IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA06-815
DIVISION: 55

JAMES T. TREACE and
ANGELINE G. TREACE,
Plaintiffs,

vs.

HARBOUR ISLAND JOINT VENTURE III; et al.,
Defendants.
_____/

STEVENSON DESIGN AND DEVELOPMENT OF JACKSONVILLE, INC., a Florida corporation,
Third-Party Plaintiff,

vs.

RYSKCON CONSTRUCTION, INC., et al.,
Third-Party Defendants.
_____/

HARBOUR ISLAND JOINT VENTURE III, et al.,
Cross-Claim Plaintiffs,

vs.

STEVENSON DESIGN AND DEVELOPMENT OF JACKSONVILLE, INC., a Florida corporation,
Cross-Claim Defendant.
_____/

JAMES T. TREACE and
ANGELINE G. TREACE,
Plaintiff Garnishors,

vs.

HANCOCK BANK OF FLORIDA; JEFFREY CHEFAN, an individual; JUDY CHEFAN, an individual; STEPHAN CHEFAN, an individual, LAW OFFICE OF BOHDAN NESWIACHENY; LEE RAUTENBERG, an individual; LOUIS N. SCHOLNIK, P.A.; MID-CONTINENT CASUALTY COMPANY,
Defendant Garnishees.
_____/

ORDER DENYING GARNISHOR'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court pursuant to Garnishor's Motion for Summary Judgment. The Court has reviewed and considered the motion as well as Garnishee, Mid-Continent Casualty Company's response to the motion, the arguments of counsel, and being otherwise fully advised in the premises finds as follows.

Plaintiffs/Garnishors, James T. Treace and Angeline G. Treace (hereinafter collectively "Treaces"), move the Court for entry of summary judgment in their favor on the issue of allocation of the jury award rendered on May 1, 2012. Pursuant to a motion in limine filed by Mid-Continent Casualty Company (hereinafter "Mid-Continent"), Mid-Continent contends that the Treaces face the impossible task of allocating the jury award rendered against Stevenson Design

and Development of Jacksonville, Inc. (hereinafter "Stevenson Design"), between covered and non-covered damages. The Treaces argue, however, that based upon the authority of *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972), the initial burden falls on Mid-Content to establish that the Final Judgment against Stevenson Design includes damages for non-covered acts. Once that is established, the burden then shifts to the Treaces and/or Stevenson Design to allocate the award, unless an exception applies.

The Treaces argue that Mid-Continent has not met its initial burden to establish that the Final Judgment against Stevenson Design includes damages for non-covered acts, nor has it attempted to, and therefore, a secondary obligation to allocate the jury award, if any, is not triggered. In response, Mid-Continent argues that under Florida law, where a judgment includes both covered and non-covered damages, the insured bears the burden of showing what portion of the judgment is covered and what portion is not covered, and, if the insured or the party seeking to recover from the insurer cannot meet this burden, it cannot recover any portion of the judgment. In this case, the Treaces stand in the shoes of the insured Stevenson Design based on the policy language and garnishment action.

"Where the judgment includes elements for which an insurer may be liable as well as elements beyond the coverage of the policy, the burden of apportioning the damages is on the party seeking to recover from the insurer." *Guarantee Ins.*

Co. v. Gulf Ins. Co., 628 F. Supp. 867, 870 (S.D.Fla. 1986)(citing *Universal Underwriters Ins. Corp. v. Reynolds*, 129 So. 2d 689 (Fla. 2d DCA 1961); *Keller Indus., Inc. v. Employers Mut. Liab. Ins. Co. of Wisconsin*, 429 So. 2d 779 (Fla. 1983)). *See also, Aetna Ins. Co. v. Waco Scaffold & Shoring Co., Inc.*, 370 So. 2d 1149, 1152 (Fla. 4th DCA 1978)("Even if one could not deduce the theory of liability which inheres in this verdict, it would still be incumbent upon the party claiming coverage in this suit to prove that the basis of liability was an exposure covered by the insurer's policy.") However, in *Duke v. Hoch*, the court held that first, the insurer has the burden "to establish that the judgment entered against its insureds and sought to be collected included damages for noncovered acts." 468 F.2d 973, 976 (5th Cir. 1972). *See also, Mid-Continent Cas. Co. v. Clean Seas Co., Inc.*, 860 F.Supp.2d 1318 (M.D.Fla. 2012)(quoting *Guarantee*, 628 F.Supp. at 870 ("the burden of apportioning damage following a jury verdict generally rests with the party seeking to recover from the insured, but this is only true '*where the judgment includes elements for which an insurer may be liable as well as elements beyond the coverage of the policy.*'"); *Phoenix Ins. Co. v. Branch*, 234 So. 2d 396, 398 (Fla. 4th DCA 1970)("The burden of proving an avoidance of the action on the basis that the loss is not covered...is upon the insurer.")

The Court finds, as a matter of law, that Mid-Continent has the initial burden to prove that the judgment includes damages for non-covered acts. If Mid-

Continent succeeds in showing that the judgment includes elements beyond the coverage of its policies, the Treaces then have the burden of allocating those damages. The Court finds, however, that due to the existence of genuine issues of material fact, the garnishment proceeding is not ripe for summary judgment in favor of the Treaces on the issue of whether the judgment against Stevenson Design includes damages for acts not covered by a Mid-Continent insurance policy. The Court cannot conclude as a matter of law that Mid-Continent has not satisfied its initial burden to demonstrate the verdict in the underlying merits trial contained matters not covered by the policy.

Second, the Treaces argue that even if Mid-Continent meets its initial burden, the Treaces and Stevenson Design are relieved of the burden of allocating the jury award based upon Mid-Continent's failure to meet a high standard of conduct whereby, pursuant to *Duke*, it was required: (1) to make known to the insured the availability of a special verdict and the divergence of interest between it and the insurer springing from whether damages were or were not allocated, and (2) to advise the insured of the consequences of an unallocated verdict, i.e. catastrophic total loss of coverage.

In *Duke*, after examination of the trial record and hearing testimony, the court found that the unallocated verdict rendered at the trial "represented in part liability for noncovered acts." 468 F.2d at 977. At that point, "the burden became

the [judgment creditor's] to prove the precise portion of the unallocated verdict representative of acts for which [the insurer] is responsible." *Id.* The court found however, that a judgment creditor or insured may be relieved of such burden if the insurer failed to fully advise its insured of the divergence of interest between it and them with respect to the verdict. *Id.* at 979. An insurer's generalized "notification of defense under a reservation of rights [is] not a sufficient notification to the insureds that they should protect their interest by requesting an appropriate verdict." *Id.*

The Court finds that this case is distinguishable from *Duke* based on the fact that in addition to Mid-Continent's notification of defense under a reservation of rights, Mid-Continent sent its insured a letter requesting that special interrogatories be included on the verdict form and Mid-Continent moved to intervene in the merits trial and requested special interrogatories regarding coverage and allocation of the damages. Significantly, the Treaces objected to Mid-Continent's request to intervene and Stevenson Design took no position on the issue. (Trial Tr. 4-11, April 23 2012.) In addressing the divergence of interest issue, *Duke* cites two cases that stand for the proposition that "one who suggests separate verdicts cannot be estopped to claim that a single verdict for one lacks proof of damages to two persons." *Id.* at 980 (quoting *Morris v. Western States Mut. Auto. Ins. Co.*, 268 F.2d 790 (7th Cir. 1959)(citing *Yancey v. Utilities Ins. Co.*, 23 Tenn.App. 663, 137

S.W.2d 318 (1939)). Based on the fact that Mid-Continent did more than simply provide a notice of reservation of rights, summary judgment in favor of the Treaces on the issue of the burden of allocation is not appropriate at this time. Accordingly, it is;

ORDERED AND ADJUDGED that:

Garnishor's Motion for Summary Judgment is DENIED.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine, Florida, this 14th day of January, 2014.

HOWARD M. MALTZ
Circuit Judge

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