

ASHTON HARDY

*

NO. 2001-C-0529

VERSUS

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COURT OF APPEAL

**JOSPEHINE COSTELLO. ET
AL.**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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**ON APPLICATION FOR SUPERVISORY WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-5864, DIVISION "J"**

Honorable Nadine M. Ramsey, Judge

JUDGE JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R.
Plotkin, and Judge David S. Gorbaty)

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AFFIRMED.

In this legal malpractice action, third-party defendant St. Paul Fire and Marine Insurance Company (“St. Paul”), seeks supervisory review of a trial court’s February 9, 2001 grant of a motion for summary judgment in favor of third-party co-defendant Ashton R. Hardy, on the issue of coverage. For the reasons that follow, we affirm the judgment of the trial court.

This action has its genesis in a legal malpractice action filed in Jefferson Parish by Josephine Costello against Ashton R. Hardy, his law partner Bradford D. Carey, and their law firm, Hardy and Carey. Thereafter, Hardy filed the instant action for malicious prosecution against Josephine Costello and James Minge. Minge filed a reconventional demand against Hardy and Joseph C. Chautin III, his counsel in the malicious prosecution action, alleging harassment. The law firm of Hardy and Carey was covered by a Commercial General Liability Protection policy issued by St. Paul. When Hardy and Chautin were sued by Minge, Hardy made demand for indemnification upon St. Paul, which denied coverage on several grounds: (1) that the policy provided coverage only for personal injury (which

includes malicious prosecution) arising out of Hardy's business activities, whereas Minge's claim arose out of Hardy's personal pursuit of damages; (2) that Hardy was not a "protected person" because the actions alleged by Minge did not occur in the course and scope of Hardy's employment, but in his personal or individual capacity; and (3) that even if the above factors were favorable, that exclusions for knowingly making false assertions, for intentional actions, and/or for damages relating to the performance of or failure to perform any professional service precluded coverage.

The trial court rejected those claims by St. Paul, finding that Hardy was acting in his partnership capacity when he filed the action against Minge, that the damages claimed by Minge arose from Hardy's actions as a partner in the firm, and that none of the exceptions applied. Thus, the court granted Hardy's motion for summary judgment, holding that St. Paul owed a duty to defend.

The Louisiana Supreme Court set forth the applicable standard for review of the grant or denial of motions for summary judgment in Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, p. 7 (La. 2/29/00), 755 So. 2d 226, 230-231:

[A] review of a grant or denial of a motion for summary judgment is de novo. A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

material fact, and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B). This article was amended in 1996 to provide that "summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action.... The procedure is favored and shall be construed to accomplish these ends." La. C.C.P. art. 966(A)(2). In 1997, the article was further amended to specifically alter the burden of proof in summary judgment proceedings as follows:

The burden of proof remains with the movant. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

La. C.C.P. art. 966(C)(2). "In effect, the amendment 'levels the playing field' between the parties in two ways: first, the supporting documentation submitted by the parties should be scrutinized equally, and second, the overriding presumption in favor of trial on the merits is removed." Hardy v. Bowie, 98-2821, p. 5 (La.9/8/99), 744 So.2d 606 (citing Hayes v. Autin, 96-287 (La. App. 3 Cir. 12/26/96), 685 So.2d 691, 694, writ denied, 97-0281 (La. 3/14/97), 690 So.2d 41). "The amendment to Art. 966 brings Louisiana's standard for summary judgment closely in line with the federal standard under Fed. Rule Civ. Proc. 56(c) ..." Id.

Though the legislative mandate is that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507, p. 2 (La. 12/8/00), 775 So. 2d 1049, 1050.

A liability insurer has a duty to defend its insured against claims by a

third party that is separate and apart from its duty to indemnify. Orleans Parish School Bd. v. Scheyd, 95-2653, p. 3 (La. App. 4 Cir. 4/24/96), 673 So. 2d 274, 276. The general rule is that the duty to defend is determined solely from the plaintiff's pleadings and the face of the policy, without consideration of extraneous evidence. Bryant v. Motwani, 96-1351, p. 8 (La. App. 4 Cir. 10/30/96), 683 So. 2d 880, 884. The allegations of the plaintiff's complaint are assumed to be true. Milano v. Bd. of Commissioners of Orleans Levee Dist., 96-1368, p. 4 (La. App. 4 Cir. 3/26/97), 691 So. 2d 1311, 1314. If, assuming all of the allegations of the petition to be true, there would be coverage under the policy and liability of the insured to the plaintiff, the insurer must defend the insured without regard to the outcome of the action. Steptore v. Masco Const. Co., Inc., 93-2064, p. 8 (La. 8/18/94), 643 So. 2d 1213, 1218. The insurer's duty to defend arises whenever the pleadings against the insured disclose even a possibility of liability under the policy. Fontaine v. Roman Catholic Church, 94-1722, p. 5 (La. App. 4 Cir. 1/31/96), 669 So. 2d 493, 495, writ denied, 671 So. 2d 340 (La. 1996).

The allegations of Minge's reconventional demand are set forth in one paragraph:

And now, further answering, James Minge avers that at all times material hereto Ashton R. Hardy, hereby made defendant in reconvention, and his counsel of record Joseph C.

Chauvin III, an adult resident and domiciliary of the Parish of Jefferson, hereby made third party defendant, were aware that the allegations contained in Ashton R. Hardy's Petition For Damages, even if true, fail to state a cause of [sic] against James Minge, that the instant Petition For Damages is premature on its face, and that James Minge was made defendant herein purely for the purposes of harassment, which conduct entitles James Minge to damages from Ashton R. Hardy and Joseph C. Chauvin III.

St. Paul's policy has a duty-to-defend clause that is not in dispute. St. Paul argues that (1) Hardy was not a "protected person" and (2) that there was no covered "personal injury offense," as those terms are used in the policy. The policy was issued to the partnership of Hardy and Carey, and a partner is a "protected person" under the policy only "for the conduct of [the partnership] business." St. Paul points out that Minge simply alleged in his reconventional demand that Hardy—"an individual with no representative or other capacity"—wrongfully sued him. The policy provides coverage of "protected persons" for damages resulting from personal injury offenses (defined in part as malicious prosecution) only if the personal injury results from the partnership's "business activities." St. Paul points out that Minge's reconventional demand simply alleges that Hardy filed suit against him purely for the purposes of harassment, with no allegation that it was done in connection with the business activities of Carey and Hardy.

Although the general rule is that the duty to defend is determined

solely by review of the allegations in the plaintiff's pleadings, in this case Minge's reconventional demand cannot be read without reference to the allegations in Hardy's original petition. This becomes obvious by simply reading Minge's reconventional demand as if it were an original petition. It cannot be done. Minge's reconventional demand is intelligible only if it is read in conjunction with Hardy's original petition, which sets forth factual allegations constituting the cause of action to which Minge is reconvening. Indeed, Minge's reconventional demand essentially incorporates Hardy's original petition. Unfortunately, Hardy's original petition is not attached to St. Paul's writ application.

The trial court found that when Hardy filed suit against Minge he was acting in his partnership capacity in an effort to clear his professional reputation and, consequently, the reputation of the firm bearing his name. Therefore, the court found that Hardy was a "protected person" under the St. Paul policy. St. Paul argues that the trial court went beyond the pleadings and accepted counsel for Hardy's argument that Hardy was acting on behalf of his partnership when he sued Mr. Minge. However, the trial court could have arrived at its conclusion by a common-sense deferential reading of the allegations in Hardy's original petition.

Minge's claim that Hardy's suit "was purely for the purposes of

harassment” essentially sets forth a claim for malicious prosecution, which is clearly covered by the policy. We note that in St. Paul’s memorandum in support of its motion for summary judgment filed in the trial court, it asserted that Hardy alleged in his petition that he “personally suffered” damages. Further, we note that the sole plaintiff named in the title of this action is Ashton Hardy; the partnership is not a party. However, as Hardy goes, so goes the partnership. Hardy is a partner in the firm. He was sued for malpractice. The reputation of the partnership is inextricably tied to Hardy’s professional reputation. If Hardy prevails in the suit, it would benefit both him and the partnership. The policy provisions at issue simply refer to personal injuries that result from “business activities,” a broad term which is not defined in the policy. It is obvious Hardy’s suit should be viewed as a business activity, and thus, St. Paul is liable under the policy. The insurer’s duty to defend arises whenever the pleadings disclose even a “possibility” of liability under the policy. Fontaine, supra.

There is a “possibility” that the alleged malicious prosecution alleged by Minge constituted a personal injury by a “protected person” resulting from “business activities,” which brings it under the policy. Accordingly, a reasonable possibility existed that St. Paul may be liable on the policy, and the trial court properly granted summary judgment in favor of Hardy on the

duty to defend issue.

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.