

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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VARILEASE TECHNOLOGY GROUP, INC.,  
f/k/a WORLDWIDE MAINTENANCE  
CORPORATION, DENNIS BROWN, BARRY  
CUMMINS, CATHY CUMMINS, JAMES P.  
MITCHELLI, CHARLENE MITCHELLI, and  
ROBERT VANHELLEMONT,

UNPUBLISHED  
December 16, 2004

Plaintiffs-Appellees/Cross-  
Appellants,

v

MICHIGAN MUTUAL INSURANCE  
COMPANY,

No. 249121  
Wayne Circuit Court  
LC No. 00-011238-CK

Defendant-Appellant/Cross-  
Appellee.

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Before: Cavanagh, P.J., and Kelly and H Hood\*, JJ.

PER CURIAM.

Defendant/Cross-Appellee, Michigan Mutual Insurance Company (“defendant”), formerly known as Worldwide Maintenance Corporation, appeals by leave granted a circuit court order denying its motion for summary disposition in this declaratory action to determine insurance coverage. Plaintiffs/Cross-Appellants (“plaintiffs”) have filed a cross-appeal. At issue is whether a complaint filed against plaintiffs by Unisys Corporation triggered defendant’s duty to defend under a provision in a commercial general liability insurance policy that provides coverage for “advertising injury” liability. We reverse.

Unisys is a developer and manufacturer of mainframe computer systems and peripherals and proprietary software that runs on its hardware. Plaintiff Varilease competes with Unisys, providing maintenance services on Unisys computer systems. In December 1998, Unisys filed a civil action against plaintiffs in the United States District Court of Arizona. The complaint essentially alleged that former employees of Unisys copied and retained copyrighted product support manuals and diagnostic software, used the materials in their contracts to perform service and maintenance for their clients, and distributed the materials to several subcontractors. In addition, plaintiffs allegedly developed or were in the process of developing software that

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

contained copies of and were derived from Unisys proprietary material. The complaint also alleged that Varilease falsely represented to customers that Varilease's software and materials were Varilease's original works and that Varilease "is properly licensed or otherwise permitted by Unisys to copy and use" Unisys' materials and software to service and maintain Unisys computer systems.

The Unisys complaint alleged claims for copyright infringement, violation of the Lanham Act, 15 USC 1125(a), misappropriation of trade secrets, unfair competition, breach of contract (alleging that individual defendants [plaintiffs herein] violated a confidentiality agreement), conversion, breach of fiduciary duty, and intentional interference with contractual relations. Unisys claimed loss of service contracts and licensing fees, and loss of royalties and other compensation. Unisys and Varilease settled this underlying action. Only attorney fees and defense costs are at issue in the instant appeal.

Plaintiffs filed this declaratory action alleging that defendant was required to defend and indemnify plaintiffs in the Unisys action pursuant to a commercial general liability insurance policy issued by defendant, which provided coverage for an "advertising injury." The pertinent policy language provides that the insurance applies to an "advertising injury" caused by "an offense committed in the course of advertising your goods, products or services[.]" "Advertising injury" is defined as an injury arising out of specified offenses, including "[m]isappropriation of advertising ideas or style of doing business[.]" or "[i]nfringement of copyright, title or slogan."

The trial court denied defendant's motion for summary disposition on the issue of coverage. Additionally, the court granted plaintiffs' motion for a declaratory judgment in part with respect to defendant's duty to provide a defense in the Unisys action, but denied plaintiffs' motion without prejudice with respect to defendant's duty to indemnify. The trial court concluded that the Unisys complaint alleged copyright infringement and trademark infringement and analyzed these claims separately in light of the three elements for evaluating advertising injury coverage set forth in *GAF Sales & Services, Inc v Hastings Mut Ins Co*, 224 Mich App 259; 568 NW2d 165 (1997). Those elements are: (1) an "advertising injury" as defined in the policy; (2) a "course of advertising"; and (3) proof of a causal relationship between the first two elements. *Id.* at 262.

With respect to copyright infringement, the trial court recognized that "copyright infringement can give rise to advertising injury" under the policy's definitions of "advertising injury." However, the court concluded that the evidence of causation between plaintiffs' course of advertising and the alleged copyright infringement was deficient. Plaintiffs' cross-appeal challenges the court's ruling in this regard.

With respect to trademark infringement, the trial court noted "Unisys' allegation of trademark infringement appears to be based on its assertion that Varilease falsely presented itself as licensed to use Unisys' diagnostic software and support materials." The court reasoned that a false representation that "one is licensed by the trademark holder can infringe on the trademark." The court recognized that there was a split of authority in the federal courts concerning whether trademark infringement fell within the definition of "advertising injury," and concluded that it did. The court further concluded that there was a causal connection between the trademark infringement and the damages allegedly suffered by Unisys. Defendant challenges this aspect of the trial court's ruling.

We review de novo a trial court's decision granting or denying summary disposition in a declaratory judgment action. *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). We also review de novo matters involving the construction and interpretation of insurance contracts. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, \_\_\_; 687 NW2d 300, 302 (2004); see also *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

The general principles of law governing an insurer's duty to defend are set forth in *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137-139; 610 NW2d 272 (2000). The insurer has a duty to defend the insured "if the allegations of the underlying suit arguably fall within the coverage of the policy . . . ." *Id.* at 137 (citation omitted). If one or more theory of recovery falls within the policy, the insurer has a duty to defend, regardless of other theories that are not covered by the policy. *Id.* The insurer must look behind the allegations to determine if coverage is possible. *Id.* at 137-138. Where there is doubt concerning whether the complaint "alleges liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Id.* at 138.

### I. Copyright Infringement

Here, under the *GAF Sales* analysis, the first of the three elements for determining whether coverage exists is "an 'advertising injury' as defined in the policy." *GAF Sales, supra* at 262. An advertising injury is an "injury arising out of one or more of the [] offenses" that are set forth in the policy. "Infringement of copyright" is one of the enumerated offenses.

The second element set forth in *GAF Sales* is that there be a "course of advertising" by the insured. In *GAF Sales, supra* at 263-264, this Court observed that there were divergent definitions of "advertising." A narrow definition would limit advertising to promotional activities directed to the public in general, while a broad definition would include any statement in connection with the solicitation of business. *Id.* at 263-264. The Court declined to adopt either definition. *Id.* at 264. In *Shefman, supra* at 304 n1, this Court likewise determined that it was not necessary to decide whether the trial court should have used a narrow or broad definition of advertising. We too decline to adopt either view because that determination is not necessary to a decision in this matter. As in *GAF Sales, supra*, and *Shefman, supra*, we direct our attention to the third element, a causal connection.

As the Third Circuit Court of Appeals noted in *Frog, Switch & Mfg Co v Travelers Ins Co*, 193 F3d 742, 750 n 8 (CA 3, 1999), there is "much confusion in the caselaw concerning when an 'advertising injury' is 'caused' by advertising within the meaning of standard business insurance policies." Courts have not consistently and clearly indicated that the focus of the causal connection element is whether an injury was caused by an offense committed in the course of the insured's advertising. *Id.* That inquiry does not merely refer to whether advertising was a cause in fact of the underlying plaintiff's damages. *Id.* Rather, it is in the context of the causal connection element that courts must also analyze and enforce the policy language requiring that the alleged offense causing the injury is one that was "committed in the course of [the insured's] advertising." *Id.*

This Court's decision in *Shefman, supra*, illustrates that the causal connection element is directed at both inquiries. In that case, the insured was the developer of a condominium complex that agreed with another developer ("Timberlane") for it to purchase and develop two units.

*Shefman, supra* at 301. Timberlane allegedly developed and sold one unit, but the insured attempted to cancel the agreement with regard to the second unit. *Id.* The insured then constructed two units that duplicated Timberlane's design of the first unit. *Id.* Timberlane filed actions against the insured in state and federal court. *Id.* at 301-302. In a declaratory action, this Court agreed with the trial court that the insurer was not required to defend the insured in the action involving Timberlane. *Id.* at 303-304. This Court held that Timberlane's complaints "did not allege any causal connection between an alleged advertising injury suffered by Timberlane and advertising by plaintiffs[.]" *Id.* at 303-304. This Court explained:

As noted by the trial court, Timberlane asserted in each lawsuit that plaintiffs wrongfully constructed and sold homes that were built using Timberlane's misappropriated designs, and that Timberlane incurred damages because of the construction and sale of those homes. Timberlane did not allege that plaintiffs used the allegedly misappropriated designs in plaintiffs' advertising or that damages resulted from such advertising; therefore, the necessary third element cannot be established. [*Id.* at 304.]

The last sentence refers to two deficiencies. The latter, that the Timberlane complaint did not allege that "damages resulted from advertising," reflects that the causal connection element requires a causal connection between the alleged injury and advertising. The former, that the Timberlane complaint did not allege that the misappropriated designs were used in the insured's advertising, reflects that the element also requires that the offense was committed in the course of advertising. Consideration of both aspects is therefore appropriate in analyzing the causal connection element.

In the present case, the Unisys complaint alleges copyright infringement. Plaintiffs contend that the allegations concerning representations to potential and actual customers involve a "course of advertising." Even if we accepted that position, however, the complaint does not allege that copyright infringement was committed in the course of plaintiffs' advertising. Therefore, copyright infringement is not a theory of recovery that arguably falls within the scope of coverage under defendant's policy and, accordingly, does not trigger defendant's duty to defend.

## II. Trademark Infringement

With respect to the trademark infringement claim, the first element, which concerns the definition of "advertising injury," is contested. Specifically, we must determine whether the Unisys complaint alleges an injury arising out of "[m]isappropriation of advertising ideas or style of doing business[.]"

The pertinent allegations in the Unisys complaint are as follows:

59. Defendants have falsely represented to potential and actual customers that their diagnostic software and related written materials are original works of WMC/Varilease.

60. Defendants have falsely represented to their potential and actual customers that WMC/Varilease is properly licensed or otherwise permitted by

Unisys to copy and use Unisys Maintenance and Product Support Materials, and its Diagnostic Software, in carrying out their obligations under commercial and government contracts to service and maintain Unisys computer systems.

61. By the conduct described above, Defendants have infringed and will continue to infringe on Unisys copyrights, trademarks and other proprietary rights in its Maintenance and Product Support Materials and its Diagnostic Software, and have misrepresented and will continue to misrepresent the origin of WMC/Varilease's diagnostic software and related written materials that improperly copied or converted Unisys proprietary software and materials.

62. Defendants' wrongful conduct described above has caused and will continue cause third parties confusion, mistake, or uncertainty as to the origin, sponsorship, or approval of Defendants' diagnostic software and related written materials. Unisys has been damaged and will continue to be damaged by these acts of Defendants.

63. Defendant's conduct violates the Lanham Act, § 43(a), 15 U.S.C. § 1125(a).

The allegations concern two distinct actions: (1) plaintiffs falsely representing the origin of Varilease's diagnostic software and materials as being Varilease's original works, which were actually copied or converted from Unisys software and materials, and (2) plaintiffs falsely representing to customers that they were licensed by Unisys to copy and use Unisys' software and materials.

Defendant's argument focuses on the former, which defendant characterizes as a claim of "reverse passing off."<sup>1</sup> Much of defendant's brief focuses on caselaw holding that misappropriating another's product or design is not an advertising injury. See, e.g., *GAF Sales, supra*. In this case, however, the trial court did not base its decision on the alleged misappropriation of Unisys software. Rather, the court held that the claim of trademark infringement "appears to be based on [Unisys'] assertion that Varilease falsely presented itself as licensed to use Unisys' diagnostic software and support materials."

We recognize, as did the trial court, that there are conflicting authorities concerning whether trademark infringement may constitute "misappropriation of advertising ideas or style of doing business." Compare *Advance Watch Co v Kemper Nat'l Ins Co*, 99 F3d 795, 802-803 (CA 6, 1996) (trademark and trade dress infringement are not "misappropriation of advertising ideas or style of doing business"); *Bay Electric Supply, Inc v Travelers Lloyds Ins Co*, 61 F Supp 2d

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<sup>1</sup> "Passing off (or palming off, as it is sometimes called) occurs when a producer misrepresents his own goods or services as someone else's. 'Reverse passing off,' as its name implies, is the opposite: The producer misrepresents someone else's goods or services as his own." *Dastar Corp v Twentieth Century Fox Film Corp*, 539 US 23, 28 n 1; 123 S Ct 2041; 156 L Ed 2d 18 (2003) (citations omitted).

611, 617 (SD Tex, 1999) (“misappropriation of advertising ideas or style of doing business encompasses claims for trademark and trade dress infringement”); *Adolfo House Dist Corp v Travelers Property & Cas Ins Co*, 165 F Supp 2d 1332, 1349 (SD Fla, 2001) (rejecting the position of *Advance Watch*.)

For purposes of this case, we need not decide whether “misappropriation of advertising ideas or style of doing business” includes or excludes trademark or trade dress infringement generally, as held in *Advance Watch, supra*. That categorical inclusion or exclusion places too much weight on the label for the claim, as opposed to its substance.

[A]n insurer’s duty to defend . . . does not depend solely upon the terminology used in a plaintiff’s pleadings. Rather, it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists. . . . [S]o must the allegations be examined to determine the substance, as opposed to the mere form, of the complaint. [*Michigan Educational Employees Mut Ins Co v Karr*, 228 Mich App 111, 113; 576 NW2d 728 (1998) (citations and internal quotation marks omitted).]

Here, the issue is not whether trademark or trade dress infringement claims as a category involve “misappropriation of advertising ideas or style of doing business,” but rather whether the specific allegations in the Unisys complaint allege “misappropriation of advertising ideas or style of doing business.” We conclude that they allege neither. The Unisys complaint does not implicate any Unisys “advertising ideas.” Moreover, the allegations that plaintiffs falsely represented that they were licensed or permitted by Unisys to use its diagnostic software and support materials do not implicate Unisys’ “style of doing business.” Thus, the trial court erred in concluding that the allegations of trademark infringement involved “misappropriation of advertising ideas or style of doing business.” Accordingly, a duty to defend was not triggered and defendant was entitled to summary disposition.

Having concluded that a duty to defend was not triggered, we need not address whether a policy exclusion barred coverage.

Reversed. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Kirsten Frank Kelly  
/s/ Harold Hood