemnify appellants with respect to the Szuch and Buck's Fishery claims. Appellants appeal that judgment to this court. They assert one assignment of error on appeal:

{¶ 4} "Appellants' Assignment of Error:

{¶ 5} "The trial court erred when it granted defendant-appellee (sic) Westfield Insurance Company's motion for summary judgment, in that it erroneously concluded that the policy did not provide coverage for appellants and did not consider or determine whether the policy language was ambiguous. (Judgment Entry of July 22, 2009)."

{¶ 6} In the underlying litigation, Edward J. Szuch, Jr. stated in the complaint that he had been a commercial fisherman for more than 20 years and held, with his brother, a 177,000 pound quota for yellow perch. He alleged that despite his large quota

he had not sold a single yellow perch during the 2006 perch season because no wholesaler would buy perch from him. He also alleged that he could not find a wholesaler to purchase his fish "because the Defendants have tortiously interfered with his business relationships, conspired to destroy his commercial fishing business, and organized a boycott of his fish."

{¶ 7} Szuch admitted in the complaint that his problems began in 2001 when he poached between 5,000 and 7,500 pounds of yellow perch and that he continued to poach perch in 2002 (between 6,000 and 10,000 pounds) and 2003 (between 2,000 and 5,000 pounds). According to the complaint, after an Ohio Department of Natural Resources ("ODNR") enforcement official threatened him with criminal prosecution, Szuch made a videotaped statement in July 2005 concerning his knowledge of perch poaching in Lake Erie. According to Szuch's complaint, the statement was made as part of an investigation by ODNR of perch poaching in Lake Erie and that others were targeted in that investigation. Appellants Trent and Lake Fish are identified in the Szuch complaint as among the subjects of the ODNR investigation.

{¶ 8} To the extent the complaint refers to appellants, the allegations are limited. Appellants summarize the allegations as follows:

{¶ 9} "The complaint alleged that appellant herein Dale Trent obtained a copy of that videotape through discovery in another criminal investigation, that he played that videotape to other defendants in the Underlying Litigation, and that those defendants played it to others in the fishing industry. The only specific allegations against Trent

were that he played the tape for the other defendants, and that he refused to buy fish from the plaintiffs."

{¶ 10} The complaint is separated into four counts. Count I is entitled "Tortious Interference Against Defendant Herr." Count II is entitled "Tortious Interference Against King." Count III is entitled "Civil Conspiracy Against All Defendants." Count IV is entitled "Group Boycott Against all Defendants."

{¶ 11} The civil conspiracy count alleges that "The Defendants either refused to purchase yellow perch from Buckshot¹, or threatened not to do business with a wholesaler or broker of yellow perch, if that wholesaler or broker purchased Buckshot's yellow perch." It also alleged that "Each of the Defendants acted with the intent of destroying Buckshot's commercial fishing business."

{¶ 12} The group boycott count asserts that "[d]efendants have committed a per se violation of Ohio's antitrust laws by organizing and participating in a group boycott of Buckshot's yellow perch." It also specifies how appellants participated in the boycott: "Defendants Lake Fish, * * * Trent, [and] Carr * * * participated in the boycott by refusing to buy Buckshot's fish." Szuch alleged that "[t]he purpose of the group boycott was to destroy Buckshot's commercial fishing operation and prevent him from fishing in the future."

¹Szuch refers to himself as "Buckshot" in his complaint.

{¶ 13} The Westfield commercial liability insurance policy provides for defense and indemnity as to covered claims. A duty to defend exists where allegations in the complaint against an insured "state a claim that falls either potentially or arguably within the liability insurance coverage." *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, ¶ 18; *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, 180. There may be a duty to defend even where it is ultimately determined that liability coverage is lacking for the claim. *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, paragraph two of syllabus.

{¶ 14} "An insurance policy is a contract whose interpretation is a matter of law." *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, ¶ 7, quoting *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, ¶ 6. In interpreting such contracts, "the role of the court is to give effect to the intent of the parties to the agreement." (Citations omitted.) *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. In *Westfield Ins. Co. v. Galatis*, the Ohio Supreme Court outlined the analysis required:

{¶ 15} "We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146,

paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Gulf Ins. Co. v. Burns Motors, Inc.* (Tex.2000), 22 S.W.3d 417, 423." *Id.*

Commercial Liability Insurance Policy

{¶ 16} The Westfield commercial liability insurance policy includes two liability insurance coverage provisions. Under Coverage A, the policy provides coverage for "bodily injury and property damage liability" and under Coverage B, for "personal and advertising injury liability." Appellants have specifically limited their arguments on appeal to claimed liability insurance coverage under Coverage B—personal and advertising injury liability insurance coverage.

{¶ 17} In Section V—Definitions, the policy defines "Personal and advertising injury." Appellants assert liability coverage exists under paragraph 14d of the definition:

{¶ 18} "14. 'Personal and advertising injury' means injury, including consequential 'bodily injury', arising out of one or more of the following offenses:

{¶ 19} "* * *

{¶ 20} "d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

{¶ 21} "* * *."

{¶ 22} We view the parties to be in general agreement as to the claims asserted by Szuch against appellants in the underlying litigation. Szuch has claimed that appellants conspired with other defendants to tortiously interfere with Szuch's business relationships and contracts and implemented an illegal group boycott against Szuch and his business interests. Appellants argue that liability coverage exists because the claims are based upon disparagement of Szuch and his business by dissemination of the video and associated "badmouthing" to "show the plaintiffs as 'bad guys' within the industry who were not to be trusted."

{¶ 23} Westfield argues that the claims involve no claimed slander or libel of Szuch or his business and no disparagement of goods, product, or services. Westfield argues:

{¶ 24} "[T]here is no allegation in the Underlying Litigation that any of the defendants made false statements about Szuch, Buck's Fishery or their goods or services. Rather it is undisputed that the basis of the claims in the Underlying Litigation was that Trent, Carr and Lake Fish showed Szuch's videotaped statement to other commercial fisherman and they refused to buy Szuch's fish. The whole purpose of showing the videotape to others was to show a truthful statement—that Szuch was actually working with law enforcement officials against poachers on Lake Erie. The alleged reaction of the local fishing industry (including Trent, Carr and Lake Fish) to boycott Szuch and Buck's Fishery was in response to the truth—not a false statement."

{¶ 25} Proof of a false statement by the defendant is an essential element of the torts of libel and slander. *Daubenmire v. Sommers*, 156 Ohio App.3d 322, 2004-Ohio-914, ¶ 80; *Saferin v. Malrite Communications Group, Inc.* (Mar. 24, 2000), 6th Dist. No. L-99-1193. The allegations in the underlying litigation clearly do not involve any claim that appellants disparaged Szuch's product, goods, or services.

{¶ 26} Westfield argues that the court should follow a decision of the Tenth District Court of Appeals in *Motorists Mut. Ins. Co. v. Natl. Dairy Herd Improvement Assn.* (2001), 141 Ohio App.3d 269 and conclude that Szuch's claims do not potentially or arguably present libel, slander, or disparagement claims and accordingly liability coverage is lacking under the Westfield policy. The *Motorists Mut. Ins. Co. v. Natl. Dairy Herd Improvement Assn.* case was a declaratory judgment action that considered the issue of whether a commercial general liability insurance policy provided coverage for antitrust claims under policy provisions affording personal and advertising injury liability coverage. As here, the policy defined "personal injury" and "advertising injury" as requiring a showing of libel or slander of the person or organization or disparagement of goods, products or services.

{¶ 27} As to the definition of "personal injury," the policy provided:

{¶ 28} "10. '**Personal injury**' means injury, or other than 'bodily injury,' arising out of one or more of the following offenses:

{¶ 29} "* * *

{¶ 30} "d. Oral or written publication of material **that slanders or libels a person or organization or disparages** a person's or organization's **goods, products or services** * * * [.] (Emphasis added.)" *Motorists Mut. Ins. Co. v. Natl. Dairy Herd Improvement Assn.*, 141 Ohio App.3d at 276.

{¶ 31} As to the definition of "advertising injury," the policy provided:

{¶ 32} "1. '**Advertising injury**' means injury arising out of one or more of the following offenses:

{¶ 33} "a. Oral or written publication of material **that slanders or libels a person or organization or disparages** a person's or organization's **goods, products or services** [.] (Emphasis added.)" *Id.*

{¶ 34} The Tenth District Court of Appeals ruled in the case that the alleged antitrust claims did not potentially or arguably come within the personal injury or advertising injury liability coverage under the policy. *Motorists Mut. Ins. Co. v. Natl. Dairy Herd Improvement Assn.*, 141 Ohio App.3d at 279. It reasoned that the antitrust claims in the complaint did not potentially or arguably state claims for libel, slander, or disparagement. *Id.* The court also indicated that it would not imply such claims. *Id.*

{¶ 35} Appellants argue that the wording of the Westfield policy is different than the policy considered in the *Natl. Dairy* case. The Westfield policy includes three additional words—"in any manner"—to the definition of personal and advertising injury:

{¶ 36} "14. 'Personal and advertising injury' means injury, including consequential 'bodily injury', arising out of one or more of the following offenses:

{¶ 37} "*" * *

{¶ 38} "d. Oral or written publication, **in any manner**, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

{¶ 39} "*" * *." (Emphasis added.)

{¶ 40} The plain and ordinary meaning of the additional language, however, is to expand coverage with respect to the manner in which defamatory or disparaging material was disseminated. The manner of publication of defamatory or disparaging material is not in issue in this case. Coverage was not denied based upon the manner in which claimed defamatory or disparaging material was disseminated.

{¶ 41} Rather, allegations of defamatory or disparaging statements or material allegedly published by appellants are entirely lacking in Szuch's complaint. Accordingly, we find appellant's arguments to distinguish *Motorists Mut. Ins. Co. v. Natl. Dairy Herd Improvement Assn.* based upon the difference of wording in the policy of the definition of personal injury or advertising injury to be without merit.

{¶ 42} The United States Sixth Circuit Court of Appeals addressed the issue of personal injury and advertising injury liability coverage for antitrust claims under a commercial general liability insurance policy in *Natl. Union Fire Ins. Co. of Pittsburgh v. Alticor* (Sept. 19, 2007), U.S. Sixth Cir. Ct. App. Case Nos. 05-2479 and 06-2538 (unpublished). The case presented the identical coverage language as considered by the Tenth District in the *Natl. Dairy* case. In affirming a judgment denying any duty to

defend or indemnify the antitrust claims under the policy, the court ruled that the antitrust claim did not include any allegation of defamation or disparagement of goods, products, or services in the antitrust case:

{¶ 43} "The Underlying Complaint does not allege or purport to allege a cause of action for defamation or slander. Nor does it allege or purport to allege a cause of action for disparagement of goods, product, or services. Further it does not appear that the plaintiffs in the Underlying Action are seeking damages 'because of' personal injury or advertising injury. On the contrary, the damages sought by plaintiffs * * * are for antitrust violations and for harm caused by isolating the plaintiffs from their down-line distributors." *Natl. Union Fire Ins. Co. of Pittsburgh v. Alticor*.

{¶ 44} In *Cardiothoracic & Vascular Surgical Specialists, Inc. v. Travelers Indemn. Co.*, 10th Dist. No. 05AP-1355, 2006-Ohio-6947, the Tenth District Court of Appeals considered claims for personal injury and advertising injury coverage in the context of claims involving fraud, breach of contract and wrongful discharge from employment. The court affirmed a grant of summary judgment to the insurer that held the insurer had no duty to defend the claims as there was no arguable claim for defamation or disparagement asserted in the case:

{¶ 45} "The allegations in the McDonnell complaint do not state a claim that could even arguably fall within the policy coverage because they clearly involve fraud, breach of contract and wrongful discharge, not defamation or disparagement." *Cardiothoracic & Vascular Surgical Specialists, Inc. v. Travelers Indemn. Co.*, at ¶ 26.

{¶ 46} In our view, the language in paragraph 14d defining coverage for personal and advertising injury under Coverage B of the Westfield insurance policy is clear and unambiguous in limiting liability coverage to claims arising out of publication of material that libel or slanders persons or organizations or disparages their goods, products or services. The Szuch and Buck's Fishery's complaint does not state a claim that falls either potentially or arguably within that coverage. Szuch's allegations of civil conspiracy and group boycott are not based upon claims of slander or libel and are also not based upon any claimed disparagement of goods, products or services.

{¶ 47} Rather, the claims by Szuch are based upon allegations appellants acted in concert with others and showed Szuch's statement to the ODNR to other commercial fisherman and they refused to buy Szuch's fish. The statement to the ODNR showed Szuch was working with law enforcement officials against fishermen poaching Lake Erie perch. The alleged boycott was furthered, not by any false representation as to Szuch or disparagement of his goods, products, or services, but by a truthful rendition of what Szuch stated to the ODNR.

{¶ 48} Accordingly, we conclude that the trial court did not err in granting the motion for summary judgment of Westfield and determining that it has no duty to defend or indemnify appellants as to claims in the underlying litigation. We find that appellants' Assignment of Error is not well-taken.

{¶ 49} Accordingly, we conclude that justice has been afforded the parties complaining and affirm the judgment of the Erie County Court of Common Pleas. We order appellants 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

Keila D. Cosme, J.
CONCUR.

JUDGE

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