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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MICHAEL BLANKENSHIP and
MISTY BLANKENSHIP,

Plaintiffs

v.

Civil Action No. 06-C-2062
Honorable James C. Stucky

THE CITY OF CHARLESTON and
BOSTON CULINARY GROUP, INC.
d/b/a DISTINCTIVE GOURMET,

Defendants,

and

THE CITY OF CHARLESTON and
BOSTON CULINARY GROUP, INC.
d/b/a DISTINCTIVE GOURMET,

Third-Party Plaintiffs,

v.

LAKWOOD SWIM CLUB, INC.,

Third-Party Defendant/
Fourth-Party Plaintiff,

v.

EVANSTON INSURANCE COMPANY,

Fourth-Party Defendant.

FILED
2007 FEB 11 PM 1:05
Clerk of the Circuit Court

**ORDER GRANTING EVANSTON INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT**

On the 6th day of December, 2007, came the parties, by their respective counsel, pursuant to Lakewood Swim Club, Inc.'s *Motion for Partial Summary Judgment*, and Evanston Insurance Company's *Motion for Summary Judgment*. Having fully considered the parties' respective motions, as well as the oral argument of counsel, and for the reasons set forth herein, this Court hereby ORDERS that Evanston Insurance Company's *Motion for Summary Judgment* is GRANTED.

FINDINGS OF FACT

1. This action arises out of a slip and fall that plaintiff Michael Blankenship sustained on October 14, 2005, during a Rascal Flatts concert at the Charleston Civic Center, when he allegedly slipped on beer spilled at or near a concession stand.

2. Plaintiff filed suit against the City of Charleston and Boston Culinary Group, d/b/a Distinctive Gourmet, alleging that they negligently operated beer concession stands during the concert.

3. Boston Culinary Group, in turn, joined Lakewood Swim Club as a defendant, on the basis that Lakewood Swim Club was allegedly operating the subject concession stand at the time of the accident.

4. At the time of plaintiff's accident, Lakewood was insured by Evanston Insurance Company pursuant to policy number CL470100500-01.

5. The Evanston commercial general liability policy contains Endorsement

M/E-217 (11/99), which provides as follows:

SPECIFIED/DESIGNATED PREMISES/PROJECT LIMITATION

THIS ENDORSEMENT CHANGES THE POLICY.

Schedule

Premises:

LAKWOOD DR.
ST ALBANS WV 25177

Project:

PRIVATE SWIM CLUB

(Complete above if information different than that shown in the Declarations)

This insurance applies only to "bodily injury", "property damage", "personal injury", "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations); or
 2. The **project** shown in the Schedule (or Declarations). (emphasis added.)
6. The policy provides coverage for "bodily injury" claims against Lakewood Swim Club only if the "bodily injury" arises out of the ownership, maintenance or use of the designated premises (LAKWOOD DR., ST. ALBANS, WV 25177) or if the "bodily injury" arises out of the designated project (PRIVATE SWIM CLUB).
7. It is undisputed that plaintiff's bodily injury claim did not arise out of the ownership, maintenance or use of the premises (LAKWOOD DR., ST. ALBANS, WV 25177) designated in the policy of insurance.

8. Evanston Insurance Company denied Lakewood Swim Club's claim for insurance coverage in this matter based, in part, on the fact that plaintiff's alleged bodily injuries did not arise out of the designated project (PRIVATE SWIM CLUB).

9. Tim Quinlan, acting on behalf of Lakewood Swim Club, completed and signed an application for the Evanston Insurance Company policy in 2005, which application was appended to Evanston Insurance Company's motion. The contents of that application have not been disputed by Lakewood Swim Club. Pursuant to the application, Lakewood Swim Club made the following representations as to the scope and nature of the project to be insured:

- a. The application specifically inquired whether any outside events were sponsored by the swim club, to which Mr. Quinlan responded, "no";
- b. The application further inquired whether the swim club engaged in any special events on or off the swim club premises, to which Mr. Quinlan again responded, "no";
- c. The application completed and signed by Tim Quinlan, on behalf of Lakewood Swim Club, inquired whether there was a snack bar **on the swim club premises**, to which Mr. Quinlan responded, "yes."
- d. Pursuant to the application, Mr. Quinlan, on behalf of Lakewood Swim Club, advised Evanston Insurance Company that no alcohol was permitted around the pool.

10. The representations made by Lakewood Swim Club in the policy application were utilized by Evanston Insurance Company to evaluate the risk to be insured.

11. Neither Tim Quinlan nor any other person associated with Lakewood

Swim Club advised Evanston Insurance Company that Lakewood Swim Club would operate any off-premises concession at any time. Specifically, the insured never provided any evidence to Evanston Insurance Company that the "project" would include the operation of a beer concession stand at the Charleston Civic Center during a country music concert. To the contrary, Lakewood Swim Club represented to Evanston Insurance Company that ***no outside events were sponsored by the swim club*** and that ***the swim club did not engage in any special events on or off the swim club premises.***

12. Lakewood Swim Club has presented no evidence to show that the swim club misunderstood the application and/or the terms and conditions set forth in the policy of insurance.

CONCLUSIONS OF LAW

1. Determination of the proper coverage of an insurance contract, when the facts are not in dispute, is a question of law. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002).

2. Language in an insurance policy should be given its plain, ordinary meaning. Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33 (1986). Where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970).

3. "A liability insurer need not defend a case against the insured if the alleged conduct is entirely foreign to the risk insured against." *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988).

4. The Evanston Insurance Company policy definition of the designated "project" as PRIVATE SWIM CLUB is not ambiguous.

5. The unambiguous definition of the designated project as PRIVATE SWIM CLUB does not include a beer concession stand at the Charleston Civic Center during a country music concert.

6. Plaintiff's alleged bodily injury did not arise out of the designated project (PRIVATE SWIM CLUB), as required by the clear, plain and unambiguous language of the policy issued to Lakewood Swim Club by Evanston Insurance Company.

7. Lakewood Swim Club did not have a reasonable expectation that its members' operation of a beer concession stand at the Charleston Civic Center during a country music concert was an insured risk, as evidenced by the policy application.

8. It is an unreasonable and untenable assertion that the known insuring of an on-premises snack bar by Evanston Insurance Company would expand the insured risk to include the selling of beer by members of the insured at an off-premises concession stand.

9. The policy application completed and signed by Tim Quinlan on

behalf of Lakewood Swim Club is consistent with the unambiguous terms and conditions of the Evanston Insurance Company policy. The policy application completed and signed on behalf of Lakewood Swim Club shows that Lakewood Swim Club understood and agreed that no outside events would be sponsored by the swim club and that there would be no special events on or off the premises.

10. The one-time operation of a beer concession stand at the Charleston Civic Center during a country music concert was a special event because it was not within the regular course of business of the designated project, a private swim club.

11. Evanston Insurance Company was provided no information during the application process that Lakewood Swim Club would undertake the operation of a beer concession stand at the Charleston Civic Center during a country music concert, thereby rendering it a special event, unknown to the insurer and foreign to the risk insured.

12. Plaintiff's alleged bodily injury did not arise out of the designated project (PRIVATE SWIM CLUB), as required by the clear, plain and unambiguous language of the policy issued to Lakewood Swim Club by Evanston Insurance Company and, therefore, the Evanston Insurance Company policy does not provide coverage for the claims asserted against the swim club in this action.

13. The Court hereby finds that Evanston Insurance Company has no duty to indemnify Lakewood Swim Club for the claims arising out of plaintiff's alleged

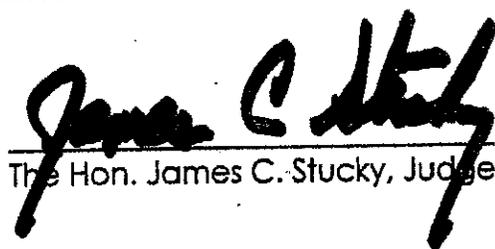
bodily injury, based on the clear, plain and unambiguous language of the Evanston Insurance Company policy.

14. The Court further finds that Evanston Insurance Company has no duty to defend Lakewood Swim Club for the claims arising out of plaintiff's alleged bodily injury, based on the clear, plain and unambiguous language of the Evanston Insurance Company policy.

WHEREFORE, it is hereby ORDERED that Evanston Insurance Company's Motion for Summary Judgment is GRANTED and Lakewood Swim Club, Inc.'s Motion for Partial Summary Judgment is DENIED. The Fourth-Party Complaint against Evanston Insurance Company is hereby dismissed in its entirety. The objections of the parties are noted and preserved.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 11th day of December, 2007.


The Hon. James C. Stucky, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
11th day of December, 2007.
Cathy S. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA