

may stop a motor vehicle if he reasonably believes that a provision of the Motor Vehicle Code is being violated. 75 P.S. 6308; *Commonwealth v. Fisher*, 294 Pa. Super. 486, 440 A.2d 570 (1982). However, in the instant case, Corporal Swartz gave no indication in his testimony that the dice, which hung down approximately 3-4" from the mirror, materially obstructed the defendant's vision or that he had stopped the defendant based on a reasonable belief that a clear view of the road was being impaired. Corporal Swartz stated that he did not observe the defendant's vehicle swerving or otherwise being driven erratically.

Based on the foregoing, we conclude that simply hanging an object from the rearview mirror does not in itself constitute grounds for stopping a vehicle under 75 P.S. 4524. the officer must have reasonable grounds to believe that the object materially obstructs the driver's vision. As there is no indication that the stop was made based on such a belief, the stop was invalid and the resulting evidence must be suppressed. Consequently, there is no need to address the defendant's second issue.

#### ORDER OF COURT

NOW this 14th day of September 1993, the defendant's Motion to Suppress the evidence obtained from the stop of his vehicle on January 30, 1993, is granted.

SUSQUEHANNA BANCSHARES, INC. AND THE CITIZENS NATIONAL BANK OF GREENCASTLE V. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, C.P. Franklin County Branch, No. A.D. 1989-302

*Post trial motions -- Fidelity bond -- Indemnification -- Manifest intent analysis -- External indicia of subjective intent -- Insurance risks -- Moral hazard*

1. The court has inherent authority to change or modify its decision or to order a new trial. The court's decision will not later be reversed on appeal absent clear abuse of discretion or error of law.

2. The court rejects an objective standard which would allow it to infer manifest intent from the fact of injury, if such injury was the natural and

probable result of the employee's voluntary acts. Such a standard could subject the insurer to liability for a broad spectrum of employee misconduct, ranging from incompetence to embezzlement and could result in coverage more comprehensive than intended by the parties.

3. The court distinguishes between the risks inherent in poor business judgment and the risks inherent in fraudulent acts such as embezzlement. The moral hazard created by insurance covering imprudent acts seems much greater than the moral hazard created by insurance covering embezzlement.

4. A fidelity bond insuring against dishonest and fraudulent acts of an employee who acts with manifest intent to harm his employer and benefit himself and others is intended to provide relatively narrow coverage for employee acts more egregious than poor business judgment.

5. Manifest intent analysis relies on external indicia of subjective intent. Manifest intent means apparent or obvious and requires more than mere probability. Manifest intent exists when a particular result is substantially certain to follow from conduct.

6. A bank employee does not act with manifest intent to harm his employer and benefit himself or others when he attempts to avoid a loss on troubled loans by granting extensions without charging a fee or refinancing delinquent loans.

7. In determining whether a bank employee acts with manifest intent to harm the bank and benefit himself or others, it is appropriate to examine the employee's actions in the context of the bank's general operations and lending guidelines, or lack thereof.

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#### OPINION AND ORDER

WALKER, P.J., February 11, 1994:

By opinion and order dated June 8, 1993, and after a fifteen day

nonjury trial, this court found that defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") is not liable under a fidelity bond it issued to plaintiff Citizens National Bank of Greencastle ("CNB"). The fidelity bond provided for indemnification for fraudulent or dishonest acts by employees of the insured, specifically in this case, Marvin Rice. The court concluded that Marvin Rice did not commit dishonest or fraudulent acts with the manifest intent to harm the bank. Plaintiffs Susquehanna Bancshares, Inc. ("SBI") and CNB have now moved for post trial relief, requesting that the court change or modify its decision or, in the alternative, order a new trial.

Plaintiffs assert the following in support of their motion:

1. That the court erred in determining that Marvin Rice's intent to harm CNB and benefit himself or others is to be determined from external indicia of subjective intent.
2. That the court erred in basing its decision on findings that CNB management could have discovered Marvin Rice's activities earlier.
3. That the court erred in relying on *Glusband v. Fittin Cunningham & Lauzon, Inc.*, 892 F.2d 208 (2d Cir. 1989).
4. That the court erred in relying on *Leucadia, Inc. v. Reliance Ins. Co.*, 864 F.2d 964 (2d Cir. 1988), cert. denied, 490 U.S. 1107 (1989).
5. That the court erred in basing its decision on findings of fact not supported by the trial record.

After consideration of the parties' briefs and oral arguments, the court will stand on its opinion of June 8, 1993 and deny plaintiffs' motion for the reasons discussed below.

