STATE OF MICHIGAN

COURT OF APPEALS

RANDALL WYLIN, MICHELE WYLIN and IDEAL MORTGAGE CORPORATION, Plaintiffs-Appellants, v AUTO OWNERS INSURANCE COMPANY, Defendant-Appellee.	UNPUBLISHED October 18, 2005 No. 255669 Wayne Circuit Court LC No. 02-244333-CK

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant, Auto Owners Insurance Company, on the ground that defendant had no duty to defend plaintiffs and therefore plaintiffs were not entitled to reimbursement of defense costs associated with the underlying claim.[1] We affirm.

In the underlying case, Randie Grier pleaded the following allegations: 1) fraud and misrepresentation, 2) intentional infliction of emotional distress, 3) tortious interference with a contract, 4) abuse of process, 5) trespass to real property, and 6) slander of title. Grier alleged in part that Ideal Mortgage, through its loan officer Jason Davis, attempted to defraud him of his interest in real property located at 19713 Snowden in Detroit, Michigan. Grier alleged that Davis processed a mortgage for Jimmie Dumas, who, along with Grier, purchased the property under a land contract. Grier claimed that Davis had knowledge of Grier's interest in the property at the time he processed mortgage documents showing that Dumas was the sole owner of the property. Grier also alleged that Randall and Michele Wylin, as officers and shareholders of Ideal Mortgage, acted in concert with Davis in furtherance of the fraud.

After a trial in the underlying action, the trial court found that Grier had no warranty deed or quit claim deed to the property. But there was a land contract listing both Grier and Dumas as vendees. There was evidence that only Dumas tendered payment on the land contract and that Grier failed to offer proof of consideration paid relating to that contract or of payments owing

[1] *Grier v Walsh Securities, Inc*, Wayne Circuit Court Case No. 99-936679-CH.

under the contract. The trial court found that any interest that Grier may have possessed in the property was extinguished by his failure to cure his default for nonpayment. The trial court further found that Davis was unaware of Grier's alleged interest in the property when he assisted Dumas, the holder of a warranty deed at that time, in obtaining a mortgage through Ideal Mortgage. The trial court concluded that Grier had no legal interest in the property at the time that he alleged his cause of action accrued and dismissed all of his claims.

Before trial in the underlying action, plaintiffs sent a notice of claim to Auto Owners in which they notified Auto Owners of the impending trial and requested assistance in defending against the allegations. Auto Owners responded by sending a reservation of rights letter to plaintiffs, and subsequently sending written notice that it was rejecting plaintiffs' claim for coverage. Auto Owners denied coverage on its determination that the underlying claim did not involve "an occurrence or a claim for bodily injury, property damage, personal injury or advertising injury." After unsuccessfully requesting reimbursement from Auto Owners for costs incurred in defending against the underlying action, plaintiffs filed the present claim.

Plaintiffs' first argue that the trial court erred in granting summary disposition in favor of Auto Owners because Auto Owners had a duty to defend and reimburse plaintiffs with regard to the underlying action that alleged property damage covered under the insurance policy. We disagree.

We review a trial court's ruling on a motion for summary disposition de novo. *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Interpretation and construction of insurance contracts are also questions of law that this Court reviews de novo. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004).

"It is well established that an insurer has a duty to defend an insured and that such duty 'is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured *even arguably* come within the policy coverage.'" *Auto Club Ins Co v Burchell*, 249 Mich App 468, 480-481; 642 NW2d 406 (2001), quoting *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (emphasis in original). If no theories of recovery fall inside the policy, the insurance company has no duty to defend. *Burchell*, *supra* at 481. The duty to defend "depends upon the allegations in the complaint of the third party in his action against the insured." *Smorch v Auto Club Group Ins Co*, 179 Mich App 125, 128; 445 NW2d 192 (1989). The insurer has the duty to look beyond the mere allegations in the underlying complaint to analyze whether coverage is possible and must resolve any doubt in favor of the insured. *Id*. "In order to determine whether an insurer has a duty to defend its insured, this Court must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy." *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 138; 610 NW2d 272 (2000).

Generally, "[a]n insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). When confronted with a dispute between the parties to an insurance contract over the meaning of the policy, the reviewing court "must determine what the agreement is and enforce it." *Radenbaugh*, *supra* at 138. In making that determination, the reviewing court must

look to the contract as a whole and confer meaning on all its terms. *Harrington*, *supra* at 381-382. When an insurance policy contains ambiguous terms, this Court will construe the terms of the policy in favor of the insured. *Nabozny v Burkhardt*, 461 Mich 471, 477 n 8; 606 NW2d 639 (2000). However, "[t]his Court cannot create ambiguity where none exists." *Churchman*, *supra* at 567. Where there is no ambiguity, the terms of the contract must be construed according to their plain and ordinary meanings. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). Moreover, the terms of an insurance contract are to be interpreted in accordance with the definitions in that contract, or, if no definitions are provided, are to be given a meaning according to their "common usage." *Cavalier Mfg Co v Employers Ins of Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). "Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." *Harrington*, *supra* at 382. An insurance policy provision is considered valid "as long as it is clear, unambiguous and not in contravention of public policy." *Id*. (citations omitted).

Auto Owner's policy states:

> A. COVERAGES
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> 1. Business Liability. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under COVERAGE EXTENSION – SUPPLEMENTARY PAYMENTS.
>
> a. This insurance applies only:
>
> (1) To "bodily injury" or "property damage":
>
> (a) That occurs during the policy period; and
>
> (b) That is caused by an "occurrence". The "occurrence" must take place in the "coverage territory".
>
> (2) To "personal injury" caused by an offense:
>
> (a) Committed in the "coverage territory" during the policy period; and
>
> (b) Arising out of the conduct of your business, excluding advertising,

> publishing, broadcasting or telecasting done by or for you.
>
> (3) To "advertising injury" caused by an offense committed:
>
> (a) In the "coverage territory" during the policy period; and
>
> (b) In the course of advertising your goods, products or services.
>
> b. We will have the right and duty to defend any "suit" seeking those damages. But
>
> ***
>
> (2) We may investigate and settle any claim or "suit" at our discretion; . . .

The term "property damage" is defined in the policy as:

> a. Physical injury to tangible property, including all resulting loss of use of that property; or
>
> b. Loss of use of tangible property that is not physically injured.

The policy requires an "occurrence," which is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although the policy does not define the term "accident," with regard to a liability insurance policy the term is generally defined as "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999). The definition of an "accident" should be determined from the standpoint of the insured and must focus on both "the injury-causing act or event and its relation to the resulting property damage or personal injury." *Id*. at 114-115 (citation omitted).

At issue is the allegation of "trespass to real property" in the underlying complaint, which plaintiffs contend is included in the policy coverage as property damage. A trespass is generally defined as "an unauthorized invasion upon the private property of another." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000). Here, the count of "trespass to real property," alleged that plaintiffs' "trespass and interference with [Grier's] property rights were done intentionally, recklessly, and wantonly when [they] knew that the property belonged to [Grier] and that [they] had no right to take these actions." Grier alleged an intent to deprive him of his interest in real property. Randall Wylin presented his affidavit, in which he averred that neither he nor anyone authorized to act on behalf of Ideal Mortgage committed an act intended to harm Grier. However, the "injury-causing act" was Davis' processing of a mortgage and other documents on behalf of Ideal Mortgage with

knowledge of Grier's ownership interest in the property. Despite Randall's attempt to state otherwise, the nature and substance of the allegation under the facts in this case remain premised on the intentional actions of plaintiffs to deprive Grier of his property rights. Because an intended action is not considered an "accident," it does not satisfy the definition of an "occurrence" under the property damage provision. Accordingly, we conclude that, because there was no coverage under the policy, the trial court did not err in ruling that there was no duty to defend and in granting summary disposition in favor of Auto Owners. See *Burchell*, *supra* at 480-481.

Plaintiffs' also argue that the trial court erred by granting summary disposition in favor of Auto Owners because Auto Owners had a duty to defend and reimburse plaintiffs with regard to the underlying action that alleged a personal injury covered under the insurance policy. We disagree.

As previously stated, "[i]n order to determine whether an insurer has a duty to defend its insured, this Court must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy." *Radenbaugh*, *supra* at 138. Plaintiffs' business liability insurance policy with Auto Owners includes coverage for "personal injury" caused by an offense. A personal injury is defined in the policy as:

> [I]njury, other than "bodily injury", arising out of one or more of the following offenses:
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> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;
>
> c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
>
> d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication of material that violates a person's right of privacy.

Because the policy defines the term "personal injury," this term must be construed as written in the policy and not by its ordinary usage. See *St Paul Fire & Marine Ins Co*, *supra* at 107. In looking to the plain language of the policy, trespass is not an enumerated offense that is covered as a personal injury. However, plaintiffs contend that trespass is included in the list of offenses under the personal injury coverage as a wrongful entry. As defined in the policy, an offense that is considered a personal injury is "[w]rongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies." Even assuming that wrongful entry is equivalent to the ordinary definition of trespass, the substance of the allegations given in the underlying complaint under the count designated "trespass to real property" do not comport with the definition of personal injury in the policy. An insurer must look beyond the mere allegations in the underlying complaint to analyze whether coverage is possible. *Smorch*, *supra*

at 128. The allegations in the underlying complaint were premised on the alleged fact that plaintiffs defrauded Grier out of his ownership interest in the property through the processing of false documents for a mortgage. The offense defined in the policy is for wrongful entry into property that the injured party occupies. Therefore, the definition of personal injury in the policy does not incorporate coverage for the actions alleged in the underlying complaint. Because the policy limits coverage to wrongful entry into a premises that the person occupies, it is clear that no insurance coverage existed under the personal injury provision for the trespass to real property allegation in the underlying complaint.

Also at issue is the count of "slander of title," which plaintiffs contend is included in the list of offenses under the personal injury coverage as slander. As defined in the policy, an offense that is a personal injury is "[o]ral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." The elements for slander or defamation include: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod)." *American Transmission, Inc*, *supra* at 702. In contrast, the underlying complaint alleges slander of title, which includes the following elements: (1) the publication of a false matter disparaging the plaintiff's title to real property, (2) with malice, and (3) resulting in special damages. *GKC Mich Theatres v Grand Mall*, 222 Mich App 294, 301; 564 NW2d 117 (1997). The proofs for a claim of slander of title relate to statements regarding the plaintiffs' title to real property, while the proofs for a slander or defamation claim relate to statements disparaging the plaintiff himself. Because these are two distinct torts with markedly different proofs, and because the policy limits coverage to disparaging statements about a person or organization or a person's or organization's goods, products or services, it is clear that no insurance coverage exists for the slander of title allegation in the underlying complaint. Accordingly, we conclude that the trial court did not err in ruling that there was no coverage under the personal protection provision of the insurance policy and that Auto Owners was entitled to summary disposition.

Because the trial court did not err in granting summary disposition in favor of Auto Owners, we decline to address plaintiffs' claim that they are entitled to twelve percent interest on the reimbursement amount.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette