STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v

LOUISE A. SMITH, as personal representative of the ESTATE OF MICHAEL JOHN SMITH, and CHARLES DEMPSEY STRICKLAND,

Defendants-Appellants,

and

LINDA MAE HOWELL, FRANK P. HRANEK and JUDY D. HRANEK d/b/a HRANEK'S RAINBOW FAMILY INN,

Defendants.

UNPUBLISHED
February 24, 1998

No. 194704
Tuscola Circuit Court
LC No. 95-013917-NO

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

In this declaratory action to establish plaintiff's obligation to provide coverage under an insurance policy, defendants appeal as of right from a grant of summary disposition to plaintiff. We reverse and remand for further proceedings.

This dispute arises from the death of Michael John Smith, who was struck with a "club," a device to lock the steering wheel of a motor vehicle, wielded by defendant Linda Mae Howell. Howell had exited a truck driven by her boyfriend, defendant Charles Dempsey Strickland, to confront Smith. Prior to the confrontation, Howell and Strickland had been drinking at Hranek's Rainbow Family Inn, after which they drove back and forth in front of Smith's house. The pair asserted in their depositions that they wished to get Smith out of his house in order to discuss previous incidents in which Smith or his

children allegedly harassed Howell and Strickland. After Smith came out of his house carrying a camcorder, Howell struck him with a "club" and apparently kicked and hit him while he lay on the ground. Strickland did not touch Smith during the incident.

Smith died as a result of the assault, and his estate and children brought a wrongful death complaint against Howell, Strickland, and Hranek's Rainbow Family Inn. The complaint alleged that Howell and Strickland were liable on theories of negligence and "willful and wanton conduct and gross negligence" and that Hranek's Rainbow Family Inn was liable under the dramshop act, MCL 436.22; MSA 18.993. Hranek's was dismissed from the underlying suit.

Howell was convicted of manslaughter and Strickland was convicted of being an accessory after the fact for initially failing to turn over the club to the police. Following the criminal trial, Smith's estate amended its complaint, asserting that Strickland's civil liability was based on negligence because he knew or should have known of Howell's violent tendencies but negligently stopped his truck near Smith, allowing Howell to escape and assault Smith.

Plaintiff, defendant Strickland's mobile home insurer, sought a declaratory judgment to establish that it had no obligation to provide coverage for Howell because she was not an insured under the policy, and no obligation to provide coverage for Strickland because the policy contained an intentional acts exclusion. The circuit court granted summary disposition for plaintiff regarding coverage for Howell but denied summary disposition regarding coverage for Strickland because the underlying suit included allegations of negligence.

Strickland then moved for summary disposition in the underlying suit, arguing that he was not directly involved in the assault on Smith, and there was no special relationship that would have made him responsible for Howell's actions. The circuit court denied his motion, finding that the romance between Strickland and Howell created a special relationship conferring upon Strickland a duty toward Smith, and there was a question of fact regarding whether Strickland and Howell acted in concert in the confrontation with Smith.

In the declaratory action, plaintiff again moved for summary disposition on the issue of coverage for Strickland. In this motion, plaintiff argued that because the estate's amended complaint alleged that Strickland was negligent in stopping his truck in front of Smith's house, coverage for Strickland was precluded under the insurance policy's exclusion for injury "arising out of the ownership, maintenance, use of a motor vehicle." Defendants filed a cross-motion for summary disposition in the declaratory action, asserting that the court had earlier ruled in the underlying suit that the question whether Strickland had been negligent was a factual question for a jury, and that this ruling was now a matter of res judicata regarding the issue of Strickland's intent. The circuit court denied plaintiff's motion, ruling that Smith's injuries did not arise from the operation, use, or maintenance of a motor vehicle, and that coverage for Strickland was therefore not excluded on that basis. The court granted defendants' cross-motion for summary disposition in the declaratory action.

Plaintiff filed a motion for reconsideration, arguing that Strickland's actions were "intended and expected" and thus fell within the insurance policy exclusion for "intentional or intended conduct." The

circuit court next issued an order granting plaintiff's motion for reconsideration and also granting summary disposition to plaintiff based on a finding that the intentional acts exclusion of the insurance policy precluded coverage for Strickland.

Defendants first argue that the circuit court erred in granting plaintiff summary disposition based on a finding that the intentional act exclusion of the insurance policy applied. This Court conducts a de novo review of a grant of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). In deciding a motion for summary disposition, a court may not make findings of fact or weigh credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). Moreover, this Court should affirm a grant of summary disposition only if the proceedings show, drawing all inferences in favor of the nonmoving party, that the moving party was entitled to summary judgment as a matter of law and there are no genuine issues of material fact. *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381, n 3; 565 NW2d 839 (1997).

An insurance policy is a contract. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). The interpretation of unambiguous and unequivocal contractual language is a question of law. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). Questions of law are subject to de novo review. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). An insurer's duty to defend extends to any allegations contained in the underlying complaint that even arguably come within the policy's coverage. *Harrington*, *supra* at 381. When presented with a dispute concerning an insurance policy, a court must determine what the parties' agreement is and enforce it. *Fragner v American Community Mutual Ins Co*, 199 Mich App 537, 542-543; 502 NW2d 350 (1993).

In the present case, the insurance policy provided in pertinent part under the "liability coverages" section:

> Coverage E—Personal Liability
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable: and
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent.

Under the definition section of the policy, "bodily injury" is described as "bodily harm, sickness or disease, including required care, loss of services and death that result." Thus, the underlying wrongful

death lawsuit fell within the policy's definition of bodily injury, and Strickland's defense fell within the policy's general coverage.

However, the policy's coverage was limited by an exclusions section, which provided in pertinent part:

> 1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> a. which is expected or intended by the insured.

The circuit court found that this exclusion precluded coverage for defendant Strickland. Exclusions limit the scope of coverage in an insurance policy and are to be read with the insuring agreement and independently of every other exclusion. *Hawkeye Security Ins Co v Vector Construction Co*, 185 Mich App 369, 384; 460 NW2d 329 (1990). If an insurer intends to exclude coverage under certain circumstances, it should clearly state those circumstances in the exclusions section of its policy. *Fragner*, *supra* at 540. Exclusionary clauses are strictly construed in favor of the insured. *Churchman*, *supra* at 567. The "intended or expected" language of the exclusion requires a subjective inquiry into the intent *or expectation* of the insured. *Harrington*, *supra* at 383. This language "bars coverage for injuries caused by an insured who acted intentionally despite his awareness that harm was likely to follow from his conduct." *Id.* at 384. Courts must enforce clear and specific exclusions. *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992).

Strickland and Howell each testified that their reason for driving in front of the decedent's house was that they wanted to talk to him about previous incidents. In denying Strickland's motion for summary disposition in the underlying suit, the circuit court observed that there was evidence showing that Strickland acted with the intent of getting the decedent to come out of his house. The court also found, however, that whether Strickland had any role in the assault on the decedent was a question of fact for the jury. We find that, under these circumstances, the circuit court was not justified in concluding as a matter of law that Strickland expected or intended the injury that Howell inflicted upon the decedent or was aware that harm was likely to follow his conduct of stopping the car in front of the decedent's house. The court, therefore, erred in finding that the exclusionary provision of the insurance policy applied to Strickland's actions and precluded plaintiff's duty to defend Strickland in the underlying suit.

Defendants next argue that the circuit court abused its discretion in granting plaintiff's motion for reconsideration under MCR 2.119(F)(3), which provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Under MCR 2.119(F)(2), no response to a motion for reconsideration may be filed, and there is no oral argument, "unless the court otherwise directs." We note that because we have ruled that the circuit court erred in granting summary disposition on the basis of the intentional acts exclusion, it is not necessary for us to decide this issue. However, we acknowledge that the circuit court's grant of plaintiff's motion for reconsideration and the subsequent grant of summary disposition to plaintiff was unorthodox, and we therefore briefly address the issue.

Defendants argue that plaintiff's motion for reconsideration was in essence a new motion for summary disposition because plaintiff presented different grounds for the motion, and defendants did not have an opportunity to respond. This argument ignores the fact that defendants responded to plaintiff's original motion based on the intentional acts exclusion clause. Defendants further contend, however, that plaintiff demonstrated no palpable error in the circuit court's ruling, and the court therefore should not have granted the motion for reconsideration.

This Court reviews a circuit court's grant of reconsideration for an abuse of discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450 NW2d 6 (1990). Although plaintiff's motion for reconsideration was filed outside the fourteen-day period allowed for submission of such motion in MCR 2.119(F)(3), the time requirement under this court rule does not limit the discretion of the circuit court to consider a motion for reconsideration nor does a party's failure to file a timely motion bar this Court from reaching the merits of the controversy. *Bers v Bers*, 161 Mich App 457, 462-463; 411 NW2d 732 (1987). Moreover, the court rule's requirement of showing palpable error merely provides guidance to the trial court in deciding reconsideration motions and does not operate to restrict the trial court's discretion in determining whether a grant of reconsideration is appropriate in a particular case. *Id.* at 463. "If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion." *Id.*

Because defendants previously had an opportunity to respond to plaintiff's argument regarding the intentional acts exclusion, the court rule's time limits are not strictly enforced, and the requirement of showing "palpable error" is meant to merely provide guidance to a trial court, we decline to find that the circuit court abused its discretion in granting plaintiff's motion for reconsideration under the facts of the present case.

Finally, defendants argue that the circuit court's denial of summary disposition for defendant Strickland in the underlying suit based on its finding that the estate had stated a prima facie case of negligence against Strickland precluded a finding for plaintiff in the declaratory action because of the application of res judicata. This argument has no merit. A party may invoke the doctrine of res judicata only when the previous decree is a final decision. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994). To be accorded the conclusive effect of res judicata, the prior judgment must ordinarily be the "last word" of the rendering court. *Id.* at 381. In the present case, the denial of Strickland's motion for summary disposition was not a final decision. The circuit court's finding that the estate had presented a prima facie case of negligence did not establish that Strickland was in fact negligent but merely permitted the

underlying suit to go forward. Accordingly, the finding had no preclusive effect on later decisions.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage