EXHIBIT 12

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Citation: **219 Va. 101**

*219 Va. 101, *; 245 S.E.2d 249, **;*
*1978 Va. LEXIS 165, ****

Theodore N. Lerner, et al., partners, doing business as Tyson's Corner Regional Shopping Center v. General Insurance Company Of America trading as Safeco Insurance

Record No. 770237

Supreme Court of Virginia

219 Va. 101; 245 S.E.2d 249; 1978 Va. LEXIS 165

June 9, 1978

PRIOR HISTORY: [*1]**
Error to a judgment of the Circuit Court of Fairfax County. Hon. James Keith, judge presiding.

DISPOSITION: *Reversed and final judgment.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured sought review of judgment from the Circuit Court of Fairfax County (Virginia) in its suit against defendant insurer for reimbursement of reasonable attorney's fees and other costs expended by insured in successfully defending a claim for punitive damages.

OVERVIEW: Plaintiff sought review of judgment in its suit against defendant for reimbursement of reasonable attorney's fees and other costs expended by insured in successfully defending a claim for punitive damages. On appeal, the judgment was reversed. In support of its ruling, the court held that the punitive damages claim, though deemed groundless, was ancillary to the claim for compensatory damages which defendant previously conceded it was obligated to defend against and pay on. It necessarily followed, said the court, that defendant's duty to defend extended to the occurrence and both the compensatory and punitive damage claims arising therefrom. Accordingly, defendant's refusal to defend the punitive damages claim was deemed a breach of its covenant to defend, for which it was liable.

OUTCOME: The judgment was reversed.

CORE TERMS: punitive damages, insured, punitive damages claim, duty to defend, insurer, bodily injury, public policy, compensatory damages, occurrence, groundless, property damage, covenant, own risk, insurer to defend, fraudulent, defending, insufficient to support, legal representation, obligation to defend, policy contained, insurance policy, punitive damage, matter of law, coverage, compensatory, ancillary, expended, trading

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HEADNOTES:
(1) Insurance -- Liability -- Insurer's Duty to Defend -- Duty Broader than Obligation to Pay.
(2) Insurance -- Liability -- Insurer's Duty to Defend -- Allegations of Complaint Leaving in Doubt whether Policy Coverage -- Insurer Fails to Defend at Own Risk.

(3) Insurance -- Liability -- Insurer's Duty to Defend -- Punitive Damages Claim-Insurer Liable for Failure to Defend.

A liability insurer failed to defend insured against a claim for punitive damages under a policy covering liability for damages because of "bodily injury or property damage . . . caused by an occurrence" with a duty on the insurer to defend "any suit against the insured seeking damages on account of such bodily injury . . . even if the allegations of the suit are groundless, false or fraudulent . . . ." The policy contained no exclusions from coverage for punitive damages or claims for punitive damages. The insured was required to retain counsel to defend the punitive damages claim which was dismissed at trial, the Court holding as a matter **[***2]** of law that the evidence was insufficient to support the claim. The insured then sued the insurer for its counsel fees expended in defending the punitive damages claim and the Trial Court held the insurer had no duty to defend because public policy precluded insurance against punitive damages.

1. Without deciding the question of public policy in insurance coverage of punitive damage claims, this matter being best left to the General Assembly and being unnecessary to the decision, under the terms of its policy the insurer's duty to defend was broader than its duty to pay and arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy.

2. While under the provisions of the policy, the insurer has no obligation to defend an action against the insured when, under the allegations of the complaint, it would not be liable under its contract for any recovery; yet if those allegations leave in doubt whether the case is covered by the policy, the refusal by the insurer to defend is at its own risk. If it turns out that the case is covered by the policy, the insurer is necessarily liable for breach of its **[***3]** covenant to defend.

3. The punitive damages claim, although found groundless, was ancillary to the claim for compensatory damages. The duty to defend extended to the "occurrence" and both the compensatory and punitive damages claims arose therefrom. The insurer's refusal to defend the punitive damages claim constituted a breach of its covenant to defend for which it is liable.

SYLLABUS:

> *Liability insurer fails to defend claim for punitive damages at its own risk when punitive damages claim was ancillary to claim for compensatory damages, the duty to defend extending to the occurrence and both claims arising therefrom; insurer liable for counsel fees when claim for punitive damages dismissed as a matter of law.*

COUNSEL: *William E. Donnelly, III (Gerald R. Walsh; McCandlish, Lillard, Bauknight, Church & Best*, on brief) for plaintiffs in error.

Adelard L. Brault (Brault, Lewis, Geschickter & Palmer, on brief) for defendant in error.

JUDGES: Harman, J., delivered the opinion of the Court.

OPINION BY: HARMAN

OPINION: [*102] [250]** This case presents the question of an insurance company's responsibility to reimburse its insured for reasonable attorney fees and other **[***4]** costs expended by the insured in successfully defending a claim for punitive damages.

The case was heard and decided by the trial court upon stipulations of fact and agreed

exhibits. Theodore N. Lerner, et al., partners, trading as Tysons Corner Regional Shopping Center (Tysons), are the owners and operators of a large commercial development of retail stores and other businesses in Fairfax County. General Insurance Company of America, trading as Safeco Insurance (Safeco), insured Tysons under a "blanket liability" insurance policy wherein Safeco agreed to pay

> ". . . on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence. [Safeco] shall **[**251]** have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient. . . . ."

This policy was in full force and effect on August 8, 1973, when **[*103]** **[***5]** Patricia Cassidy and her young daughter, Michelle (the Cassidys), were alleged to have suffered damages. By their stipulations, the parties agreed that the event alleged by the Cassidys constituted an "occurrence" as defined in the policy and that the policy contained "no exclusions from coverage for punitive damages or claims for punitive damages."

The Cassidys filed suit against Tysons on April 30, 1974, seeking to recover compensatory damages in the amount of $ 50,000 and punitive damages in the amount of $ 500,000 on account of alleged bodily injury suffered by Michelle Cassidy on August 8, 1973. When notified of this suit, Safeco advised Tysons that it would defend only against the claim for compensatory damages and that Tysons should secure separate legal representation for the punitive damage claim. Safeco further advised Tysons that Safeco "would decline to pay any award for punitive damages."

The stipulations further tell us "Tysons was obliged to secure separate legal representation to raise all matters of defense to the claims for punitive damages." At the conclusion of the Cassidys' evidence at trial of their action, the court held, as a matter of law, that the evidence **[***6]** was insufficient to support the claim for punitive damages and dismissed that claim. Tyson's counsel fees and other expenses in defending the punitive damages claim reasonably amounted to $ 4111.00.

On the basis of these facts, the trial court held that Safeco had no duty to defend Tysons against the claim for punitive damages because public policy prohibits insurance against indemnity for punitive damages.

We reverse. In doing so, however, we do not reach the public policy question * since decision on that issue, a matter best left to the General Assembly, is unnecessary to our decision here.

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* The same public policy argument raised here, *i.e.* that public policy prohibits one from insuring against punitive damages, was also raised, but not decided, in *Lipscombe v. Security Ins.*, 213 Va. 81, 189 S.E.2d 320 (1972). Our holding there, that the insured-victim under an uninsured motorist policy could recover punitive damages from his own insurance carrier,

was based on the provisions of the uninsured motorist statute, Code § 38.1-381(b).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[***7]**

[1] Under the insurance policy here at issue, Safeco had both "the right and the duty to defend any suit against the insured seeking damages on account of bodily injury or property damage, even if any of the allegations of the suit are groundless, false or **[*104]** fraudulent." Under such a provision, an insurer's obligation to defend is broader than its obligation to pay, and arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy. *Sturges Mfg. Co.* v. *Utica Mut. Ins. Co.*, 37 N.Y.2d 69, 72, 332 N.E.2d 319, 321 (1975); *Lee* v. *Aetna Casualty & Surety Co.*, 178 F.2d 750, 752-53 (2nd Cir. 1949); Annot. 50 A.L.R.2d 458, 506-07 (1956); 14 Couch on Insurance 2d § 51:44 (1965).

[2] It should be noted, however, that such a provision places no obligation on the insurer to defend an action against the insured when, under the allegations of the complaint, it would not be liable under its contract for any recovery therein had. *Travelers Indem. Co.* v. *Obenshain, Committee*, 219 Va. 44, 245 S.E.2d 247 (1978) (this day decided); *Accident Corp.* v. *Washington Co.*, 148 Va. 829, **[***8]** 843-44, 139 S.E. 513, 517 (Spec. Ct. App. 1927). But, as we said in *London Guar. Co.* v. *White & Bros.*, 188 Va. 195, 199-200, 49 S.E.2d 254, 256 (1948):

> "While the duty to defend is, in the first instance, to be determined by the allegations of the notice of motion, yet if those allegations leave it in doubt whether the case alleged is covered by the **[**252]** policy, the refusal of the insurance company to defend is at its own risk; and if it turns out on development of the facts that the case is covered by the policy, the insurance company is necessarily liable for breach of its covenant to defend. . . ."

[3] In the case at bar, Safeco concedes that it was obligated to defend against and to pay any compensatory damages awarded to the Cassidys in their suit. The punitive damages claim, although found groundless by the trial court, was ancillary to the claim for compensatory damages. It necessarily follows that the duty to defend extended to the occurrence and both the compensatory and punitive damage claims arising therefrom. In these circumstances, the refusal by Safeco to defend the punitive damages claim constituted a breach of its covenant to defend for **[***9]** which it is liable.

For these reasons, the judgment of the trial court will be reversed and vacated, and judgment will be entered here for Tysons against Safeco for $ 4111.00, the amount which Tysons reasonably spent in its defense of the punitive damages claim.

Reversed and final judgment.

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EXHIBIT 13

Service: **Get by LEXSEE®**
Citation: **188 Va. 195**

*188 Va. 195, *; 49 S.E.2d 254, **;*
*1948 Va. LEXIS 157, ****

LONDON GUARANTEE & ACCIDENT COMPANY, LTD. v. C. B. WHITE AND BROS., INC.

Record No. 3356

Supreme Court of Virginia

188 Va. 195; 49 S.E.2d 254; 1948 Va. LEXIS 157

September 8, 1948

PRIOR HISTORY: [*1]**

Error to a judgment of the Court of Law and Chancery of the city of Norfolk. Hon. J. Hume Taylor, judge presiding.

DISPOSITION: *Affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Defendant insurance company appealed the judgment of the Court of Law and Chancery of the City of Norfolk (Virginia), which required the insurance company to reimburse plaintiff insured $ 613.50, the amount of a judgment obtained against the insured in a personal injury action which the insurance company had refused to defend.

OVERVIEW: The policy at issue covered a dump truck owned by the insured, a retail coal dealer. While the insured was delivering coal to a customer, a woman was injured when she fell on a lump of coal on the sidewalk. The insured's truck had dumped its load of coal at the curb and from there the insured's employees shoveled the coal into the customer's bin. The insurance company refused to defend the insured in the woman's personal injury suit. The insured brought suit against the insurance company for reimbursement of the personal injury judgment against it. On appeal, the court affirmed the judgment in favor of the insured, holding that the insurance policy covered the insured's delivery of coal to the customer. Adopting the "complete operation" doctrine, the court held that "unloading" in the policy's "loading and unloading" clause covered the entire process of transportation of the insured's goods. The delivery of coal to the customer could not be accomplished unless it was shoveled into the bin; thus, the act of shoveling was not an act separate from and independent of the use of the truck, but was a step attached to the truck's use and necessary to accomplish the truck's purpose.

OUTCOME: The court affirmed the trial court's judgment that required the insurance company to reimburse the insured for the amount of a personal injury judgment obtained against the insured in a suit the insurance company refused to defend.

CORE TERMS: truck, unloading, coal, insured, sidewalk, loading, manhole, deliver, customer, unloaded, beer, shoveling, delivery, bin, dump truck, pedestrian, basement, insurer, transportation, coverage, dumped, notice, curb, feet, girders, contracted, shoveled,

lump, load, barrel

LexisNexis(R) Headnotes ◆ Hide Headnotes

Insurance Law > General Liability Insurance > Obligations > Defense

HN1 An insurance policy casts upon an insurance company the duty to defend, initially at least, only if the suit against its insured states a case covered by the policy. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Types of Contracts > Covenants

Insurance Law > General Liability Insurance > Obligations > Defense

HN2 While the duty to defend is, in the first instance, to be determined by the allegations of the notice of motion, yet if those allegations leave it in doubt whether the case alleged is covered by the policy, the refusal of the insurance company to defend is at its own risk; and if it turns out on development of the facts that the case is covered by the policy, the insurance company is necessarily liable for breach of its covenant to defend. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN3 The whole document should be construed in the light of the subject matter with which the parties are dealing and the words or phrases of the policy should be given their natural and ordinary meaning as understood in the business world. More Like This Headnote | *Shepardize:* Restrict By Headnote

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HEADNOTES: 1. ACCIDENT, CASUALTY, HEALTH AND INDUSTRIAL INSURANCE -- *Provision of Policy Requiring Defense of Suits -- Suit against Insured Must State Case Covered by Policy -- Case at Bar.* -- The instant case was a suit by insured against an insurance company under a liability policy covering a dump truck, which required the company to defend suits against the insured "alleging such injury and seeking damage on account thereof, even if such suit is groundless, false or fraudulent." The insurance company contended that in order for it to be required to defend a suit it was necessary that the notice of motion allege facts which brought the case within the terms of the policy. Plaintiff asserted that the basis of liability stated by the notice was the negligence of the plaintiff "in the act of unloading the coal on the sidewalk" and that consequently there was an obligation to defend, regardless of the merits of the suit or the truth of the statement in the notice.

Held: That the insurance policy cast upon the defendant the duty to defend, initially **[***2]** at least, only if the suit against its insured stated a case covered by the policy.

2. ACCIDENT, CASUALTY, HEALTH AND INDUSTRIAL INSURANCE -- *Policy Covering Dump Truck Including Loading and Unloading Covers Transportation to Point Where Goods Turned Over to Consignee.* -- A liability insurance policy covering a truck including "the loading or unloading thereof" covers, as respects unloading, the entire process of transportation to the point where the goods are turned over to the party for whom intended at the agreed place of delivery. This theory of liability is called the "complete operation" doctrine.

3. INSURANCE -- *Construction of Insurance Policy -- Words and Phrases Given Natural and Ordinary Meaning.* -- In construing an insurance policy the whole document should be

construed in the light of the subject matter with which the parties are dealing and the words or phrases of the policy should be given their natural and ordinary meaning as understood in the business world.

4. ACCIDENT, CASUALTY, HEALTH AND INDUSTRIAL INSURANCE -- *Policy Covering Dump Truck Including Loading and Unloading Covers Transportation to Point Where Goods Turned Over to Consignee* -- **[***3]** *Case at Bar.* -- The instant case was a suit by insured against an insurance company under a liability policy covering a dump truck, the policy covered the use of the truck in the business of the insured, as a coal dealer and included the loading and unloading thereof. Evidence showed that plaintiff contracted to deliver coal and while two of his employees shoveled coal which was dumped from the truck into a manhole, a pedestrian tripped over a piece of coal and was injured. The truck was at the time about one hundred feet from the dumping place on its way for another load of coal to be delivered. The plaintiff's contract was to deliver the coal into the bin of the customer and the evidence showed that that was its practice and contract in all of its sales.

Held: That under the plaintiff's contract and its practice, the unloading was not completed until the coal was loaded into the bin in the basement. Only by shoveling could the mission of the truck be accomplished and such shoveling was an integral part of the unloading process and there was no sound reason for excepting it from the coverage of the policy.

SYLLABUS: The opinion states the case.

COUNSEL: *Eastwood D. Herbert,* **[***4]** for the plaintiff in error.

Rixey & Rixey, for the defendant in error.

JUDGES: Present, Hudgins, C.J., and Eggleston, Buchanan, Staples and Miller, JJ.

OPINION BY: BUCHANAN

OPINION: [*196] [255]** BUCHANAN, J., delivered the opinion of the court.

The defendant below, London Guarantee & Accident Company, Ltd., herein referred to as defendant or insurance company, issued its policy of liability insurance to C. B. White and Bros., Inc., plaintiff below, herein referred to as plaintiff or insured, covering a dump truck used by the plaintiff in its business of retail coal dealer in Norfolk.

While plaintiff was delivering coal to a customer, under **[*197]** the circumstances to be related, a Mrs. Gurganus was injured by falling over a lump of coal on the sidewalk. She brought suit against plaintiff for damages, which the insurance company refused to defend. It was settled at a cost to plaintiff of $613.50. Plaintiff thereupon brought this suit against the insurance company for reimbursement and recovered a judgment for said amount. Its right to that judgment is the question at issue on this appeal.

The trial court instructed the jury that there was an obligation on the **[***5]** insurance company under the policy to defend the action brought by Mrs. Gurganus. The parties stipulated that if there was anything due the plaintiff, the whole amount of $613.50 was due. We are, therefore, not concerned with the amount of the verdict or its items.

By the policy, in "Coverage A," the insurance company contracted, among other things, to pay all damages for which the insured is made liable by law for bodily injury sustained by any person caused by accident and arising out of the ownership, maintenance or use of the truck. Use of the truck was stated to be "commercial," which was defined as use principally in the business occupation of the insured (coal and fuel dealer), including "the loading and unloading thereof."

The policy further provided that "as respects such insurance as is afforded by the other terms of this policy" under Coverage A, the company shall defend "any suit against the insured alleging such injury * * * and seeking damages on account thereof, even if such suit is groundless, false or fraudulent."

The notice of motion in the suit of Mrs. Gurganus, after amendment, alleged that the insured and its co-defendant, Old Dominion Paper Company, **[***6]** negligently threw or placed lumps of coal on the sidewalk, "said coal having been unloaded upon the said *sidewalks,* in violation of the ordinances of the City of Norfolk by C. B. White and Brothers, Incorporated, from a truck or trucks owned, operated and controlled by said C. B. White and Brothers, Incorporated, which coal was ordered to be unloaded at **[*198]** said place by the Old Dominion Paper Company," and that the defendants negligently permitted said lumps of coal to remain on the sidewalk and failed to give warning thereof, thereby rendering said sidewalk unsafe for pedestrians.

The insurance company argues that in order for it to be required to defend that suit, it was necessary that the notice of motion allege facts which brought the case within the terms of the policy, and that it did not do so. On the other hand, the plaintiff asserts that the basis of liability stated by the notice, "in part at least," is the negligence of the plaintiff "in the act of unloading the coal on the sidewalk;" and that consequently there was an obligation to defend, regardless of the merits of the suit or the truth of the statement in the notice.

[1] We agree that HN1 the insurance **[***7]** policy cast upon the defendant the duty to defend, initially at least, only if the suit against its insured stated a case covered by the policy. So we have held and so it seems to be generally held.

In *Ocean Acci, etc., Corp.* v. *Washington Brick, etc., Co.,* 148 Va. 829, 139 S.E. 513, a clause was considered likewise making it the duty of the insurance company to defend any suits against its insured, although "wholly groundless, false or fraudulent." It was **[**256]** contended there that the insurance company was bound by the terms of its policy to defend all suits. But it was held that it would be illogical to say that this provision concerning the obligation to defend was intended to bind the insurer to defend a suit in which, under the terms of the policy, it had no interest; that this language of the policy must be read in connection with the fundamental contractual obligation appearing upon the face of the contract between the parties, which was that the insurer would indemnify the insured only in case of recovery of damages by employees legally employed. It was said:

* * * "In our opinion the only reasonable construction of the policy here is that the insurer **[***8]** was under no obligation to defend the case against the insured when it would not be liable under its contract for any recovery therein **[*199]** had. On the contrary, it should refrain from interfering in any way with the insured in respect to its defense of the case." (148 Va. 829, 844, 139 S.E. 513, 517).

Cf. Maryland Cas. Co. v. *Cole,* 156 Va. 707, 158 S.E. 873, in which the basis of the action was the failure of the insurer to defend, under a policy which the record on file shows bound the insurer to "investigate all accidents and claims covered hereunder, and defend in the name and on behalf of the Assured all suits thereon, even if groundless, * * *."

In *Fessenden School* v. *American Mut. Liability Ins. Co.,* 289 Mass. 124, 193 N.E. 558, 561, it was said:

* * * "We think the contention of the defendant is sound, that the obligation of the defendant insurance company is to be determined by the allegations of the declaration and it is not required to defend if it would not be held bound to indemnify the defendant in the action if the plaintiff prevailed upon the allegations of the declaration. * * *." Citing *Ocean Acci., etc.,*

Corp. v. *Washington Brick,* **[***9]** *etc., Co., supra,* and many other cases.

See also, *Brodek* v. *Indemnity Ins. Co.,* 292 Ill. App. 363, 11 N.E.2d 228; *Luchte* v. *State Auto. Mut. Ins. Co.,* 50 Ohio App. 5, 197 N.E. 421, 3 Ohio Op. 411; *Daniel* v. *State Farm Mut. Ins. Co.,* 233 Mo. App. 1081, 130 S.W.2d 244; *Duval* v. *Aetna Cas., etc., Co.,* 304 Mich. 397, 8 N.W.2d 112.

When we look to the notice of Mrs. Gurganus, it is at least uncertain whether it alleges a case covered by the policy. It alleges that the piece of coal stumbled over was one "having been unloaded," a past transaction; and which "was ordered to be unloaded at said place by the Old Dominion Paper Company." The time of unloading and the place of unloading are two vital elements in the question of liability under the policy, and the allegations of the notice are not such as to be conclusive upon the question, as we shall show.

HN2 While the duty to defend is, in the first instance, to be determined by the allegations of the notice of motion, yet if those allegations leave it in doubt whether the case alleged **[*200]** is covered by the policy, the refusal of the insurance company to defend is at its own risk; and if it **[***10]** turns out on development of the facts that the case is covered by the policy, the insurance company is necessarily liable for breach of its covenant to defend. The defendant admits that to be true and states in its brief that "if this Court upholds the lower court in extending coverage of the policy to the facts of this case, then the defendant is liable for the agreed damages."

