STATE OF MICHIGAN

COURT OF APPEALS

ROBERT SCHULTZ,

Garnishee Plaintiff-Appellee,

v

AAA MICHIGAN,

Garnishee Defendant-Appellant.

UNPUBLISHED
May 28, 1999

No. 201175
Grand Traverse Circuit Court
LC No. 94-012764 NO

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Defendant appeals of right from an order granting plaintiff's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

While attending a New Year's Eve party at the home of C. Andrew and Jean Bonner, plaintiff was injured when a fireworks display misfired. The Bonners were insured under a homeowner's insurance policy issued by defendant. Plaintiff filed suit against the Bonners and one other individual, who was also involved in igniting the fireworks display. Citing to a criminal acts exclusion contained in the homeowner's policy, defendant declined to defend the Bonners in the underlying suit. Ultimately, plaintiff was granted summary disposition in the underlying suit. Plaintiff then sought to garnish defendant for payment of the judgment. Because defendant had failed to defend the underlying lawsuit, the trial court granted summary disposition to plaintiff.

On appeal, a trial court's decision to grant a summary disposition motion is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. In deciding such a motion, the trial court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence . . . , and must give the nonmoving party the benefit of every reasonable doubt." *Porter v Royal Oak*, 214 Mich 478, 484; 542 NW2d 905 (1995). Accord *Spiek, supra* at 337. For purposes of the present appeal, defendant is considered to be the nonmoving party.

First, defendant contends that the trial court erred when it ruled that because defendant had failed to either defend the Bonners or to seek a declaratory judgment, defendant could not raise the

exclusionary clause as a defense in response to plaintiff's garnishment action. We agree. This Court held in *In re Smith Estate*, 226 Mich App 285, 288-289; 574 NW2d 388 (1997), "that defenses raised in an initial letter denying coverage are preserved and may be raised in a later garnishment action." It is undisputed that defendant notified its insureds and plaintiff that it was denying the claim on the basis of the policy's criminal acts exclusion. Therefore, defendant properly preserved its right to raise that defense in response to plaintiff's garnishment action. *Id.*

Plaintiff asserts, however, that whether defendant could raise a criminal act or omission exclusion defense is irrelevant since the underlying action was decided on the alternate theory of premises liability. We disagree. In *In re Smith, supra*, the plaintiff successfully litigated the underlying action on a theory of negligence. *Id.* at 287. Nevertheless, the Court held that the insurer could raise as a defense in the garnishment action the "assertion that [the] plaintiff's injuries were sustained as a result of the 'natural, foreseeable and anticipatory unlawful and felonious acts' of" the deceased. *Id.* at 290. As in the case at hand, the insurer in *In re Smith* had first raised its coverage defense in a letter of denial. *Id.* We conclude that defendant in the case at hand should also be afforded the same opportunity to raise its coverage defense. See also *Havens v Roberts*, 139 Mich App 64, 66-67; 360 NW2d 183 (1984).

We also reject plaintiff's claim that defendant is estopped from litigating the criminal acts exclusion by the rule of res judicata. Res judicata applies to bar re-litigation of legal issues decided in a previous lawsuit only where "(1) the prior action [was] decided on its merits; (2) the issues raised in the second case [were] resolved in the first; and (3) both actions . . . involved the same parties or their privies." *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 535; 442 NW2d 714 (1989). The parties in this garnishment action were not the same as in the underlying action. Although the insureds were related to defendant by virtue of their contractual relationship, their interests in the underlying lawsuit were decidedly in conflict. See *Havens, supra* at 66-67 (concluding that the doctrine of res judicata was inapplicable, where it had been in the insured's "best interest to have any judgment against her based upon negligence so that the [intentional act] exclusion would not apply").

Second, defendant argues that it gave the Bonners adequate notice of the change in coverage that added the criminal acts exclusion to the policy. Although the trial court did not specifically address this issue in its ruling, we will address it here because of the likelihood that this issue will arise again on remand. *Great Lakes Div of National Steel Corporation v Ecorse*, 227 Mich App 379, 415; 576 NW2d 667 (1998). The question of whether the notice was adequate is a legal question that is reviewed de novo. *Bergeron v Busch*, 228 Mich App 618, 620: 579 NW2d 124 (1998).

Defendant maintains that the two-page notice it sent to the Bonners along with a copy of the revised homeowners policy was adequate to alert them to, and inform them of, the addition of the criminal acts exclusion. We agree. The cover letter that accompanied the revised policy contained the following relevant language:

PART II - BODILY INJURY AND PROPERTY DAMAGE **NOT** COVERED

New or revised policy provisions have been made to clarify exclusions for the following:

Intentional Acts *Criminal Acts or Omissions*

Intra-Household Liability Pollution to the Environment

> Since each of these revisions may contain new information, we again urge you to read the full text of these provisions in your new policy. [Bold in original; italics added; bullets removed.]

We deem the language of the notice letter sufficient to have made the insureds aware of the need to read the policy and make timely inquiries regarding any coverage questions. Once such notice was given, it then became the obligation of the Bonners to read the policy and raise questions about the coverage within a reasonable time. *Transamerica Ins Corp of America v Buckley*, 169 Mich App 540, 546; 426 NW2d 696 (1988).[1]

Defendant also argues that the trial court erred when it held that the criminal acts coverage exclusion was not applicable because the exclusion did not have a requirement of foreseeability and that, as determined by the underlying tort action, the alleged criminal act was not the proximate cause of plaintiff's injury. We agree. Regarding the matter of foreseeability, this Court held in *Allstate Ins Co v Fick*, 226 Mich App 197; 572 NW2d 265 (1997), that "a broad criminal acts exclusion . . . 'eliminates from coverage more than just intentional crimes or injuries intended or reasonably expected.'" *Id.* at 203-204, quoting *Allstate Ins Co v Juniel*, 931 P2d 511, 515 (Colo App, 1996). As in *Fick*, the policy language in this case is clear and unambiguous. It does not contain any requirement of foreseeability.

As for the trial court's conclusion regarding probable cause, the court based its determination on the "uncontroverted" facts that had been submitted in support of plaintiff's uncontested summary disposition motion in the underlying action against the Bonners. However, neither those facts nor the summary disposition decision in the underlying action resolved whether the firework that struck and injured plaintiff was illegal and if so, whether the Bonners were criminally responsible for the possession, provision or use of that allegedly illegal firework.

The trial court further ruled that even if the insurer could raise the policy exclusion, the uncontroverted facts precluded the insurer from demonstrating a causal relationship "between an ostensible, criminal act as a social host and the injury here." We again respectfully disagree. In determining whether a particular activity is excluded from coverage, "we look to the underlying cause of the injury to determine coverage and not the specific theory of liability alleged in the complaint." *Allstate Ins Co v Freeman*, 160 Mich App 349, 357-358; 408 NW2d 153 (1987). Plaintiff alleged in his complaint in the underlying action that his injury was caused by the misfiring of an illegal firework. The failure "to maintain their residence premises in a safe condition so as to avoid unreasonable risk of danger or harm to the persons and/or property of others," is plaintiff's specific theory of liability, but it is not the alleged cause of plaintiff's injury.

In light of our foregoing analysis, we hold that summary disposition was incorrectly granted to plaintiff. We therefore reverse and remand for further proceedings consistent with this opinion.

Finally, we will briefly address the judgment interest calculation utilized by the trial court in case the issue is subsequently revisited on remand. *Ecorse, supra* at 415. The issue of what interest rate ought to be applied to the judgment is a matter of statutory interpretation that is reviewed de novo on appeal. *Yaldo v North Pointe Ins Co,* 457 Mich 341, 344; 578 NW2d 274 (1998).

Defendant argues that because the underlying judgment is based on a tort action, the trial court erred in granting twelve percent interest on the garnishment judgment pursuant to MCL 600.6013(5); MSA 27A.6013(5). We agree. Garnishment is a proceeding ancillary to the original suit; it is not a new or separate action. *Ward v Detroit Automobile Inter-Ins Exchange,* 115 Mich App 30, 35; 320 NW2d 280 (1982). Therefore, the filing of a writ of garnishment in this case did not start a new cause of action, but rather constituted a post-judgment continuation of the existing lawsuit to satisfy the judgment. A tort judgment cannot be transformed into an action on a written instrument simply by the filing of a writ of garnishment against an insurance company in that tort case. Accordingly, the applicable interest would be the variable rate provided for in MCL 600.6013(6); MSA 27A.6013(6).

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

[1] Plaintiff has also argued that the use of the word "clarify" in the cover letter suggested that the new language only explained existing exclusions. That argument is without merit. Although the word "clarify" can be taken to refer to an explanation of something already in existence, there is no reason why it cannot also refer to an explanation of something new. The notice alerted the insureds to the existence of *new* or revised exclusions. The revised policy purported to clarify these exclusions. The notice also specified that the revisions might contain *new information* so it was important for the insureds to read the entire revised policy.