

IN THE COURT OF APPEALS 3/26/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00802 COA

**MISSISSIPPI MANAGEMENT, INC., HOLIDAY INN FRANCHISE OWNERS (GROUP #2)
, AND ORLANDO PLAZA SUITE HOTEL, LTD.-A**

APPELLANTS

v.

FEDERAL INSURANCE COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

ROBERT N. WARRINGTON AND RANDALL E. DAY, III

ATTORNEY FOR APPELLEE:

GEORGE R. FAIR

NATURE OF THE CASE: CIVIL: FAILURE TO PAY SUMS DUE UNDER CONTRACT OF
INSURANCE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO THE APPELLEE
FEDERAL INSURANCE

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

KING, J., FOR THE COURT:

The parties filed cross- motions for summary judgment in the Circuit Court of the First Judicial District of Hinds County, Mississippi. MMI appeals the court's grant of summary judgment to Federal Insurance, and the denial of its motion for summary judgment. We find no error and affirm.

FACTS

On or about September 26, 1988, MMI discovered that two of its employees had embezzled cash from one of its hotels. MMI had insured itself against losses resulting from employee theft. It had purchased from Federal a blanket crime insurance policy, which contained liability limits of \$100,000.00. Later, MMI purchased additional coverage containing liability limits of \$500,000.00.

After discovering the loss, MMI submitted to Federal a proof of loss statement totaling

\$658,762.00 and requested that Federal pay the \$500,000.00 liability limits of the New Policy. Upon receipt of MMI's proof of loss statement, Federal employed an independent certified public accounting firm to investigate and verify the loss. After the investigation, the firm was able to verify that \$560,036.08 in cash had been misappropriated by MMI employees.

Federal paid MMI the sum of \$344,620.66 and denied liability for the additional loss claimed by MMI. Thereafter, MMI sued to recover the remaining limits of liability available under the New Policy.

ANALYSIS OF THE ISSUES AND LAW

Because the parties agree that there are no genuine issues of material fact, we need only determine if one of the parties is entitled to a judgment as a matter of law. In so doing, we employ a de novo standard of review. *Mississippi Ins. Guar. Ass'n v. Harkins & Co.*, 652 So. 2d 732, 734-35 (Miss. 1995). Resolution of the following issues are pertinent to the determination.

A.

DID THE TRIAL COURT ERR IN FINDING THAT FEDERAL'S LIMIT OF LIABILITY FOR PRE-APRIL 1, 1988 LOSSES WAS \$100,000.00?

MMI argues that the trial court erred in finding that Federal's limits of liability for losses sustained prior to April 1, 1988 was \$100,000.00. The trial court's findings regarding the limits of liability for pre-April 1, 1988 losses were based upon its construction of Section 3.06 of the New Policy, which provided:

The liability of the Company for loss sustained prior to (1) the effective date of this policy or (2) the effective date additional Insureds or coverages are subsequently added, is

subject to the following:

(A) The Insured or some predecessor in interest of the Insured carried some other bond or policy (other than a fidelity bond or policy, with respect to such loss under Insuring Clause 4) which, at the time such loss was sustained, afforded on or at the Premises at which the loss was sustained or on the person or persons (whether Employee (s) of the Insured or not) causing the loss, some or all of the coverage of the Insuring Clause of this policy applicable to the loss; and

(B) such prior coverage and the right of claim for loss thereunder continued under the same or some superseding bond or policy without interruption from the time the loss was sustained until the date specified in (1) or (2) above; and

(C) the loss shall have been discovered after the expiration of the time for discovery of such loss under the last such bond or policy.

The liability of the Company with respect to such loss shall not exceed the amount which would have been recoverable under the coverage in force at the time the loss was sustained, or the amount recoverable under the Insuring Clause of this policy applicable to the loss, whichever is smaller.

MMI contends that Section 3.06 is not applicable to the pre-April 1, 1988 losses because the losses were discovered prior to the expiration of the one-year discovery period set forth in the Old Policy; therefore, the condition set forth in (C) of Section 3.06 was not met. We note that an insurance policy must be "viewed by its four corners, and all parts and clauses must be construed to determine if and how far one clause is modified, limited, or controlled by others" and "construction[s] . . . which entirely neutralize[] one provision [are]. . . not adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent." *Benefit Trust Life Ins. Co. v. Lee*, 248 Miss. 715, 729-30, 160 So. 2d 909, 916 (1964) (citations omitted).

Equally important to the construction of Section 3.06 are the provisions of Section 6.3 of the New Policy which state:

The taking effect of this policy shall terminate, if not already terminated, all previous liability of the Company to the Insured under bonds or policies specified in Item 8 of the Declarations of this policy. By reason of the issuance of this policy, the prior bonds or policies shall not cover any loss not discovered and notified to the Company prior to the

effective date of this policy as specified in Item 6 of the Declarations."

According to the provisions of Section 6.3, when the New Policy was issued, the time for discovery and reporting of losses under the Old Policy expired at 12:01 A.M. on April 1, 1988. The discovery period had expired when MMI discovered the losses on September 26, 1988. Contrary to MMI's assertion, condition (C) of Section 3.06 was met. Therefore, we find that the trial court correctly determined that Federal's limit of liability for losses sustained prior to April 1, 1988 was \$100,000.00. Any finding to the contrary might encourage insureds to ignore losses resulting from employee theft until a time when coverage or additional coverage insuring the losses has been acquired.

B.

DID THE TRIAL COURT ERR IN FINDING THAT MMI ONLY SUSTAINED A LOSS WHEN THE EMPLOYEES TOOK CASH?

MMI states that the trial court erred in finding that it sustained a loss only when the employees took cash from the cash envelopes. MMI argues that it also sustained a loss when the employees substituted checks, credit card vouchers, and traveler's checks for misappropriated cash or when the employees failed to properly credit account receivables. As MMI readily admits, the Mississippi Supreme Court has not had occasion to determine when losses are sustained under a lapping scheme of embezzlement. However, we are not handicapped by the lack of precedent. Assuming MMI sustained multiple losses under a "lapping" scheme of embezzlement, the New Policy does not provide coverage for the losses. The terms and conditions of a policy are construed according to their plain meaning, and coverage is not created where none exists. *See A & S Trucking v. First Gen. Ins.*, 578 So. 2d 1212, 1216-17 (Miss. 1990).

Insuring Clause 1 of the New Policy states, "The Company shall be liable for direct losses of money, securities and other property caused by *theft* . . . by any identifiable employee(s) of any insured acting alone or in collusion with others." In Section 7 of the New Policy, theft is defined as "the unlawful taking of money, securities, or other property to the *deprivation* of the insured." Thus, liability does not attach unless the theft results in a *deprivation*. Because MMI was not deprived of the benefit of the checks, credit card vouchers, or travelers checks, a covered loss was not sustained by MMI when the employees merely used the cash equivalents to conceal misappropriations of actual cash. Thus, the trial court was correct in determining that MMI only sustained a loss when employees took cash.

In conclusion, we find no merit in any of the arguments advanced by MMI. Accordingly, we find that the trial court properly granted Federal's motion for summary judgment and affirm the judgment.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF

HINDS COUNTY, MISSISSIPPI IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.