

STATE OF MICHIGAN
COURT OF APPEALS

CONSOLIDATED MEDICAL SERVICES,
KATHY RANDAZZO and ANDREW
RANDAZZO,

UNPUBLISHED
May 25, 2001

Plaintiffs-Appellants/Cross-
Appellees,

v

TRAVELERS PROPERTY CASUALTY,

Defendant-Appellee/Cross-
Appellant,

and

BARRY LOCKHART,

Defendant.

No. 220846
Oakland Circuit Court
LC No. 98-007109-CK

Before: Jansen, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiffs Randazzo appeal, and defendant Travelers cross-appeals, as of right from a circuit court order granting upon reconsideration Travelers' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Kathy Randazzo sought treatment from a doctor at Consolidated. The doctor ordered x-rays, which were taken by Lockhart, an x-ray technician employed by Consolidated. While taking the x-rays, Lockhart allegedly sexually assaulted Kathy Randazzo. The Randazzos sued Consolidated and Lockhart. Travelers, Consolidated's general liability insurer, denied Consolidated's request for a defense and indemnification.

The trial court originally ruled that the Randazzos' claims against Consolidated arguably constituted claims for "bodily injury" caused by an "occurrence" as those terms are defined under the policy, but that the claims were excluded from coverage under the health services exclusion. It therefore concluded that Travelers did not have a duty to indemnify Consolidated but did have

a duty to defend until its duty to indemnify had been resolved. Upon reconsideration, the trial court ruled that the Randazzos' claims against Consolidated were not predicated upon a bodily injury and thus Travelers did not have a duty to defend or indemnify.

The Randazzos, assignees of Consolidated's rights under the policy, appeal the court's ruling that there was no coverage under the policy because the underlying complaint did not allege a bodily injury. Travelers appeals the court's ruling that it had a duty to defend the underlying action even though coverage was excluded under the health services exclusion and its ruling that the underlying complaint was arguably based on an occurrence. Neither party has appealed the trial court's ruling that coverage was excluded under the health services exclusion.

We review the trial court's ruling on a motion for summary disposition de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion brought under subrule (C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

An insurance company's duty to defend its insured arises solely from the language of the insurance policy. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 600 n 6; 575 NW2d 751 (1998). The duty to defend arises if the underlying allegation even arguably come within the policy coverage. *Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997). Thus, "an insurer has a duty to defend, despite theories of liability asserted against an insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *Dochod v Central Mut Ins Co*, 81 Mich App 63, 67; 264 NW2d 122 (1978).

The duty to defend is tied to the availability of coverage. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 315; 575 NW2d 324 (1998). If coverage is not possible under the policy, the insurer does not have a duty to defend the insured. *Id.*; *Protective Nat'l Ins Co of Omaha v Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991). Thus, the insurance company does not have a duty to defend against claims that are expressly excluded from policy coverage. *Meridian Mut Ins Co v Hunt*, 168 Mich App 672, 677; 425 NW2d 111 (1988).

Assuming without deciding that the Randazzos' complaint against Consolidated did allege claims for bodily injury caused by an occurrence, coverage for those claims was excluded under the health services exclusion. Because the duty to defend is tied to coverage and does not arise if the underlying claim is excluded from coverage, the trial court erred in ruling that Travelers ever had a duty to defend. We therefore reverse that aspect of the trial court's ruling.

Because Travelers did not have a duty to defend or indemnify its insured due to the health services exclusion, we need not address the other issues raised by the parties.

Reversed.

/s/ Kathleen Jansen

/s/ Brian K. Zahra

/s/ Donald S. Owens