UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7439
Summary Calendar

SEA PRODUCTS, INC.,

Plaintiff-Appellant,

versus

UNITED STATES FIDELITY AND GUARANTY INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-l:91-478(Br) (R))

(November 15, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Sea Products, Inc. appeals the district

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's grant of summary judgment in favor of Sea Products' insurer, Defendant-Appellee United States Fidelity and Guaranty Insurance Company (USF&G), dismissing Sea Products' claim against USF&G for alleged bad faith failure to provide a defense. As we conclude that the complaint in the underlying litigation alleged facts and claims which, if proved, would clearly be excluded from coverage under Sea Products' commercial general liability policy, so that USF&G had no duty to defend Sea Products, we dismiss its appeal as frivolous.

I

FACTS AND PROCEEDINGS

USF&G insured Sea Products under a commercial general liability policy. That policy provides in pertinent part:

> 1. Insuring Agreement.
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . to which this insurance applies.
>
> 2. Exclusions.
> This insurance does not apply to:
> g. "Bodily injury" . . . arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented to or loaned to any insured. Use includes operation and "loading or unloading."
>
> This exclusion does not apply to:
> (1) A watercraft while ashore on premises you own or rent;
> (2) A watercraft you do not own that is:
> (a) less than 26 feet long; and
> (b) not being used to carry persons or property for a charge.[1]

[1]Emphasis added.

On or about July 29, 1991, John Royal sued Sea Products and other defendants in a personal injury action. Royal alleged in his complaint that Sea Products owned, managed, possessed and controlled The Recovery, a sixty-foot long, steel hull fishing vessel. Royal alleged that (1) he was employed by Sea Products as a crew member of The Recovery in the capacity of fisherman and deck hand, (2) the accident occurred on July 8, 1991, (3) the Recovery was in navigable waters and Royal was acting in the course and scope of his employment, and (4) unseaworthiness of the vessel and negligence caused permanent injury to his left hand.[2]

The suit papers were sent by attorney Mark Lyons, counsel for Sea Products, to Charles Frost, a general agent of USF&G, along with a request that Sea Products' insurance carriers be put on notice of the suit and that Sea Products be given an affirmative response stating that a defense would be provided.

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[2]The complaint states in relevant part:

¶6. [Royal] . . . was assisting in retrieving the anchor line which was furnished to said vessel for the use of said vessel's crew. Said anchor line was inadequate by virtue of being insufficient length for the existing circumstances being in an unserviceable condition and being handled improperly by the crew management of said vessel.

¶7. Further, in addition to said anchor line causing said vessel to be unseaworthy, the vessel's crew was made to perform those foreseeable conditions which exist in stormy seas as was the situation at the time and place involved in this lawsuit. Further, that the shortage and inexperience of the vessel's crew, as well as the aforesaid anchor line and related equipment, did then and there cause unseaworthiness of the vessel . . . causing [Royal] severe and potential permanent injury to his hand.

¶8. [Royal's] injuries were caused by the negligence of [Sea Products], . . . and by the unseaworthiness of the vessel . . . .

After receiving the suit papers on August 15, 1991, Frost learned that Royal was not Sea Product's employee and that Sea Products had no connection whatsoever with The Recovery. Frost informed Sea Products that the commercial general liability policy did not cover Royal's claim[3] and that he would send the suit papers to the workers' compensation carrier. Frost mistakenly believed that Royal's claim was work-related and reported the claim to Sea Products' workers' compensation carrier, Liberty Mutual, rather than to USF&G.

Liberty Mutual declined to defend because Royal was not Sea Product's employee. USF&G did not receive notice of the Royal litigation until October 8, 1991. Meanwhile, Sea ProductsSQwhich asserts that it never received a response from USF&GSQwas successful in obtaining a dismissal with prejudice in the Royal action.

Sea Products filed the instant bad faith breach of contract action against USF&G on October 11, 1991SQonly three days after USF&G first learned of the Royal litigation. USF&G answered, asserting as a defense that it did not defend Sea Products due to the mistake of Frost, a general insurance agent, who thought the claim was work-related and reported it to Liberty Mutual rather than USF&G.

During discovery, an employee of USF&G stated that if USF&G had received notice of the Royal litigation it would probably

[3]The general liability policy excludes bodily injury to "an employee of the insured arising out of the course and scope of employment by the insured."

have provided a defense for Sea Products under reservation of rights until it had an opportunity to make a proper investigation. That employee acknowledged that the policy provided for a defense.

Subsequently, however, an upper level official in USF&G's home office reviewed the policy and discovered that, under Sea Products' policy, watercraft coverage was expressly excluded. USF&G then amended its answer to assert that a specific policy exclusionSQparagraph G aboveSQnegated its duty to defend.

USF&G moved for summary judgment, asserting that the policy exclusion precluded watercraft coverage under the policy, thereby eliminating any obligation of USF&G to defend against a watercraft claim. Sea Products contested the motion, arguing that the policy nevertheless required a defense. Sea Products insisted that both parties knew that the exclusion did not apply under the known facts. Sea Products also insisted that the exclusion did not apply to claims of negligence.[4] The district court rejected Sea Product's contentions and granted summary judgment in USF&G'S favor, dismissing Sea Product's claims. Sea Products timely appealed.

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[4]Sea Products argued further that the exclusion only applied to indemnity under the policy, not USF&G's duty to defend Sea Products. The insurance policy specifically provides, however, that USF&G has the right and duty to defend any suit seeking damages for bodily injury to which the policy applies. Thus the policy requires USF&G to defend Sea Products only if the policy provides coverage for the alleged bodily injury.

II

ANALYSIS

A. Standard of Review

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court."[5] Summary judgment is proper when no genuine issue of material fact exists that would necessitate a trial.[6] In determining on appeal whether the grant of a summary judgment was proper, all fact questions are viewed in the light most favorable to the nonmovant.[7] Questions of lawSQincluding the construction and effect of an unambiguous contractsQare always decided de novo.[8]

B. Contract Exclusion: No Duty to Defend

Under Mississippi law, a court determines an insurer's duty to defend by examining the allegations in the complaint filed against the insured.[9] For such a duty to be established, the pleadings must allege a claim that is covered by the applicable policy.[10] The duty to defend "is measured upon the allegations

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[5]Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

[6]Celotex Corp v. Catrett, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265 (1986); see FED. R. CIV. P. 56(c).

[7]Walker, 853 F.2d at 358.

[8]Id.; Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1413 (5th Cir. 1993).

[9]Southern Farm Bureau Casualty Ins. Co. v. Logan, 119 So.2d 268, 271 (Miss. 1960).

[10]See id.

in the plaintiff's pleadings regardless of the ultimate outcome of the action."[11] But when the plaintiff's petition makes allegations which, if proved, would place plaintiff's claim within an exclusion from coverage, there is no duty to defend.[12]

Sea Products contends on appeal that because Royal's cause of action could not have arisen (as both parties admit) from Sea Product's ownership, maintenance, or use of The Recovery, or from its being entrusted to another, the policy exclusion does not relieve USF&G of a duty to defend. Sea Products also contends that the plaintiff's allegation of "negligence" places the claim outside the policy exclusion, thereby requiring USF&G to provide a defense. Sea Products' arguments ignore both the scope of our inquirySQthe "allegations of the complaint"SQand the plain meaning of the insurance contract.

If facts alleged by Royal were proved, his claim would fall within the watercraft exclusion. Sea Products' contention that the policy covers any and all "negligent" acts, and that the watercraft exclusion thus does not apply, is nonsensical. USF&G's general liability policy expressly excludes any coverage whatsoever for bodily injury occurring on watercraftSQregardless of the theory of liability, and regardless of ownership or other relationship of the insured to such craft, including total

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[11] EEOC V. Southern Publishing Co., Inc., 894 F.2d 785, 789 (5th Cir. 1990).

[12] Jones v. Southern Marine & Aviation Underwriters, Inc., 739 F. Supp. 315, 324 (S.D. Miss. 1988), aff'd on other grounds, 888 F.2d 358 (5th Cir. 1989).

absence of such a relationship. The district court correctly held that "any reference to negligence does not override the exclusion."

The district court's opinion more than adequately addressed and disposed of these issues. Sea Products' appeal in the face of that opinion is frivolous. We can add nothing to the correct and comprehensive analysis of this case contained in the district court's opinion. Instead of writing separately, then, we adopt the reasoning, findings, and conclusions expressed therein, incorporate it by reference, and annex a copy hereto.

III

CONCLUSION

Sea Products' argument that the policy exclusion does not apply either under the known facts or because Royal's claim was one of negligence has no arguable basis in law or in fact and is thus frivolous.[13] Given the obvious applicability of the exclusion, there can be no duty to defend. Sea Products' appeal is therefore

DISMISSED.

[13] See 5TH CIR. R. 42.2.