[Cite as *Smith v. Ohio Bar Liab. Ins. Co.*, 2009-Ohio-6619.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ANTHONY J. SMITH, et al. Appellees v. OHIO BAR LIABILITY INSURANCE CO., et al. Appellants	C. A. No. 24424 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2007-05-3805

DECISION AND JOURNAL ENTRY

Dated: December 16, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Ohio Bar Liability Insurance Company ("OBLIC"), appeals from the judgment of the Summit County Court of Common Pleas. We reverse.

I.

Introduction

{¶2} Anthony J. Smith operated as a lawyer in the law firm of Karl & Smith LLC. Simultaneously, he owned and operated Anthony J. Smith Agency, Inc., an insurance agency that provided services including the sale of annuities underwritten by National Western Life Insurance Company. Anthony's brother, Joe Smith, and David Jeffries were employees of Anthony J. Smith Agency, Inc. Walter and Thelma Otto ("the Ottos") first met with Joe Smith regarding investments they wished to make. They later met with both Joe and Anthony. These meetings led to the purchase of annuities from Anthony J. Smith Agency, Inc. This appeal is

concerned only with the extent of professional liability coverage owed to Karl & Smith LLC and Anthony J. Smith ("Smith Plaintiffs").

Annuities Purchases

{¶3} In the underlying action, the Ottos, as well as their daughter, Margaret Ann Otto-Hannaford, and grandson, Thomas Otto, sued National Western Life Insurance Company, Anthony J. Smith, Karl & Smith, Rooney & Smith, Anthony J. Smith Agency, Inc. and David Jeffries. The complaint in that case stems from Anthony Smith's operation of the insurance agency from which the Ottos purchased several annuities. The Ottos initially purchased two one million dollar policies from Anthony J. Smith Agency, Inc., one in Margaret's name and one in Thomas's name. The annuities were purchased after consulting first with Anthony's brother, Joe, and later with Anthony. Some time later, the Ottos purchased two more $475,000 annuity policies. All of the policies were underwritten by National Western Life Insurance Company.

Legal Work

{¶4} Anthony Smith also performed legal work in creating the Ottos' wills and trusts, at least some of which were funded with the National Western annuities. Later, the Ottos became dissatisfied with the wills and trusts. Their dissatisfaction stemmed from the nature of the annuities, which were sold in the names of Margaret and Thomas. The Ottos felt that they had no control over the annuities and that Margaret and Thomas could cash in the annuities for the surrender value at any time. The Ottos filed the underlying suit, which includes claims for fraud, legal malpractice, negligence, negligent supervision, breach of fiduciary duties and breach of contract. As professional liability claims were implicated, the Smith Plaintiffs notified OBLIC of the claims and sought a defense.

Malpractice Coverage

{¶5} OBLIC issued professional liability policy number 225485 to the Smith Plaintiffs effective January 2, 2006. The policy in question states that OBLIC will "defend any Claim or suit against the Insured alleging such act, error, or omission and seeking damages which are payable under the terms of this policy[.]" (Emphasis omitted.) The policy covers claims made for "an act, error, or omission of the Insured or any person for whose act, error or omission the Insured is legally liable, in rendering or failing to render Professional Services for others in the Insured's capacity as a lawyer[.]" (Emphasis omitted.) Professional Services are defined as "all services or activities performed by the insured lawyer in a lawyer-client capacity on behalf of one or more clients[.]" Accordingly, OBLIC need only defend any claim or suit which is payable under the policy.

{¶6} The policy is subject to several exclusions, including the business enterprise exclusion. This exclusion, Exclusion (h), states that the policy does not apply

> "to any Claim arising out of or in connection with the conduct or sale of any business enterprise not named in the Declarations (including the ownership, maintenance or care of any property in connection therewith) wholly or partly owned by an Insured or in which any Insured is a partner, or which is directly or indirectly controlled, operated or managed by an Insured either individually or in a fiduciary capacity[.]" (Emphasis omitted.)

{¶7} The policy declarations state that coverage applies only to Karl & Smith LLC, and attorneys Anthony J. Smith and Margaret T. Karl.

{¶8} OBLIC undertook defense of the underlying action under a reservation of rights and attempted to intervene in that suit to obtain a declaration of the parties' rights and obligations with regard to insurance coverage. The attempt to intervene was denied. The Smith Plaintiffs then filed this action for a declaratory judgment. In this matter, OBLIC and the Smith Plaintiffs filed cross-motions for summary judgment. The trial court denied OBLIC's motion and granted

the Smith Plaintiffs' motion, ruling that OBLIC must defend all claims in the suit including those not related to the policy coverage.

{¶9} OBLIC timely filed a notice of appeal, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN FAILING TO EVEN ANALYZE WHETHER THE OTTO PLAINTIFFS' CLAIMS FELL WITHIN THE BUSINESS ENTERPRISE EXCLUSION OF THE POLICY, AND INSTEAD ERRONEOUSLY LIMITED ITS ANALYSIS TO WHETHER SOME OF THE OTTO PLAINTIFFS' CLAIMS INITIALLY FELL WITHIN THE POLICY'S SCOPE OF COVERAGE."

{¶10} OBLIC's first assignment of error contends that the trial court erred when it failed to analyze whether the claims in the underlying lawsuit fell within the business enterprise policy exclusion even if the claims initially fell within the policy's scope of coverage. Essentially, OBLIC argues that even if one or more claims in the underlying suit fell within the policy's coverage, the claim or claims also fell within the business enterprise exclusion contained in the policy. OBLIC contends that it was error not only to grant the cross-motion for summary judgment in favor of the Smith Plaintiffs, but also to deny OBLIC's summary judgment motion. We agree.

{¶11} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶12} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶13} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶14} At issue is whether the Ottos' underlying claims fall within the coverage of the Smith Plaintiffs' policy, and, if covered, whether the claims then are subject to an exclusion relieving OBLIC of its duty to defend. An insurer's duty to defend is broader than and distinct from its duty to indemnify. *W. Lyman Case & Co. v. Natl. City Corp.* (1996), 76 Ohio St.3d 345, 347. The duty to defend an action is not determined by the ultimate outcome of the action or the insurer's ultimate liability. *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, at paragraph two of the syllabus. The scope of the allegations in the complaint determines whether the insurance company has a duty to defend its insured. Id. If the allegations in the underlying complaint arguably, potentially or even doubtfully fall within the coverage of the policy, the insurer must fulfill its duty to defend. *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio

St.3d 177, 179. Then, once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint resulting from the same occurrence. *Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co.* (1993), 84 Ohio App.3d 302, 313. "Coverage is provided if the conduct falls within the scope of coverage defined in the policy, and not within an exception thereto." *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 36. Accordingly, "the insurer may be absolved of its duty to defend if the facts uncovered during discovery demonstrate that there is no possibility of coverage under the policy." *Helman v. Hartford Fire Ins. Co.* (1995), 105 Ohio App.3d 617, 625, citing *Wedge Products, Inc. v. Hartford Equity Sales, Co.* (1987), 31 Ohio St.3d 65, 67-68.

> "[Once], during discovery, the insurer uncovers facts which it believes, in good faith, absolve it of its duty to defend, the insurer may bring a declaratory judgment action to adjudicate its duty to defend, even if the underlying complaint alleges conduct within the coverage of the policy." *Helman*, 105 Ohio App.3d at 625, citing *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, 112-113.

{¶15} OBLIC undertook the Smith Plaintffs' defense in the underlying action under a reservation of rights. The reservation of rights letter put the Smith Plaintiffs on notice that OBLIC believed the business enterprise exclusion, among others, applied to bar coverage.

{¶16} OBLIC contended in its summary judgment motion that any allegations that could be construed as covered by the policy were then excluded by, among others, the business enterprise exclusion. On appeal, OBLIC continues to pursue the application of the business enterprise exclusion to vitiate its obligation to defend.

{¶17} We must now determine whether the business enterprise exclusion applies in this case: specifically, whether the claims in the Ottos' complaint "aris[e] out of" or occur "in connection with" the Anthony J. Smith Agency's conduct.

> "An insurance policy is a contract whose interpretation is a matter of law. In *Westfield Ins. Co. v. Galatis*, we stated, 'When confronted with an issue of

> contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. 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. 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. 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. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.'" (Internal citations and quotations omitted.) *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, at ¶¶ 7-8.

{¶18} We need not determine whether the Otto's claims occurred "in connection with" the Smith Agency's conduct because it "arises out of" the conduct of the agency. "'Arising out of' means generally 'flowing from' or 'having its origin in.'" *Nationwide Mut. Fire Ins. Co. v. Turner* (1986), 29 Ohio App.3d 73, 77, citing *Ins. Co. of North America v. Royal Indemn. Co.* (C.A.6, 1970), 429 F.2d 1014. In this case, OBLIC's motion for summary judgment pointed to the testimony of several witnesses and parties. Smith testified in his deposition that his brother Joe, an employee of Anthony J. Smith Agency, Inc., met with the Ottos first regarding investments. Walter Otto confirmed this fact. Walter Otto testified in his deposition that he and Thelma purchased the annuities on the recommendations of Anthony and Joe. Walter stated that he was not suing on the basis of the wills, trusts or other estate planning work Anthony performed. Thelma Otto testified in her deposition that the reason she was not satisfied with the wills and trusts was because the children had control of the annuities. She stated that the annuities were sold to the children and not to the Ottos, leaving them no control at all. It is undisputed that the first contact between the Ottos and Joe occurred prior to contact between the Ottos and Anthony. The contact with Joe occurred in relation to investments. The Ottos then relied on Joe and Anthony's advice in purchasing the annuities. As part of the annuity transaction, Anthony then completed legal work related to the Ottos' estate planning, including the drafting of wills and trusts. Accordingly, in a temporal sense, the legal work had its origin in

the investments. More importantly, Walter and Thelma's testimony indicates that they are dissatisfied, not with the drafting of the wills and trusts, but instead with the nature of the annuities. Their chief complaint is that they were sold in the names of Margaret and Thomas, who, according to the Ottos, now have control of the funds. The Ottos dislike the mechanics of the annuities and the possible surrender of their value prior to the Ottos' deaths. Therefore, under the facts of this case, the Ottos claims, including those that would not fall under the definition of "Professional Services" to invoke coverage prior to application of the exclusions, necessarily have their origins in the sale of annuities by the Anthony J. Smith Agency. For this reason, we need not address the application of the exclusions claim by claim. OBLIC satisfied its *Dresher* burden, demonstrating that the Ottos' claims arose from the conduct of the Smith Agency in selling the annuities and, thus, subjected them to the business enterprise exclusion.

{¶19} Interestingly, in the opposition and cross-motion for summary judgment filed by the Smith Plaintiffs below, the Smith Plaintiffs' counsel[1] cited several areas of deposition testimony that overlapped those cited by OBLIC in the motion for summary judgment. The overlap includes the facts in the preceding paragraph establishing that the legal malpractice claims arose out of the sale of the annuities. In the opposition to the motion for summary judgment and on appeal, those representing the Smith Plaintiffs' interests consistently argue that the duty to defend is predicated solely upon whether or not the complaint states a claim that is "potentially or arguably within the policy coverage" or even if there is some doubt as to whether coverage is implicated, citing *Willoughby Hills*, 9 Ohio St.3d at 180. However, these arguments fail to observe our holding in *Helman* that the duty to defend may be avoided when facts fleshed

[1] Neither Anthony Smith nor Karl & Smith is involved in the instant appeal. Instead, the Ottos' counsel advocates on their behalf.

out in discovery demonstrate that no coverage is possible under the policy. *Helman*, 105 Ohio App.3d at 625.

{¶20} In order to survive summary judgment it was necessary for the Smith Plaintiffs to demonstrate not only that coverage was potentially, arguably or even doubtfully available, but also that there was a question of material fact regarding the application of the business enterprise exclusion because this issue was specifically raised by OBLIC within the context of the summary judgment motions. *Henkle*, 75 Ohio App.3d at 735. The Smith Plaintiffs failed to present such evidence. Accordingly, we reverse the trial court's grant of summary judgment in favor of the Smith Plaintiffs and we enter summary judgment in favor of OBLIC.

{¶21} OBLIC's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN FAILING TO EVEN CONSIDER ANY OF THE ALTERNATIVE ARGUMENTS RAISED BY [OBLIC] IN ITS MOTION FOR SUMMARY JUDGMENT INVOLVING THE POLICY'S EXCLUSIONS FOUND IN ITS CONFLICT OF INTEREST ENDORSEMENT, INSURANCE AGENT OR BROKER ENDORSEMENT EXCLUSION, BROAD FORM SECURITIES EXCLUSION ENDORSEMENT, AND ITS INTENTIONAL ACTS EXCLUSION, WHICH INDIVIDUALLY AND/OR COLLECTIVELY APPLY TO PRECLUDE COVERAGE TO [SMITH]."

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT MISQUOTED AND MISCONSTRUED PREFERRED MUT. INS. CO. V. THOMPSON [] WHEN IT HELD THAT '[O]NCE AN INSURER MUST DEFEND ONE CLAIM WITHIN A COMPLAINT, IT MUST DEFEND THE INSURED ON ALL THE OTHER CLAIMS WITHIN THE COMPLAINT, EVEN IF THEY BEAR NO RELATION TO THE INSURANCE POLICY COVERAGE' AND THEREBY SUGGESTED AN IMPROPERLY BROAD DEFENSE OBLIGATION."

{¶22} In light of our disposition of OBLIC's first assignment of error, we need not address its second and third assignments of error as they are rendered moot. See App.R. 12(A)(1)(c).

III.

{¶23} OBLIC's first assignment of error is sustained. OBLIC's second and third assignments of error are rendered moot. The judgment of the Summit County Court of Common Pleas is reversed and judgment is entered in favor of OBLIC on its motion for summary judgment.

Judgment reversed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶24} I respectfully dissent. I would reverse and remand the matter to the trial court to consider the issue whether a contractual exclusion relieves OBLIC of its duty to defend. I would not address this issue in the first instance. See *Schaffer v. First Merit Bank, N.A.*, 9th Dist. Nos. 09CA009530, 09CA009531, 2009-Ohio-6146 (Carr, J., concurring, in part, and dissenting, in part).

APPEARANCES:

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