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(Cite as: 831 F.2d 596)

United States Court of Appeals,
Sixth Circuit.
GRANTHAM AND MANN, INC., d/b/a Grantham
Safety Industries, Inc., Plaintiff-Appellant,
v.
AMERICAN SAFETY PRODUCTS, INC., Sam
Evans, Richard J. Althoff and James Hunneke, De-
fendants-Appellees.

No. 85-5857.
Argued Dec. 1, 1986.
Decided Sept. 30, 1987.

CELEBREZZE, Senior Circuit Judge.

Plaintiff-appellant Grantham and Mann, Inc. ("Grantham") appeals the district court's judgment notwithstanding the verdict ("j.n.o.v.") in favor of defendants-appellees American Safety Products, Inc. ("ASP") and three of its corporate officers following a jury verdict finding that the defendants had breached a contract with Grantham. This diversity case also involved allegations of unfair trade practices and a violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), [18 U.S.C. §§ 1961-1968 \(1982\)](#). Grantham contends on appeal that the district court erred in finding that the jury's award of damages was too speculative to be sustained, in granting a directed verdict in favor of the defendants on its RICO claim, in granting summary judgment to ASP on its claims brought pursuant to the North Carolina Unfair Trade Practices Act ("N.C. Act") and the Tennessee Consumer Protection Act ("TCPA"), and in excluding certain evidence during the course of trial. We hold that deficiencies in Grantham's proof of damages warranted the district court's grant of j.n.o.v. to ASP on the breach of contract claim and its treatment of Grantham's RICO and N.C. Act claims. In addition, we conclude that a reasonable factfinder could not have found that the alleged RICO violations caused any injury Grantham might have sustained, that the corporation was an improper party to initiate a private suit under the TCPA, and that errors in the trial court's evidentiary rulings, if any, were harmless. Accordingly, we affirm the district court in all respects.

I. The Facts

ASP is a Tennessee corporation formed in February, 1981 to engage in the business of manufacturing and selling fire extinguishers. On May 12, 1982, ASP entered into a distributorship agreement with Grantham, a North Carolina corporation formed by its sole shareholders, John D. Grantham ("Mr. Grantham") and William C. Mann, for the purpose of selling ASP's product. Under this agreement, Grantham was given master distributorship rights for thirty-four counties of eastern and central North Carolina ("Grantham I") in exchange for an initial purchase of \$25,000 worth of inventory from ASP. The contract afforded Grantham a sixty percent discount on inventory purchased from ASP and prohibited ASP from itself selling products in the territory covered by the contract or selling inventory to a third party if that party planned sales within Grantham's area. To remain the master distributor in Grantham I, Grantham agreed to purchase an additional \$25,000 in inventory from ASP within six months, and an equal amount every *599 three months thereafter. Additionally, the contract gave Grantham a right of first refusal for the master distributor rights for those areas of North Carolina not covered by distributorship agreements. By virtue of this provision, Grantham could foreclose ASP's granting of a master distributorship to another by matching the terms negotiated between ASP and the third party and taking over the territory itself.

On June 1, 1982, defendant-appellee James Hunneke, ASP's sales manager, informed Mr. Grantham by telephone that ASP had a party interested in a distributorship. Although Mr. Grantham reminded Hunneke of Grantham's right of first refusal, he learned at ASP's first annual sales meeting a few days later that ASP had already entered into a distributorship agreement with Charles Wood covering a twenty-one county area in the western part of the state. Hunneke initially informed Mr. Grantham that nothing could be done about this situation, but called a few days later to explain that the sale of the western counties had been a mistake, and that ASP would do whatever Grantham wanted to make up for it, including rescission of the Wood contract. Grantham declined this offer, but after a month of negotiations, the "Wood incident" terminated with a settlement

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resulting in a second distributorship contract between Grantham and ASP. This new agreement gave Grantham the master distributorship rights for twenty-five additional counties contiguous to Grantham's original territory ("Grantham II"). Under this July agreement, Grantham confirmed the \$25,000 inventory purchase and repurchase provisions regarding Grantham I, and agreed to identical provisions for the purchase and repurchase of inventory to cover Grantham II, thereby requiring Grantham to purchase a total of \$50,000 of initial inventory, an additional \$50,000 in six months, and \$50,000 worth of products every three months thereafter. In addition, a more detailed right of first refusal in the second contract gave Grantham seven days from the receipt of written notification to exercise its refusal right and required ASP, upon request, to disclose to Grantham all of its previous agreements, contracts, letters and other communications with any third party who was interested in purchasing the distributorship area.

In August, Mr. Grantham received another phone call and a letter, both from Hunneke, informing him that ASP had a definite offer for the purchase of a fifteen county distributorship around Charlotte, North Carolina for \$40,000.00. Grantham, through its own investigation, determined that the potential purchaser was Larry Surber. Surber was not allowed to testify before the jury, but his proffered testimony indicated that although ASP had asked \$40,000 for the distributorship, no firm offer had been made by him. Surber also indicated that Hunneke had suggested that if Grantham contacted Surber, Surber should inform Grantham that the offer was for \$50,000. At any rate, negotiations between ASP and Surber broke down, and the "Surber incident" ended with no further action on Grantham's part.

The last incident forming the basis for Grantham's action, the "Day incident," occurred in October, 1982. Defendant-appellee Richard J. Althoff, the president of ASP, notified Grantham by letter dated October 8 that ASP had "an interested party for the distributorship covering the Winston-Salem and Charlotte areas." Grantham received the letter on October 14, and immediately wrote ASP requesting that Grantham be informed when a "firm bid" was received, the identity of the potential purchaser, and copies of all correspondence related to the negotiations. By letter dated October 19, Althoff responded that ASP had already notified Grantham as required

by their contract with the October 8 letter, and informed Grantham that the purchaser's name was Frank Day, and that the purchase price was \$65,000. This letter was received by Grantham on October 27, but in the interim, on October 22, ASP had granted a distributorship to Day (the "Day territory") by an agreement calling for Day to purchase \$65,000 in inventory each quarter for a period of five years.

*600 Grantham instituted suit against ASP in the United States District Court for the Middle District of North Carolina on February 15, 1983, claiming that ASP had breached the contract with Grantham when it granted Day a distributorship without affording Grantham the opportunity to exercise its right of first refusal. The complaint also alleged that throughout its dealing with Grantham, ASP had violated both the N.C. Act and RICO. In addition to ASP, Grantham named Sam Evans (ASP's Chairman of the Board), Althoff, and Hunneke as individual defendants. On October 1, 1984, the case was transferred to the United States District Court for the Eastern District of Tennessee pursuant to [28 U.S.C. § 1406\(a\) \(1982\)](#). Thereafter, the Tennessee district court granted ASP's motion for summary judgment on Grantham's claimed N.C. Act violation. Grantham was permitted to substitute for this claim an alleged violation of the TCPA, but prior to trial the district court also granted summary judgment to ASP on that claim. Hunneke was also dismissed from the suit prior to trial.

The case went to trial on July 15, 1985. At the end of Grantham's proof, the district court directed a verdict in favor of the remaining defendants on Grantham's RICO claim, leaving only Grantham's breach of contract claim to be submitted to the jury. On July 18, 1985, the jury returned a verdict for Grantham in the amount of \$350,000 plus interest. The district court, however, granted ASP's j.n.o.v. motion, and this appeal ensued.

* * * *

III. The RICO Claim

Grantham's complaint alleged that one telephone call involving defendant Hunneke concerning the "Wood incident," two *605 phone calls and one letter connected with the "Surber incident," and the two letters from ASP involved in the "Day incident" constituted acts of mail and wire fraud for which ASP was liable under RICO. In dismissing Grantham's action against Hunneke prior to trial, the district court

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found that the four acts relating to the Wood and Surber incidents resulted in no injury to Grantham. Following the presentation of Grantham's proof, the district court found the remaining two alleged acts of mail fraud, the October letters connected to the "Day incident," insufficient to constitute predicate acts necessary for a violation of the RICO Act. Accordingly, the district court granted ASP's motion for a directed verdict in favor of the remaining defendants on the RICO claim.

On appeal, Grantham does not assign error to the district court's dismissal of Hunneke as a defendant or its finding that the correspondence surrounding the Wood and Surber incidents did not result in injury to Grantham. Instead, Grantham contends that the district court's directing out of its RICO claim was error because the two October mailings, alone or in conjunction with the phone calls and letter surrounding the Surber incident which Grantham claims were erroneously excluded from evidence,^{FN8} satisfied the predicate acts requirement of RICO. In addition, Grantham claims that corporate defendant ASP could be held liable based on the doctrine of *respondent superior*, and that any defense provided by the defendants' assertion of a "good faith" belief that the mailings were all that was required to give Grantham notice to exercise its right of first refusal was a matter properly left for a jury to assess. We believe it is unnecessary for us to address any of these contentions which Grantham raises on appeal. In our view, Grantham's pleadings and proof at trial clearly demonstrate that the plaintiff was not entitled to recover under RICO.

^{FN8}. The district court refused to permit Surber to testify concerning his dealings with Hunneke in August, 1982, finding that the testimony would be irrelevant since Hunneke had been dismissed as a defendant. The court also declined to admit into evidence a post-complaint, pre-trial mailing from ASP to Grantham in March, 1983 containing newspaper clippings decrying frivolous lawsuits. Grantham contends on appeal that Surber's testimony and the March, 1983 mailing were relevant and probative of the defendants' intent to defraud Grantham in a manner violative of the RICO Act. Our resolution of Grantham's contention that the district court erred in its directed verdict on the

RICO claim demonstrates that these evidentiary rulings, if erroneous, were harmless.

[Section 1964\(c\)](#) of RICO, the provision upon which Grantham's claim is founded, provides for a private cause of action:

Any person *injured* in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

[18 U.S.C. § 1964\(c\)\(1982\)](#) (emphasis added). Section 1962(c), the specific prohibition upon which Grantham relies, makes it illegal for anyone employed by or associated with an enterprise engaged in interstate commerce to participate "in the conduct of such enterprise's affairs through a pattern of racketeering activity." [18 U.S.C. § 1962\(c\)\(1982\)](#). "Racketeering activity" is defined in [section 1961\(1\)](#) in terms of a long list of federal and state crimes, including mail fraud, [18 U.S.C. § 1341 \(1982\)](#), and wire fraud, [18 U.S.C. § 1343 \(1982\)](#). A "pattern of racketeering activity" requires at least two acts of racketeering activity within a ten year period, [18 U.S.C. 1961\(5\) \(1982\)](#), generally referred to as the "predicate acts" or "predicate offenses" underlying the RICO claim.

Assuming *arguendo* that ASP was engaged in an enterprise affecting interstate commerce conducted through a pattern of mail and/or wire fraud violative of [section 1962\(c\)](#), Grantham's own evidence shows that no reasonable factfinder could have found that Grantham was entitled to recovery under [section 1964\(c\)](#). First, Grantham's proof failed to establish that it had been injured to any degree by any conduct on the part of ASP. The injury alleged by Grantham under the RICO claim *606 was the loss in profits which Grantham would have derived from the Day territory absent ASP's fraud, precisely the same injury alleged in Grantham's breach of contract claim. As we determined above, however, although Grantham clearly had the opportunity and the motivation to prove that it had been damaged as a result of ASP's breach, the plaintiff simply failed to prove that it had suffered injury, in the form of lost profits or otherwise, as a result of being deprived expansion into the Day territory. Indeed, Grantham's proof did not preclude the possibility that it was benefitted by being

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denied the new territory and provided with the impetus to leave a business likely headed south. This failure to establish injury in the context of the breach of contract claim likewise precludes finding a RICO injury compensable under [section 1964\(c\)](#). See [Sedima, S.P.R.L. v. Imrex Co., Inc.](#), 473 U.S. 479, 105 S.Ct. 3275, 3285-86, 87 L.Ed.2d 346 (1985) (A RICO plaintiff can recover only to the extent that “he has been injured in his business or property by the conduct constituting the violation.”); [Haroco, Inc. v. American Nat'l Bank & Trust Co.](#), 747 F.2d 384, 398 (7th Cir.1984), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

In addition, even if Grantham had established lost profits as a result of ASP's conduct, it would have still been unable to recover under RICO because that injury would not have been “by reason of” ASP's fraud. This language of the private civil RICO remedy imposes a causation requirement on plaintiffs:

The criminal conduct in violation of [section 1962](#) must, directly or indirectly, have injured the plaintiff's business or property. A defendant who violates [section 1962](#) is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured.

[Haroco Inc.](#) 747 F.2d at 398; see also [Sedima](#), 105 S.Ct. at 3285-86 (quoting [Haroco](#) favorably); 18 U.S.C. § 1964(c)(1982). Grantham, however, suffered no loss by reason of the correspondence connected with the Wood or Surber incidents, and does not contest on appeal the district court's finding to this effect. As for the Day incident correspondence, Grantham's pleadings and proof at trial demonstrate that it was in no way deceived by ASP's October mailings and in no way relied on those letters to its detriment. Cf. [Bender v. Southland Corp.](#), 749 F.2d 1205, 1216 (6th Cir.1984) (RICO plaintiffs' failure to allege what misrepresentation of material fact they reasonably relied on to their detriment rendered the complaint defective under [Fed.R.Civ.P. 9\(b\)](#)). Following receipt of the October 8 letter, Grantham immediately responded with a letter of its own reminding ASP of its right of first refusal, and requesting the name of the party and copies of correspondence between ASP and the bidder after ASP received a “firm bid” for the new territory. This clearly shows that Grantham, far from being deceived by ASP into fail-

ing to exercise its right of first refusal, never accepted the October 8 letter as the notification called for in its contract with ASP. The October 19 letter, received by Grantham on October 27 after ASP had already breached its contract with Grantham by granting the distributorship to Day, could not have induced Grantham to forego expansion into the new territory. Clearly, any injury which Grantham allegedly suffered could not have resulted from misrepresentations or omissions of material fact in ASP's correspondence on which Grantham did not rely. Assuming, therefore, that Grantham was injured in its business by ASP's conduct, it was injured by virtue of being denied the distributorship of the Day territory, an effect proximately caused solely by ASP's breach of its contract with Grantham. Accordingly, since Grantham failed to establish either the injury or the causation necessary for a [§ 1964\(c\)](#) RICO claim, the district court's directed verdict must stand.

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In light of the foregoing, the judgment and orders of the district court are AFFIRMED.

C.A.6 (Tenn.),1987.

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