Pursuant to Pa.R.C.P. 227.1 (1) and (4), the court has the inherent authority to grant or deny the relief requested by plaintiff. The court's decision will not later be reversed on appeal absent a clear abuse of discretion or error of law. *Spang & Co. v. U.S. Steel Corp.*, 519 Pa. 14, 24, 545 A.2d 861, 865 (1988).

The relevant provision of the fidelity bond that National

Union issued to CNB provides:

Dishonest and fraudulent acts as used in the Insuring Agreement shall mean only dishonest or fraudulent acts committed by such employee with the manifest intent:

- (a) to cause the insured to sustain such loss, and
- (b) to obtain financial benefit for the Employee or for any other person or organization intended by the Employee to receive such benefits, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.

Thus, to recover under the fidelity bond, plaintiffs must prove that they sustained a loss as the result of dishonest or fraudulent acts committed by Marvin Rice with the manifest intent to harm the bank and benefit himself or others. Plaintiffs contend that the dispositive issue is not merely whether they established that Marvin Rice had the manifest intent to harm the bank, but also which standard the court should have applied in determining manifest intent.

Plaintiffs argue for a purely objective standard which would allow the court to infer manifest intent from the fact of injury if such injury was the natural and probable result of the employee's voluntary acts. Citing *Liberty National Bank v. Aetna Life and Casualty Co.*, 568 F.Supp. 860, 868 (D.N.J. 1983); *Citizens Bank of Tazewell*, 718 F.Supp. 471, 474 (W.D.Va. 1989). This standard, however, could effectively subject the insurer to liability for a broad spectrum of employee misconduct, ranging from mere incompetence to embezzlement. The court is not persuaded that the parties intended such comprehensive coverage. Indeed, in construing similar or identical bond language, courts have emphasized the distinction between poor business judgment and fraudulent acts, such as embezzlement. See e.g., *FDIC v. St. Paul Fire and Marine Ins. Co.*, 942 F.2d 1032, 1036 (6th Cir. 1991) ("[T]his clause covers fraud, not bad business judgment, whether that be characterized as 'reckless and imprudent,' or just plain 'poor.'") (citations omitted); *First National Bank of Louisville v. Lustig*, 961 F.2d 1162, 1165 (5th Cir. 1992) ("An embezzler always has a manifest intent to cause the bank a loss because his gains come only at the bank's expense.") By

contrast, Marvin Rice's acts were purportedly aimed at saving troubled loans, acts which, if successful, would benefit both the bank and his customers.

The court finds this to be a significant distinction. The risks inherent in acts such as embezzlement are very different than those presented by imprudent or incompetent acts of an employee. The implications of insuring against such different risks were addressed by the Sixth Circuit in the context of an identically worked bond issued to a brokerage firm:

A refusal to recognize the intended limitation on coverage in the present case would amount to a legal rule that investment firms may not purchase insurance against embezzlement or like acts without purchasing insurance against an indeterminate number of other risks, including deception by a trader like Starbuck who pursues reckless trading, to be identified only after the fact by courts. Such a rule would necessarily entail extra costs to be borne ultimately by investors. These costs may be substantial because the other risks selected by the courts may be entirely different from embezzlement-like acts. For example, the moral hazard created by insurance covering losses incurred through risky trading such as Starbuck's seems much greater than the moral hazard created by insurance covering embezzlement.

*Glusband v. Fittin Cummingham & Lauzon, Inc.*, 892 F.2d 208, 212 (2nd Cir. 1989). For these reasons, this court concludes that defendant's fidelity bond was intended to provide relatively narrow coverage for employee acts more egregious than poor business judgment. Plaintiff's proposed standard is therefore inappropriate under such circumstances.

In finding for defendant, this court employed the standard used by the Sixth Circuit in *FDIC v. St. Paul Fire and Marine Ins. Co.*, 942 F.2d 1032 (6th Cir. 1991). This standard required that the court determine whether, based on external indicia of subjective intent, it was apparent or obvious that Marvin Rice intended to harm the bank and benefit himself or others.

Although the district court employed the language of 'subjective intent' as if it believed that the case turned entirely on inner thoughts, it relied, in its analysis, on external indicia of subjective intent—as it had to.

... The clause at issue here ... has been adopted throughout the fidelity insurance industry. 'Manifest intent,' in such a provision, means 'apparent or obvious.' Although the concept of 'manifest intent' does not necessarily require that the employee actively wish for or desire a particular result, it does require more than a mere probability. [M]anifest intent exists when a particular result is 'substantially certain' to follow from conduct.)

*Id.* at 1035. (citations omitted).

Courts have not applied consistent interpretations of the term "manifest intent." This court accepted analyses by the second, sixth, seventh and tenth Circuit Courts of Appeal as an accurate statement of the law. *See, e.g., Leucadia, Inc. v. Reliance Ins. Co.*, 864 F.2d 964 (2nd Cir. 1988), cert. denied, 490 U.S. 1107 (1989) (Refinancing delinquent loans and making new loans to customers in default are not acts committed with manifest intent to harm employer or benefit himself or others); *Heler International Corp. v. Sharp*, 974 F.2d 850, 859 (7th Cir. 1992) (Jury should have been instructed that manifest intent exists when a specific result is "substantially certain" to result from conduct); *First Federal Savings & Loan Assoc. v. Transamerica Insurance Co.*, 935 F.2d 1164 (10th Cir. 1991) (Where loan officer used poor business judgment which resulted in defaults, no manifest intent to cause bank a loss and obtain benefit for himself or others as a matter of law).

Based on external indicia of subjective intent, it was not obvious or apparent to this court that Marvin Rice acted with intent to harm CNB. The parties' post trial arguments and briefs have not persuaded the court to reach a different conclusion. Although Rice was aware that he would benefit his customers by not charging a fee for extensions, he also intended to benefit the bank by attempting to save the loans and avoid the costs of repossession. Indeed, the loan committee subsequently implemented Rice's policy to a limited extent. The court can only conclude that the bank impliedly approved of such attempts to recoup troubled loans. Similarly, this court cannot conclude that Rice's other questionable acts, such as refinancing delinquent loans, were done with an intent to harm the bank.

It is not obvious or apparent to the court that the bank's resulting losses were substantially certain to follow from Rice's

poor business judgment. As previously discussed, the court does not determine poor business judgment to fall within the terms of the bond. If Rice's actions were intended to mislead the bank, they were apparently so intended in order to avoid a loss rather than to sustain a loss.

Plaintiffs also argue that the court erred in considering the quality of management and the general banking environment in which Rice trained and worked, that such consideration effectively amounts to a defense of contributory negligence. The court disagrees. In using the above-cited standard it was appropriate, indeed necessary, for the court to examine Rice's actions in the context of the bank's general operations and lending guidelines, or lack thereof. An employee's conduct cannot be judged as dishonest or fraudulent without a basis for comparison with conduct that is deemed proper and expected by the employer. The court cannot determine whether Rice's actions were dishonest or fraudulent within the terms of the fidelity bond without considering proper banking guidelines and procedures with which plaintiffs' claim that Rice failed to comply. Even if the court had employed plaintiffs' objective standard, it could not ignore the overall lending environment, including reporting procedures, in which Rice operated on a day-to-day basis. Such an inquiry is entirely appropriate in determining Rice's manifest intent regarding these loans.

## CONCLUSION

The parties' post trial arguments and briefs have not persuaded the court to alter or modify its findings and conclusions, as set out in its opinion of June 8, 1993. The court simply cannot conclude that Marvin Rice had the manifest intent to harm the bank and benefit himself or others. For the foregoing reasons, and based on the findings of fact and analysis in this court's prior opinion, plaintiffs' post trial motion is denied.

## ORDER OF COURT

February 11, 1994, plaintiff's post trial motion is denied.

## INDEX OF LEGAL POINTS

### EXPLANATION

Cases are first segregated into legal point categories, and, sometimes, into subcategories, deemed by the index preparer to be most importantly discussed therein. These categories and the subcategories within each of them are alphabetized and sub-alphabetized, according to the first word of each thereof. Each case reported in this volume is then mentioned, inside one or more of such categories or subcategories. The headnotes of each case are quoted, in full, within the category (subcategory) deemed most important for that case, by the index preparer. The headnotes are followed, at the end thereof, by the name and page number, of the beginning of the report of that case. Then, an effort is made, also, under "See Also," to list other cases on point, which other cases are more fully digested, under some other legal point category (subcategory) of the index (Some categories do not include any headnotes, but just mention case names and pages after "See"). This way, because of space limitations, each reported case, hopefully, is digested, just once, and most legal points discussed by each, are highlighted, once. The reader may form his or her opinion, which may differ from that of the index preparer, about what is important concerning each reported case; the publication is not attempting to pass final judgment, in this regard. We are just trying to save space.

## BANKING

### Bonding of Employees

*Post trial motions--Fidelity bond--Indemnification--Manifest intent analysis--External indicia of subjective intent--Insurance risks--Moral hazard*

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