The evidence shows that the plaintiff had contracted to deliver the coal that was being hauled by this truck to its customer, Old Dominion Paper Company, in the bin under the customer's store. Access to this bin was through a manhole in the sidewalk in front of the store, located 4 feet 8 inches from the front of the building and 13 feet 10 inches from the curb. The first load of the order had been delivered by a conveyor truck, not covered by the policy. This method would not work, so the balance was being delivered by the dump truck. Two employees of the plaintiff went with the conveyor truck and remained at the store to handle the coal from the dump truck into the customer's bin. No coal had been left on the sidewalk from the conveyor truck. The dump truck dumped its load at the edge of the curb **[***11]** and from there the two **[**257]** employees shoveled it into the manhole. They were thus engaged when Mrs. Gurganus came along walking between the store and the manhole. She tripped, or in some manner fell over a piece of the coal and was injured. The truck was then about 100 feet away from the dumping place, returning to its loading place for another load of the coal to be delivered.

The sidewalk sloped from the building to the curb and one of plaintiff's men, who was shoveling the coal, testified that none of the coal rolled on the sidewalk when it was dumped. The necessary inference is that the piece of coal which caused Mrs. Gurganus to fall was there as a result of shoveling the load of coal, which had been dumped by the truck, from the curb through the manhole into the bin where the plaintiff had contracted to deliver it.

[*201] There are two theories in regard to liability under the "loading and unloading" clause of the policy in judgment. One is called the "coming to rest" doctrine. Under this doctrine "unloading" is given a narrow construction and is held to extend only to the actual lifting of the article from the motor vehicle to a place of rest outside **[***12]** the vehicle, and the connection of the vehicle with the process of unloading has ceased. A leading case adopting this theory is *Stammer* v. *Kitzmiller,* 226 Wis. 348, 276 N.W. 629. There a pedestrian fell into a manhole in the sidewalk which had been left open by an employee of a brewery company, who was using one of its trucks to deliver beer to a tavern. He parked the truck at the curb, opened the manhole, removed a barrel of beer from the truck, and put it through the manhole, which he left unguarded while he went inside the tavern to have a sales slip signed. It was held that the insurance company was not liable under the loading and unloading provision of its contract, on the ground that

* * * "The stipulation to pay all losses and expenses imposed by law under the clause quoted does not carry the liability to the insurer beyond what may be described as the natural territorial limits of an automobile and the process of loading and unloading it. When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile **[***13]** has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile then may be said to be no longer in use. * * *." (276 N.W. 629, 631).

[2] The other theory of liability is called the "complete operation" doctrine. It gives to the "loading and unloading" clause a broader construction and interprets it to cover, as respects unloading, the entire process of transportation to the point where the goods are turned over to the party for whom intended at the agreed place of delivery.

[*202] A leading case applying this rule is *State* v. *District Court,* 110 Mont. 250, 100 P.2d 932. There a brewing company was engaged in delivering a barrel of beer into the basement of a customer through a hinged door in the sidewalk. The beer had been taken from the truck and placed on the sidewalk; the servant of the company then entered the customer's place of business, proceeded to the basement and lifted the door in the sidewalk just as a pedestrian stepped on it. It was held that the accident was covered by the insurance policy, the court saying:

"We hold that under the facts here presented **[***14]** the unloading of the truck was a continuous operation from the time the truck came to a stop and the transportation ceased until the barrel of beer was delivered to the customer. The unloading of the truck cannot be said to have been accomplished when the barrel of beer was placed upon the sidewalk. As well might it be argued that the loading of the truck consisted merely of the act of lifting commodities from the ground to the body of the truck. The loading of the truck would contemplate much more than that. It would embrace the entire process of moving the commodities from their accustomed place of storage or the place from which they were being delivered until they had been placed on the truck. So, too, the unloading thereof embraced the continuous act of placing the commodities where they were intended to be actually delivered by **[**258]** use of the truck. This being so, the insurance company policy has application. * * *." (100 P.2d 932, 934-35).

In *Wheeler* v. *London Guarantee, etc., Co.,* 292 Pa. 156, 140 A. 855, the insured had contracted to deliver steel girders inside of a garage building where they were to be used. The girders had been unloaded from the **[***15]** truck and the truck was standing across the street when a boy was hurt in attempting to climb over one of the girders, which was extending on to the sidewalk. The insurer declined to defend but it was held that the accident was covered by its policy, which contained the usual loading and unloading provision. The court said:

* * * "Unquestionably **[*203]** at the time of the accident plaintiffs were actually engaged in the transportation and delivery of merchandise and materials incidental to their business. The process of the transportation was commenced by loading at the factory the two steel girders on the truck and trailer, both insured under the policy, and was to be completed by delivery of the girders upon a space within the garage building. We think no reference to authorities or decisions is required to support here the elemental principle that this particular instance of transportation and delivery could not be completed, in the absence of direct or implied orders or directions to the contrary, until the merchandise was unloaded and delivered from the truck and trailer inside the garage building where intended for use, * * *." (140 A. 855, 856).

In *Pacific Auto.* **[***16]** *Ins. Co.* v. *Commercial Cas. Ins. Co.*, 108 Utah 500, 161 P.2d 423, 160 A.L.R. 1251, employees of a brewery company were delivering beer to a restaurant. They parked the insured truck at the curb, took the kegs of beer off and placed them on the sidewalk. One of the employees then went through the building and opened a manhole in the sidewalk and was taking the beer into the basement, where it was to be delivered. A blind man came along and fell into the manhole and the question involved was whether the lowering of the kegs into the basement was a part of the process of unloading the truck. It was held that it was, the court saying:

* * * "Practically all authorities are agreed that in such insurance contracts the phrase 'including loading and unloading' is a phrase of extension. It expands the expression 'the use of the truck' somewhat beyond its connotation otherwise so as to bring within the policy some acts in which the truck does not itself play any part. * * *." (160 A.L.R. 1253).

"The necessary causal relationship between the use of the truck and the accident is apparent in the fact that the accident occurred in the course of making a commercial **[*204]** delivery **[***17]** in which delivery the use of the truck was an active factor or element.

"We conclude that the proper rule of construction of policies such as here involved is that the mission, or transaction, or function being performed by the insured's employees at the time of the accident is the controlling element in determining whether the situation from which the accident occurred is included in loading and unloading. The job being performed here, that part of the insured's business functioning at the time of the accident was that of making a proper commercial delivery. * * *, which was the purpose of which, and the field over which the policy of plaintiff was written, * * *." (*Idem,* p. 1258).

This case reviews a number of cases and discusses the divergent views. Appended to it in 160 A.L.R., beginning at page 1259, is a comprehensive note discussing the two doctrines and related questions under the "loading and unloading" clause, and many cases dealing with the subject. n1

n1 For additional discussion and citation of cases on the subject, see article at page 21 of the Spring issue, 1948, of "The Lawyer and Law Notes." The author refers to the "complete operation" rule as the modern doctrine and states that the modern trend seems to be to afford the insured complete protection and to hold that the loading and unloading clause "covers the entire process involved in the movement of goods from the moment when they are given into insured's possession until they are turned over to or delivered at their destination." **[***18]**

We hold that the "complete operation" doctrine should be adopted and applied to the case in judgment as better effecting **[**259]** the purpose of the policy and in keeping with the common understanding of its terms.

[3] * * * HN3 "The whole document should be construed in the light of the subject matter with which the parties are dealing and the words or phrases of the policy should be given their natural and ordinary meaning as understood in the business world. *Maryland Cas. Co.* v. *Cassetty*, 6 Cir., 119 F.2d 602, 603-4. n2

n2 This was a case construing an identical policy and holding the insurer liable where a pedestrian stumbled over a lump of coal from a pile which had been dumped from a truck and was being shoveled down a manhole into the basement where it was to be delivered. At the time of the accident the truck was about a block away. Practically the only difference

between that case and this is that the accident occurred after the coal was unloaded but before the shoveling process began.

See also, *Maryland Cas. Co.* v. *Tighe*, 9 Cir., 115 F.2d 297, in which the insured truck was being used to deliver vegetables to a restaurant. The truck was parked on the opposite side of the street from the restaurant. The servant of the insured carried vegetables across the street and delivered them; he then started back to the truck for more vegetables to deliver when he collided with and injured a pedestrian. The court found that at the time of the accident the servant was unloading the truck and the accident was therefore within the coverage of the policy.

In *B. & D. Motor Lines, Inc.* v. *Citizens Cas. Co.*, 181 Misc. 985, 43 N.Y.S.2d 486, (affirmed 267 A.D. 955, 48 N.Y.S.2d 472; leave to appeal denied, 49 N.Y.S.2d 274), the truck was sent to deliver cartons; the driver and helper unloaded them from the truck on to a hand conveyor, which was then pushed 30 feet to the entrance of the building, then 18 feet or more into the building, where it collided with a pedestrian. It was held the accident occurred before delivery was complete. "Unloading continues * * * until delivery is effected, and is a 'use' of the truck within the meaning of the policy." (43 N.Y.S.2d) 489-90).

See also, *Krasilovsky Bros. Truck Corp.* v. *Maryland Cas. Co.*, 54 N.Y.S.2d 60. **[***19]**

[*205] Here the subject matter was a dump truck to be used in the business occupation of the plaintiff. That occupation was the sale and delivery of coal. Delivery could not be made without unloading the truck, and that process, in addition to the *use* of the truck, was specifically covered by the policy.

[4] Neither could the business of delivering coal be accomplished by unloading the coal on the street or sidewalk. It would be of no use to the customer there, and the plaintiff's contract was to deliver it into the bin of the customer. Not only was that the plaintiff's contract in this case, but the evidence affirmatively shows that was its practice and contract in all of its sales. It is to be presumed that the insurance company knew the character of the plaintiff's business in which the truck was to be used. The policy of insurance specified that the truck was to be used in that business, and to emphasize that coverage, it specified it was to include unloading. Under the plaintiff's contract in this instance and its practice and contract in all instances, the unloading was not completed until the coal was unloaded into the bin in the basement.

[*206] **[***20]** If the lump of coal that caused the accident had been shoveled from the truck, very clearly the policy would have covered the accident, even under the "coming to rest" doctrine, as we understand the scope of that doctrine. We are unable to discern the logic of holding that there was no coverage if, instead of shoveling the coal from the truck, it was first dumped from the truck and then shoveled into the manhole. The act of shoveling was not an act separate from and independent of the use of the truck, but a step attached to its use and necessary to accomplish the purpose for which the truck was being used.

The ultimate purpose was to deliver the coal into the bin, and the policy stated it was to cover the unloading of the truck in its use for that purpose. Only by the shoveling could the mission of the truck be accomplished **[**260]** and its use be made effective. The shoveling was an integral part of the unloading process, and we perceive no sound reason for excepting it from the coverage of the policy.

The judgment complained of is

Affirmed.

Service: **Get by LEXSEE®**
Citation: **188 Va. 195**
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EXHIBIT 14

Service: **Get by LEXSEE®**
Citation: **256 Va. 288**

*256 Va. 288, *; 504 S.E.2d 849, **;*
*1998 Va. LEXIS 117, ****

MARTIN & MARTIN, INC. v. BRADLEY ENTERPRISES, INC., ET AL.

Record No. 972378

SUPREME COURT OF VIRGINIA

256 Va. 288; 504 S.E.2d 849; 1998 Va. LEXIS 117

September 18, 1998, Decided

PRIOR HISTORY: [*1]** FROM THE CIRCUIT COURT OF FAIRFAX COUNTY. M. Langhorne Keith, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant buyer sought review of the decision of the Circuit Court of Fairfax County (Virginia), which confirmed a jury verdict in appellee seller and appellee seller's president's favor in the buyer's action against the sellers for fraud and breach of contract.

OVERVIEW: The buyers alleged that the seller and seller's president breached an asset purchase agreement and fraudulently induced the buyer to execute the agreement. The trial court refused to permit the buyer to present parol evidence of an express warranty through the seller's president's purported statement, struck the buyer's breach of contract claim, and refused to permit a buyer's witness to testify regarding the seller's president's purported statement. On appeal, the court held that the trial court did not err by refusing to permit the buyer to present parol evidence. The court found that the agreement, construed in favor of the seller and the seller's president because the buyer drafted the purportedly ambiguous provisions, stated that all understandings between the parties were merged in the agreement. The court determined that because the agreement did not contain a warranty of the amount of annual gross sales, the buyer could not seek to establish such a warranty with parol evidence. The court concluded that the exclusion of the buyer's witness's testimony was within the sound discretion of the trial court and that the record failed to disclose that it had abused its discretion.

OUTCOME: The court affirmed the trial court's judgment confirming a jury verdict in appellee seller and appellee seller's president's favor.

CORE TERMS: deposition, warranty, gross sales, purchase agreement, parol evidence, ambiguity, interrogatory, annual, discovery, refusing to permit, purported, ambiguous, yogurt, frozen, answers to interrogatories, motion in limine, indemnify, excluding, responded, breached, covenant, deposed, cut-off, drafted, merged, abused, retail

LexisNexis(R) Headnotes ◆ Hide Headnotes

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN1 Courts must give effect to the intention of the parties as expressed in the language of their contract. In the event of an ambiguity in the written contract, such ambiguity must be construed against the drafter of the agreement. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Reviewability > Preservation for Review

HN2 An appellate court will not consider an argument that was not raised in the trial court. More Like This Headnote

JUDGES: OPINION BY JUSTICE LEROY R. HASSELL, SR.

OPINION BY: LEROY R. HASSELL, SR.

OPINION: [850] [*289]**

HASSELL, Justice.

The primary issue that we consider in this appeal is whether the trial court erred in refusing to permit the plaintiff to use parol evidence to explain a purported ambiguity in a contract.

Plaintiff, Martin & Martin, Inc., filed an amended motion for judgment against Bradley Enterprises, Inc., and its president, Robert J. Bradley, Jr. The plaintiff, a Virginia corporation, alleged in its amended motion that the defendants breached a contract, described as an asset purchase agreement, and that the defendants fraudently induced the plaintiff to execute that agreement.

The following facts are relevant to our disposition of this appeal. The plaintiff executed an asset purchase agreement with the defendants, in which Bradley Enterprises agreed to sell, transfer, and deliver to the plaintiff a retail frozen yogurt store in Fredericksburg for a price of $59,500. Bradley Enterprises had sold frozen yogurt at the store, and the plaintiff intended to continue to operate a retail frozen yogurt **[***2]** business.

The asset purchase agreement contained the following provisions which are pertinent in this appeal:

"Section 2. Indemnifications and Warrants [sic].

"2.1. Seller covenants and agrees to indemnify and hold harmless the Buyer from and against any loss, claim, liability, obligation or expense (including reasonable attorneys' fees) a) incurred or sustained by Buyer on account of any misrepresentation or breach of any warranty, covenant, or agreement of Seller contained in this Agreement or made in connection herewith . . . . **[*290]**

. . . .

"Section 3. Entire Agreement

"The exhibit hereto is an integral part of this agreement. All understandings and agreements between the parties are merged into this Agreement which fully and completely expresses

their agreements and supersedes any prior agreement of understanding relating to the subject matter, and no party has made any representations or warranties, expressed or implied, not herein expressly set forth. This Agreement shall not be changed or terminated except by written amendment signed by the parties hereto."

Judith A. Martin, president of Martin & Martin, Inc., signed the agreement on behalf of the plaintiff, **[***3]** and Robert Bradley executed the agreement on behalf of Bradley Enterprises.

Judith Martin testified at trial that Robert Bradley had represented to her, before she executed the contract, that the store had annual gross sales of approximately $ 168,000. Mrs. Martin stated that she relied upon this sales figure when Martin & Martin, Inc., decided to acquire the store. After the plaintiff began to operate the store, Mrs. Martin became concerned because of the low gross sales volume. Subsequently, Mrs. Martin obtained a report from the Virginia Department of Taxation which revealed that the store's annual gross sales were significantly lower than $ 168,000. Mr. Bradley testified that he informed Mrs. Martin and her husband, before the asset purchase agreement was executed, that the store generated between $ 70,000 and $ 80,000 in annual gross sales.

At trial, the plaintiff sought to introduce parol evidence of an express warranty through Mr. Bradley's purported statement that the store had annual gross sales of $ 168,000. The trial court refused to permit the plaintiff to present such evidence and, consequently, struck the plaintiff's breach of contract claim because, without the parol **[***4]** evidence, the plaintiff could not establish a contractual duty that the defendants could have breached. The trial court also refused to permit a witness to testify on behalf of the plaintiff. The case proceeded to the jury on the fraud claim, and the jury returned a verdict in favor of the defendants, which was confirmed by the trial court. The plaintiff appeals.

The plaintiff asserts that Mr. Bradley's representations to Mrs. Martin constituted a warranty of the gross sales revenue. Continuing, the plaintiff says that the language in the asset purchase agreement is **[*291]** ambiguous because Section 2 of the agreement requires the defendant Bradley Enterprises **[**851]** to indemnify the plaintiff for losses incurred because of any breach of warranty, but Section 3 of the agreement limits this defendant's liability to breaches of warranties that are actually expressed in the agreement. The plaintiff contends that it was entitled to present parol evidence to establish the terms of the warranty because of this purported ambiguity, and that the trial court failed to give effect to Section 2 of the agreement.

Responding, the defendants argue that if an ambiguity exists in the agreement, such ambiguity **[***5]** must be resolved in their favor because the plaintiff drafted the purportedly ambiguous provisions. We agree with the defendants.

The plaintiff drafted the asset purchase agreement. HN1 We "must give effect to the intention of the parties as expressed in the language of their contract." Rash v. Hilb, Rogal & Hamilton Co., 251 Va. 281, 286, 467 S.E.2d 791, 794 (1996); Foti v. Cook, 220 Va. 800, 805, 263 S.E.2d 430, 433 (1980); accord Worrie v. Boze, 191 Va. 916, 925, 62 S.E.2d 876, 880 (1951). In the event of an ambiguity in the written contract, such ambiguity must be construed against the drafter of the agreement. Mahoney v. NationsBank of Virginia, 249 Va. 216, 222, 455 S.E.2d 5, 9 (1995); Winn v. Aleda Constr. Co., 227 Va. 304, 307, 315 S.E.2d 193, 195 (1984).

Applying these principles, we hold that the trial court did not err by refusing to permit the plaintiff to present parol evidence. Section 3 of the agreement, which must be construed in favor of the defendants, states that all understandings and agreements between the parties are merged in the agreement and that no party has made representations or warranties that are not expressly set forth in the agreement. **[***6]** The agreement does not contain a

warranty of the amount of gross sales that the store generated annually, and, thus, the plaintiff may not seek to establish such warranty with parol evidence.

Next, the plaintiff argues that the trial court erred in refusing to permit her husband, James R. Martin, to testify as a witness at trial. Mr. Martin would have testified that he heard Mr. Bradley state to Mrs. Martin that the store had annual sales of $ 168,000.

On the morning before the trial commenced, the defendants made a motion in limine to exclude Mr. Martin's testimony. According to representations of counsel, upon which the trial court relied without objection, the following events occurred. The defendants filed a notice to take the discovery depositions of Mr. and Mrs. Martin. Before the depositions began, plaintiff's counsel informed defendants' **[*292]** counsel that "Mr. Martin would prefer to go on a business matter; that he had business to attend; and furthermore that he was not a material witness in the case; and there was no reason for him to be deposed."

The defendants' counsel replied that he had "no problem with excusing [Mr. Martin] for that deposition so long as [counsel] **[***7]** could rely on that assurance." Defendants' counsel conducted the discovery deposition of Mrs. Martin, and, during that deposition, she was asked: "is your husband a player or participant in Martin & Martin and its operations?" She responded: "He comes in and mops the floors occasionally but, other than that, no. He has other work." Additionally, Mrs. Martin was asked: "Apart from your testimony today, does your husband, if you know, have any knowledge that bears on the issues before the court in this litigation?" She responded: "Not really. He gets his information from me. He does not deal directly with any of the business matters. I confer with him. You know, we decide things together but the actual dealing with Mr. Bradley or any other, he does not participate on that level."

After the expiration of a discovery cut-off date, which had been established by a court order, the plaintiff submitted to the defendants a late answer to interrogatories that had been propounded timely by the defendants. The plaintiff's answer to an interrogatory stated that Mr. Martin may have knowledge of facts relevant to this litigation. Additionally, the plaintiff stated, in another interrogatory answer **[***8]** which was also filed after the discovery cut-off date, that Mr. Martin may have witnessed fraudulent representations made by Mr. Bradley.

The trial court refused to permit Mr. Martin to testify. The trial court, explaining its **[**852]** ruling, stated: "I sustain the objection. I think the defendants have been misled if we let Mr. Martin testify." * *

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* * The trial court's ruling, however, may have been based, in part, upon an inaccurate representation concerning the sequence of events during the discovery process. During oral argument on the motion in limine to exclude Mr. Martin's testimony, the defendants advised the trial court that the plaintiff had filed its answers to interrogatories prior to the deposition of Mrs. Martin and that one of the purposes of the subsequent deposition was to "clear up" any matters left uncertain or ambiguous by the interrogatory answers. However, the defendants deposed Mrs. Martin on April 23, 1997, and the plaintiff filed its answers to interrogatories on July 17, 1997, almost three months after Mrs. Martin's deposition. We conclude that the trial court did not abuse its discretion in excluding Mr. Martin's testimony because the plaintiff did not object or point out to the trial court that the deposition of Mrs. Martin had, in fact, occurred before the plaintiff answered the interrogatories.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***9]**

The plaintiff contends that the trial court abused its discretion in excluding Mr. Martin's testimony. We disagree. The decision to **[*293]** exclude Mr. Martin's testimony is within the sound discretion of the trial court, and the record simply fails to disclose that the trial court abused its discretion. The plaintiff also argues that when Mrs. Martin testified during her deposition, she was not the designated representative of the plaintiff corporation and, therefore, her responses could not bind the corporation. HN2 We do not consider this argument because it was not raised in the trial court. Rule 5:25.

Accordingly, we will affirm the judgment of the trial court.

Affirmed.