RENDERED: September 7, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000154-MR

L. T. RUNION; GREG STALEY;
DICK NEAL; and WHISPERING
WOOD NO. 5, A PARTNERSHIP — APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 98-CI-00488

STATE AUTOMOBILE INSURANCE COMPANY;
MOTORISTS MUTUAL INSURANCE COMPANY;
INDIANA INSURANCE COMPANY; and
TRI-CITY INSURANCE SERVICE, INC. — APPELLEES

and NO. 2000-CA-000477-MR

ROBIN RAMEY, as Mother and Next Friend,
Guardian and Custodian of the minor
children, JENNA RAMEY and ELI RAMEY;
ESTATE OF ROBERT RAMEY, by and through
its duly appointed Administratrix,
MARGO GRUBBS; JAMES STRICKLEY; JAN MUDD;
and JILL MUDD — APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 98-CI-00488

STATE AUTOMOBILE INSURANCE COMPANY;
MOTORIST MUTUAL INSURANCE COMPANY;
TRI-CITY INSURANCE SERVICE, INC.;
INDIANA INSURANCE COMPANY; and
GRANGE MUTUAL CASUALTY COMPANY — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON AND TACKETT, JUDGES.

EMBERTON, JUDGE: This case arises from a fire that occurred in an apartment building in Burlington, Kentucky. Numerous plaintiffs filed actions for property damage, personal injury, and wrongful death against Whispering Wood No. 5, a partnership, and its partners, L. T. Runion, Greg Staley, and Dick Neal. The present controversy concerns insurance coverage by Indiana Insurance Company, State Automobile Insurance Company, and Motorists Mutual Insurance Company, all of whom the trial court found had no liability. The appellants also made a third-party claim against Tri-City Insurance Service, Inc., the agency through which the State Auto and Motorists Mutual Insurance policies were procured, alleging that Tri-City negligently failed to procure appropriate insurance coverage.

On March 27, 1989, Runion, a California resident, purchased the Meadowood Golf Course in Burlington and procured a policy of insurance for the golf course from Motorist Mutual through Tri-City, a local insurance agency. Subsequently, Runion purchased an additional tract in Burlington and together with Staley and Neal, formed a partnership called Whispering Wood for the purpose of constructing two apartment buildings on the property. Runion owned 51% of the partnership while Staley and Neal each owned 24½%.

Upon Runion's request in June of 1990, Tri-City procured through State Auto a builder's risk policy for the

Whispering Wood Partnership. Staley and Neal also had liability insurance for the construction of the apartments in 1990-1991, through a commercial general liability policy and an umbrella policy, both issued by Indiana Insurance.

Following the completion of the apartments in the summer of 1991, State Auto's builder's risk policy was replaced with a comprehensive business liability policy, also issued by State Auto through Tri-City. In 1992, Runion purchased the interest of Staley and Neal and became the sole owner of the apartment buildings. The State Auto policy was renewed each year until Runion sold the buildings in February 1996, at which time he canceled the State Auto policy. On February 13, 1997, the apartment building burned, and Staley, Neal, Runion and the Whispering Wood partnership were sued by those injured.

LIABILITY OF INDIANA INSURANCE

The commercial package policy issued by Indiana Insurance covered bodily injury and property damage occurring during the policy period. The excess policy issued to Staley and Neal covered only personal injury and property damage "caused by an occurrence" during the policy period. There is no dispute that the policy period for both policies was February 14, 1990, to February 14, 1991.

The general commercial liability policy issued to Staley and Neal provides in pertinent part:

> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY.
>
> I. Insuring agreement.

> A. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory." We will have the right and duty to defend any "suit" seeking those damages.

The excess policy states:

> "Personal injury" means (1) bodily injury, sickness, disease, disability or shock, including death at any time arising therefrom, and if arising out of the foregoing, mental anguish and mental injury; (2) false arrest, false imprisonment, wrongful eviction, wrongful entry, wrongful detention or malicious prosecution; (3) libel, slander, defamation of character, humiliation or invasion of the rights of privacy, unless arising out of the advertising activities; and (4) racial or religious discrimination (unless coverage is prohibited by law) not committed by or at the direction of the insured or any executive officer, director or stockholder thereof, but only with respect to the liability other than fines and penalties imposed by law; caused by an occurrence during the policy period.

Coverage is provided under either policy for the fire that occurred in 1997, if the alleged negligent construction of the apartment buildings can be characterized as an occurrence during the policy period. The language of both policies is clear and unambiguous and is to be given its plain and ordinary meaning under Kentucky law.[1] "An insurance policy must be interpreted to

[1] Washington National Insurance Company v. Burke, Ky., 258 (continued...)

its true character and purpose, and in the sense which the insured had reason to suppose it was understood."[2]

In James Graham Brown Foundation, Inc. v. St. Paul Fire and Marine Insurance Company,[3] the court interpreted the term "occurrence" as more expansive than "accident" in that it can include losses and damages arising over a period of time from continuous or repeated exposure to conditions.[4] And, we agree with appellants' analysis that an occurrence need not occur at a single moment but can be gradual. In those cases cited by appellants, however, the damage to the property began to occur while the policy was in effect.[5] In this case, assuming the appellants' theory is correct, that the faulty wiring caused the blaze, there was no damage to the property or any person until the fire erupted six years after the expiration of the Indiana Insurance policy. "An event which qualifies as an occurrence must either cause property damage or bodily injury during the period of time the policy is in effect."[6] There must be some damage caused by the wrongful act to trigger the policy coverage. As noted by the court in Jenoff, Inc. v. New Hampshire Insurance

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[1](...continued)
S.W.2d 709, 710 (1953).

[2] Cheek v. Commonwealth Life Insurance Company, 277 Ky. 677, 126 S.W.2d 1084 (1939), quoting Continental Casualty Company v. Linn, 266 Ky. 328, 10 S.W.2d 1079, 1082 (1928).

[3] Ky., 814 S.W.2d 273 (1991).

[4] Id. at 278.

[5] Id.

[6] Id. at 277.

Company,[7] this is the general rule in the majority of jurisdictions.

[7] 558 N.W.2d 260, 263 (fn2)(1997). Citing Kirkham, Michael & Assoc., Inc. v. Travelers Indem. Co., 493 F.2d 475, 476 (8th Cir. 1974)(applying South Dakota law, holding no coverage for accident occurring after policy period but caused by negligent design and supervision of water treatment plant during policy because "it is the damage incurred by 'accident' that triggers the policies' coverage, not the preceding wrongful acts.")(citation omitted); United States Fidelity & Guar. Co. v. Warwick Dev. Co., Inc., 446 So.2d 1021, 1024 (Ala. 1984)(finding that "as a general rule the time of an 'occurrence' of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time the complaining party was actually damaged.")(citation omitted); Tiedemann v. Nationwide Mut. Fire Ins. Co., 164 Conn. 439, 324 A.2d 263, 266 (Conn. 1973)(stating that "accident" unambiguously means "the event causing injury, not the cause of that event," holding no coverage for damages resulting from fire occurring after the policy period but caused by negligent construction of chimney during the policy period)(citation omitted); Wrecking Corp. of Am., Virginia, Inc. v. Insurance Co. of N. Am., 574 A.2d 1348, 1349-50 (D.C. 1990)(holding no coverage for collapse of wall after policy period caused by negligent demolition work during policy period because "the prevailing rule is that 'property damage occurs' at the time the damage is discovered or when it has manifested itself."); Travelers Ins. Co. v. C.J. Gayfer's & Co., Inc., 366 So. 2d 1199, 1201 (Fla. Dist. Ct. App. 1979)(applying general rule, holding no coverage for rain damages suffered after policy had expired but caused by negligent installation of drainage system during policy period); Millers Mut. Fire Ins. Co. v. Ed Bailey, Inc., 103 Idaho 377, 647 P.2d 1249, 1251-52 (Idaho 1982)(applying general rule, holding no coverage for fire occurring after policy period but caused by negligent installation of insulation during policy period); Employers Mut. Liab. Ins. Co. v. Michigan Mut. Auto Ins. Co., 101 Mich. App. 697, 300 N.W.2d 682, 685 (Mich. Ct. App. 1981) (adopting general rule, holding no coverage for explosion of boat after policy period caused by negligent installation of gas line during policy period); Yarrington v. Camarota, 138 N.J. super. 398, 351 A.2d 353, 355 (N.J. Super. Ct. App. Div. 1971)(applying general rule, holding no coverage for fire damage occurring after policy period but caused by negligent construction during policy period); Dorchester Dev. Corp. v. Safeco Ins. Co., 737 S.W.2d 380, 383 (Tex. App. 1987)(applying general rule, holding no coverage for faulty construction where damage did not manifest itself until after the policy period).

We find no error in the summary judgment entered in favor of Indiana Insurance Company.[8]

LIABILITY OF STATE AUTOMOBILE INSURANCE COMPANY

The State Automobile policies, like the Indiana Insurance policy, contain similar language requiring that the bodily injury or property damage occur, or be caused by an occurrence, during the policy period. There was no State Auto policy in effect at the time of the fire. In the interest of avoiding redundancy, we will not again reiterate the applicable law. Simply stated, the 1997 fire was not an occurrence within the meaning of the State Auto policies.

Appellants contend that they had a reasonable expectation that any damage caused by the negligent construction of the apartments, no matter at what time, was covered by the State Auto policies. We find it difficult to accept the argument that experienced business persons could reasonably believe that insurance coverage extended into perpetuity long after the expiration of the policy. Moreover, the reasonable expectation doctrine is employed in those cases where the insurance contract is ambiguous.[9] There is no ambiguity in the language of the State Auto policies. Both the occurrence and the property damage must occur within the policy period.

Finally, we can find no language in the State Auto policies that would cover "completed operations." Although the

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[8] Steelvest, Inc. v. Scansteel Service Ctr., Ky., 807 S.W.2d 476 (1991).

[9] Swartz v. Metropolitan Property & Casualty Co., Ky. App., 949 S.W.2d 72 (1997).

definitions section defined the term, there is no coverage provided in the policies issued.

The summary judgment as to State Auto is affirmed.

LIABILITY OF MOTORIST MUTUAL INSURANCE

On the date of the fire, Motorist Mutual had in effect a policy of insurance providing coverage for the golf course owned by Runion. The apartment complex was not connected to the operation of the golf course. Runion and Meadowood Golf Course, Inc., were not insured under the Motorists policy and summary judgment was properly entered.

LIABILITY OF TRI-CITY INSURANCE SERVICE, INC.

Appellants contend that Tri-City had an affirmative duty to advise Runion regarding his insurance needs including the need to have insurance coverage after the sale of the apartment complex.

As explained in Mullins v. Commonwealth Life Insurance Company,[10] absent an expressed or implied assumption of such a duty, there is no affirmative duty on an insurance agent to advise an insured:

> The record, when viewed in the light most favorable to the appellants, does not present a genuine issue of material fact concerning the existence of an affirmative duty on the part of insurance agent, Vanover, to advise the Mullinses about the availability of UIM coverage, and added RB. . . .
>
> Appellants' negligence action requires: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury. [citation omitted]. Thus to find potential liability to exist in the case at

[10] Ky., 839 S.W.2d 245, 247-249 (1992).

bar, there must first exist an affirmative duty of the appellees to advise the Mullinses about the availability of UIM coverage. The trial court and Court of Appeals held no such duty exists. We agree. . . .

The question of duty presents an issue of law. 57A Am.Jur.2d Negligence § 20; Prosser and Keeton on Torts, § 37 (5th ed. 1984). When a court resolves a question of duty it is essentially making a policy determination. [citations omitted]. While Kentucky courts have not ruled on the specific issue at bar, other jurisdictions have generally found "no affirmative duty to advise it assumed by mere creation of an agency relationship." Hardt v. Brink, 192 F. Supp. 879, 880 (D.C. Wash 1961).

An insurance agent ordinarily only assumes those duties found in an agency relationship. Hardt, supra, at 880. An agent owes his principal the obligation to deal in good faith and to carry out the principal's instructions. See 29 A.L.R.2d 171. Other jurisdictions have found that, generally, an insurer may assume a duty to advise an insured when: (1) he expressly undertakes to advise the insured; or (2) he impliedly undertakes to advise the insured. Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 377 S.E.2d 343, 347 (1988). The insured has the burden of proving that the insurer assumed such a duty. Id.

An implied assumption of duty may be present when: (1) the insured pays the insurance agent consideration beyond a mere payment of the premium, Id., citing Nowell v. Dawn-Leavitt Agency, Inc., 127 Ariz. 48, 617 P.2d 1164 (1980); (2) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on, Trotter, supra, citing Nowell, supra; or (3) the insured clearly makes a request for advice. Trotter, supra, citing Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc., 44 Or. App. 739, 607 P.2d 763 (1980). . . .

We note that while appellants fail to produce facts evidencing an express assumption of duty to advise, such a duty may

> be present if the company, or agent, represents directly, or by advertising, that it will assume responsibility to advise the customer as to what is needed. See 2A C.J.S. Agency, § 54.

Where, as here, there is no express assumption of the duty to advise, the company or its agent must represent directly or by advertising that it will assume the responsibility to advise the customer as to what is needed.[11]

Runion had an ongoing business relationship with Tri-City. He testified that several times per year he met William McCarty of Tri-City to discuss his insurance coverages and needs. During those discussions, McCarty gave advice and recommendations to Runion. However, he did not pay an additional premium nor make a specific request for advice. While Runion and McCarty met on occasion throughout the eight years McCarty acted as his agent, there is no evidence that Tri-City assumed the additional duty as an insurance advisor. The summary judgment as to Tri-City is affirmed.

CONCLUSION

The summary judgments are affirmed.

ALL CONCUR.

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[11] Id.

BRIEF FOR APPELLANTS:

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Mark W. Howard
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ORAL ARGUMENT FOR APPELLANTS L. T. RUNION, GREG STALEY, DICK NEAL and WHISPERING WOODS NO. 5:

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ORAL ARGUMENT FOR APPELLANTS ROBIN RAMEY, ESTATE OF ROBERT RAMEY, JAMES STRICKLEY, JAN MUDD and JILL MUDD:

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BRIEF FOR APPELLEE INDIANA INSURANCE COMPANY:

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