

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 2009-184 (WOB-JGW)

KSPED, LLC

PLAINTIFF

VS.

MEMORANDUM OPINION AND ORDER

VIRGINIA SURETY COMPANY, INC.

DEFENDANT

This matter is before the court on the parties' motions for summary judgment (Docs. #27, #28).

The court heard oral argument on these motions on Monday, April 11, 2011. Kevin Hoskins and Todd McMurtry represented the plaintiff, and Ashley Ward represented the defendant. Official court reporter Joan Averdick recorded the proceedings.

Discussion

This is a declaratory judgment action in which plaintiff, the Kentucky Speedway, LLC ("the Speedway"), seeks coverage under a commercial general liability policy issued by defendant for costs that the Speedway paid in defense and settlement of a wrongful death action filed against it, and others, by the estate of a woman who was killed while riding in a vehicle driven by a friend who had been served alcohol at the Speedway on August 15, 2004.

Although the Speedway demanded defense and indemnification

from defendant in that underlying action, defendant refused. This action ensued.

The policy in question, in a clause entitled "Liquor Liability," excludes coverage for bodily injury or property damage for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, or ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion only applies if you are in the business of manufacturing, distributing, or selling, serving or furnishing alcoholic beverages.

(Doc. 27-1 at 12-13) (emphasis added)

"Kentucky law mandates that exclusions in insurance policies should be narrowly construed as to effectuate insurance coverage." *Aetna Cas. & Surety Co. v. Comm.*, 179 S.W.3d 830, 839 (Ky. 2005) (citation omitted). "Moreover, any limitation on coverage or exclusion must be clearly stated in the policy in order to apprise the insured of such limitations." *Auto-Owners Ins. v. Veterans of Foreign Wars Post 5906*, 276 S.W.3d 298, 301 (Ky. App. 2009) (citation omitted).

The court finds the above emphasized language in this exclusion, as applied to these facts, to be ambiguous as a matter of law. While alcoholic beverages are sold at the Speedway,

those sales are handled through and made by concessionaires with whom the Speedway contracts for the provision of food and beverage services at the track. The Speedway does not hold a liquor license and does not employ the persons who sell alcohol at the track.

Viewing the above language favorably to the insured, the court cannot say with certainty that the Speedway is in the "business" of manufacturing, distributing, or selling, serving or furnishing alcoholic beverages, particularly where the policy does not define "business." See *Auto-Owners*, 276 S.W.3d at 301 (finding identical clause to be ambiguous as applied to VFW which made alcohol available to guests).

Therefore, this ambiguity must be construed in favor of coverage, and the Speedway's motion for summary judgment will be granted.

Therefore, having heard the parties, and the court being otherwise sufficiently advised,

IT IS ORDERED that:

(1) Plaintiff's motion for summary judgment (Doc. 27) be, and is hereby **GRANTED**, and defendant's motion for summary judgment (Doc. 28) be, and is hereby, **DENIED**; and

(2) **On or before May 2, 2011**, the parties shall tender for the court's signature a proposed judgment setting forth the

liquidated amount of the defense costs and other recoverable expenses incurred by plaintiff in the underlying action which are subject to coverage under the policy discussed herein.

This 14th day of April, 2011.



Signed By:

William O. Bertelsman *WOB*

United States District Judge

TIC: 17 min.