

STATE OF MICHIGAN
COURT OF APPEALS

ANIMAL BEHAVIOR INSTITUTE, INC.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

December 28, 2001

No. 226554

Oakland Circuit Court

LC No. 99-018139-CZ

Before: White, P.J., and Talbot and E.R. Post*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Animal Behavior Institute (ABI) operates an animal research and training facility on a forty-acre parcel of property in Metamora Township. Defendant is ABI's insurer. In December 1992, ABI received a special land use permit from Metamora Township to operate the facility at issue. Ronnie and Delia Gipson purchased a ten-acre parcel adjacent to ABI by land contract in December 1990, obtained the warranty deed in August 1992, began building a home on the parcel in 1995, and moved into the home in 1997.

The Gipsons brought the underlying action in February 1999 against ABI, ABI's director and administrator, individually, the property owner from whom ABI leases the property (SBL, Inc.), and Metamora Township. The Gipsons' four count complaint alleged in pertinent part:

6. That the Defendant, Animal Behavior Institute, kennels dogs at a kennel at 2634 Rock Valley Road, immediately to the west of Plaintiffs' residence, and said dogs bark loudly and incessantly, thereby destroying the Plaintiffs' quiet enjoyment of their property.

7. That 2634 Rock Valley Road is located in an A2 zoned area and kennels are not allowed in an A2 zoned area.

* Circuit judge, sitting on the Court of Appeals by assignment.

8. That on October 9, 1991, almost one year after the Plaintiffs had purchased their property, James Lessenberry, Administrator of the Animal Behavior Institute, attended a Metamora Township Planning Commission meeting asking "to be considered for a kennel license" for a kennel to be built on the property immediately to the west of Plaintiffs' property.

9. That Mr. Lessenberry was told by the Planning Commission that Commercial Kennels were not allowed in an A-2 District, but was advised that he should seek a special land use permit for a "Limited Business Use" pursuant to Section 1428 of the Metamora Township Ordinances.

* * *

16. That the entity calling itself the Animal Behavior Institute, which leases land from SBL, Inc., is a kennel, as that term is defined in MCL 287.270, and in fact Defendant Lessenberry refers to the Animal Behavior Institute as a "private kennel" in his November 2, 1992 letter to the Township, seeking Township approval for a special use.

17. That the entity calling itself the Animal Behavior Institute, is really a commercial kennel as that term is defined in the Metamora Township Ordinances, Article 3, to wit: "An establishment where three or more dogs, cats or other pets are confined or kept for sale, boarding, breeding or training purposes for remuneration."

18. That at a Metamora Township Planning Commission meeting held on November 11, 1992, Messrs. Barlia and Lessenberry made a special land use request "to form an Animal Behaviour (sic) Institute at 2634 Rock Valley Road" . . . and a public hearing was set. . .

* * *

21. That the Plaintiffs were not notified of the Metamora Township Planning Commission's Public Hearing held on December 9, 1992 to consider the very serious issue of whether or not to allow dogs to be kenneled immediately next to the property that Plaintiffs had owned for over two years, and upon which they intended to build their family home.

* * *

25. That Defendant, Metamora Township violated its own Ordinance in failing to give Plaintiffs proper notice as required by its own Ordinances.

26. That Defendant, Metamora Township violated State Law in failing to give Plaintiffs proper notice as required by MCL 125.216b; MSA 5.2961.

27. That the decision made by the Metamora Township Planning Commission to allow the present special land use is void ab initio

28. That Defendants, Lessenberry and Barlia confirmed at the December 9, 1992 Planning Commission was therefore issued “for the purpose of conducting behavior research with dogs” . . . however, the Defendants frequently use the facility for the boarding of dogs, only.

30. That, in fact, the Defendant, Animal Behavior Institute publishes to the general public, its own brochure, which openly solicits the general public to board dogs there.

31. That the Plaintiffs brought their case before the Metamora Township Planning Commission on September 10, 1997, asking that the Commission rescind its decision to allow the special use “private kennel”, however, the Commission upheld its decision after a cursory investigation.

The first count of the Gipsons’ underlying complaint alleged nuisance against all the defendants:

32. That Defendants, Animal Behavior Institute, Barlia, Lessenberry, and SBL, Inc. maintain a nuisance, in that the dogs kenneled on the aforementioned property immediately adjacent to Plaintiffs’ home, bark loudly and incessantly.

33. That the barking of the kenneled dogs destroys the Plaintiffs’ quiet enjoyment of their property and this Honorable Court should immediately abate this nuisance.

34. That the kennel, Animal Behavior Institute, has in the past kept a manure pile close to the property of Plaintiffs.

35. That the manure pile is situated such that any drainage from the pile will from towards Plaintiffs’ property.

36. That Defendant, Metamora Township is equally responsible for maintaining said nuisance because the Township has sanctioned the same by allowing a kennel to be placed in an A2 zoned district, even though the entity is referred to as an “Animal Behavior Institute”.

37. That Defendant, Metamora Township is equally responsible for maintaining said nuisance because of its Planning Commission’s negligence in failing to notify the Plaintiffs of the hearing which led to the allowance of the special use kennel adjacent to Plaintiffs’ property.

The remaining counts of the Gipsons’ complaint alleged negligence, a taking and violation of due process by Metamora Township. The prayer for relief stated:

WHEREFORE, Plaintiffs pray that this Honorable Court will:

1. Abate the nuisance described in this complaint:
2. Award Plaintiffs just compensation for the taking of their property relative to the diminution in value of said property.

3. Award Plaintiffs their costs and attorney fees for having to bring this action before the court;
4. Provide any further relief that the court deems just and fair.

ABI requested that defendant defend it against the Gipson suit, but defendant denied coverage on the basis that there had been no “occurrence.” Plaintiff filed this declaratory action. On cross-motions for summary disposition, the circuit court granted defendant’s motion. This appeal ensued.

I

Although defendant sought summary disposition on several grounds, the circuit court granted defendant’s motion on one ground alone - - that defendant had no duty to defend because the Gipsons sought only injunctive relief from ABI, i.e., abatement of a nuisance, and not money damages.¹

Plaintiff argues that the circuit court erred, asserting that the Gipsons clearly alleged property damage for which they are seeking money damages, plainly alleged a loss of the use and quiet enjoyment of their property caused by ABI’s conduct, and alleged a taking of their property for which they should be compensated, also caused by ABI’s conduct. Plaintiff argues that the Gipsons’ allegations clearly fall within the plain meaning of the term “Property Damage” under the policy.

¹ The circuit court stated:

The policy states that it 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.”

Thus, the next question is whether the underlying lawsuit seeks damages from the Plaintiff or whether it merely seeks an abatement of the nuisance. Paragraphs 32 through 35 of the underlying Complaint allege a loss of use of the property by the Gipsons. Paragraph 40 alleges a taking by Defendant, Metamora Township, not Plaintiffs, so it is not relevant to the damages that are sought against the Plaintiffs.

The relief sought, as stated in the prayer for relief, seeks, one, an abatement of the nuisance; two, just compensation for the taking; and three, an award of costs and attorney fees. Thus, the only relief sought from the Plaintiffs is the abatement of the nuisance and there’s no duty to defend when the action seeks only injunctive relief. That’s Jones vs. Farm Bureau [Mut Ins, 172 Mich App 24; 431 NW2d 242 (1988)].

This Court is satisfied that on the basis the facts and the law governing this particular policy and its execution, that Defendant’s Motion for Summary Disposition should be granted and Plaintiff’s Motion for summary disposition is denied.

We review de novo the circuit court's grant of summary disposition to defendant. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The circuit court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted in the action in the light most favorable to the party opposing the motion. *Id.* The moving party has the initial burden of supporting its positions by documentary evidence; the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* at 455.

An insurer's duty to defend is broader than its duty to indemnify. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). The insurer has a duty to defend claims that are arguably covered by the policy, even though the claims may be groundless or frivolous. *Id.* Any doubt regarding the duty to defend must be resolved in favor of the insured. *Id.* at 10. "The duty to defend and indemnify is not based solely on the terminology used in the pleadings in the underlying action. The court must focus also on the cause of the injury to determine whether coverage exists." *Fitch v State Farm Ins*, 211 Mich App 468, 471; 536 NW2d 273 (1995).

Insurance policies must be enforced according to their terms. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). An insurance company will not be held liable for a risk it did not assume. *Id.* Where the terms of the policy are clear, the courts shall not create ambiguities and must enforce the contract as written. *Id.* However, if there are ambiguous terms in the policy, construction should be in favor of the insured. *Id.*

II

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992), citing 4 Restatement 2d of Torts, § 821D, at 100.

[A]n actor is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [See also *Adams v Cleveland-Cliffs Iron*, 237 Mich App 51, 67; 602 NW2d 215 (1999) (noting that "in nuisance, the plaintiff must prove all damages, which may be awarded only to the extent that the defendant's conduct was "unreasonable" according to a public-policy assessment of its overall value." [Citations omitted and emphasis in original.])]

"Liability for damage caused by a nuisance may be imposed where the defendant creates the nuisance, owns or controls the property from which the nuisance arose, or employed another that it knows is likely to create a nuisance." *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 488; 532 NW2d 183 (1994).

"[D]amages for a nuisance can be recovered for a diminution of the value of property or on the basis of a claim that the nuisance was of such an extent as to prevent the use of a home."

Travis v Preston, 247 Mich App 190, 203; 635 NW2d 362 (2001), citing *Kobs v Zehnder*, 326 Mich 202, 207; 40 NW2d 120 (1949).²

In a nuisance case, where the injury is permanent, a plaintiff may recover future or prospective, as well as past damages. Where the injury is of a temporary, recurrent or removable character, a plaintiff may recover damages occurring after the commencement of the action if he seeks in one action both equitable relief by an abatement of the nuisance and damages, in which case, damages may be awarded to the time of trial. 66 CJS, Nuisances, § 171, p 976. [*Oakwood Homeowner's Ass'n Inc v Marathon Oil Co*, 104 Mich App 689, 693; 305 NW2d 567 (1981).]

Damages may also be recovered if abating the nuisance would be inequitable. *Kurrle v Walker*, 56 Mich App 406, 411; 224 NW2d 99 (1974).

Thus, money damages were a possible remedy for the cause of action alleged. Further, the prayer for relief in the underlying complaint cannot be read as excluding any possibility of money damages.

III

The circuit court relied on *Jones v Farm Bureau Mut Ins*, 172 Mich App 24; 431 NW2d 242 (1988), but we find that case distinguishable and not controlling here. The plaintiffs in *Jones*, were insured by the defendant under a farmowners insurance policy. The Village of Mendon filed a complaint against the plaintiffs alleging that their hog farm constituted a public nuisance, and seeking abatement by permanent injunction. The plaintiff tendered defense of the suit to the defendant, who refused to defend or indemnify on the basis that the action sought only injunctive relief, and not money damages. The hogfarmers funded their own defense and, following a bench trial, a permanent injunction issued and costs were awarded to the village. The plaintiffs then filed suit alleging that the defendant insurer had breached its duty to defend. In *Jones*, this Court affirmed the circuit court's grant of summary disposition to the defendant insurer, noting:

² See also, MCL 600.2940, Michigan's private nuisance statute, which provides in pertinent part:

(2) **Private nuisance; judgment for damages, abatement.** When the plaintiff prevails on a claim based on a private nuisance, he may have judgment for damages and may have judgment that the nuisance be abated and removed unless the judge finds that the abatement of the nuisance is unnecessary.

* * *

(5) **Actions equitable in nature; damages.** Actions under this section are equitable in nature unless only money damages are claimed.

First, the suit by Mendon alleged that the operation of plaintiffs' hog feedlot resulted in obnoxious odors, air contamination, large numbers of flies and other disease-carrying insects, and the violation of zoning and environmental laws. Mendon sought abatement of the **public** nuisance. