STATE OF MICHIGAN

COURT OF APPEALS

PHILIP J. GROSSO and PREMIER REAL ESTATE INVESTMENT CO., a Michigan corporation, d/b/a RED KEIM PREMIER REAL ESTATE,

Plaintiffs-Appellants,

v

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a foreign insurance company,

Defendant-Appellee.

UNPUBLISHED
June 12, 2001

No. 218622
Macomb Circuit Court
LC No. 98-003491-CK

Before: Hoekstra, P.J., and Whitbeck, and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's order granting summary disposition to defendant and holding that defendant owed no duty to indemnify or defend plaintiff Grosso during a portion of an underlying lawsuit brought against Grosso by a third party. We affirm.

Grosso is a licensed real estate broker and part owner of plaintiff Premier Investment Company. Premier obtained an insurance policy from defendant. The policy provided that defendant would cover the amount of money that any protected person was legally required to pay as damages for covered loss that (1) "result[ed] from the conduct of real estate agent or broker duties" and (2) "[was] caused by a wrongful act. . . ."

In 1997, Matteo Foglia commenced a lawsuit against Grosso and one of Grosso's clients, Keith Evola, who had entered into an agreement with Foglia in 1996. The agreement specified that Foglia would purchase a service station from Evola; Grosso assisted in arranging the purchase. In his initial and first amended complaints,[1] Foglia alleged a breach of an implied covenant of goodwill, fraud, civil conspiracy, tortious interference with a business expectancy,

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[1] Foglia also filed a second amended complaint. The instant suit does not concern the second amended complaint. The term "lawsuit" in the remainder of this opinion refers solely to Foglia's initial and first amended complaints.

and rescission of contract. In essence, Foglia claimed that Evola had sold him a working service station, a portion of which consisted of good will and customer lists, and that Evola, with Grosso's knowledge and assistance, wrongly began sending letters to the customers, soliciting their business for Evola's new service station.

When informed of the claims against Grosso, defendant both declined coverage for the claims and stated that it did not have a duty to defend the lawsuit because, inter alia, Foglia's lawsuit did not concern Grosso's "real estate or broker duties," and Foglia's claims were based on intentional conduct not covered under the "wrongful act" definition of the insurance policy. Plaintiffs then sued defendant to force coverage and defense of the lawsuit, and the trial court eventually granted defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that Foglia's lawsuit did not encompass "real estate agent or broker duties" or a "wrongful act" by Grosso.

Plaintiffs contend on appeal that the trial court erred in granting defendant summary disposition because Foglia's lawsuit did indeed encompass "real estate agent or broker duties" by Grosso. We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Moreover, the interpretation of contractual language is a question of law subject to de novo review on appeal. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). A clear and unambiguous insurance policy must be enforced as written, using the plain and easily-understood meanings of the policy's terms. *Gelman Sciences, Inc v Fidelity & Casualty Co*, 456 Mich 305, 318; 572 NW2d 617, amended 456 Mich 1230 (1998).

We hold that plaintiffs are not entitled to appellate relief. First, plaintiffs address only one of the trial court's justifications for granting defendant summary disposition. The trial court granted summary disposition because Foglia's lawsuit encompassed neither "real estate agent or broker duties" *nor* a "wrongful act" by Grosso. Plaintiffs address only whether the lawsuit encompassed "real estate agent or broker duties." Accordingly, because the clear absence of a "wrongful act," by itself, is sufficient to deny coverage and defense of the lawsuit,[2] and because plaintiffs do not argue on appeal that the trial court erred in finding no "wrongful act," plaintiffs are not entitled to relief.

Moreover, even if plaintiffs *had* raised the issue of the existence of a "wrongful act," we would find no basis for relief. The definition of "wrongful act" in the policy contained two separate classes of conduct: conduct constituting a defined "personal injury offense" and conduct constituting a "negligent act, error or omission other than an act of discrimination." The alleged acts described in the initial and first amended complaints did not fall within these categories.

First, Foglia clearly did not allege misconduct on the part of Grosso that would constitute a "personal injury offense" as defined in the policy. For example, Foglia did not contend that

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[2] As indicated earlier, in order for coverage to exist in this case, not only must the harm have resulted from the insured's duties as a real estate agent or business broker, the harm must also have resulted from a "wrongful act" as defined in the policy.

Grosso slandered him, that the solicitation materials belittled his work or the quality of his service station activities or facilities, or that Grosso violated his right to privacy.

Additionally, none of the counts alleged in Foglia's first two complaints rested upon any "negligence, error or omission" by Grosso. The counts were based on allegedly fraudulent, dishonest, intentional misconduct. This alleged misconduct was not equivalent to a failure to use due care (negligence) or a failure to do something necessary (omission). Nor was the alleged misconduct equivalent to an "error." As noted in *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996), terms in an insurance policy must be given their ordinary and plain meanings. *Random House Webster's College Dictionary* (1997), p 444, defines "error" primarily as "a deviation from accuracy or correctness; mistake." The alleged misconduct here was not a mistake but was instead intentional.

Accordingly, because Foglia did not claim a "wrongful act" by Grosso, defendant had no duty to indemnify. Nor did defendant have a duty to defend. As stated in *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994), "an insurer's duty to defend is broader than the duty to indemnify. It arises in instances in which coverage is even arguable." Here, under the unambiguous language of the policy, coverage is not even arguable, because Grosso's alleged misconduct clearly did not constitute a "wrongful act."

Because the trial court correctly concluded that the "wrongful act" provision of the insurance policy precluded coverage and defense of the lawsuit, we need not reach plaintiffs' contention that the trial court erred in concluding that Foglia's lawsuit did not encompass "real estate agent or broker duties" by Grosso.

Plaintiffs additionally contend that coverage and defense of Foglia's lawsuit by defendant was required under the doctrine of "reasonable expectation." Under this doctrine, the court determines whether the policyholder, on reading the contract, would have a reasonable expectation of coverage. *Gelman*, *supra* at 318. We agree with the trial court that no such reasonable expectation existed in this case. Indeed, given the clear language of the policy and the nature of the alleged misconduct, plaintiffs could not reasonably expect coverage or defense services with respect to Foglia's initial and first amended complaint.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter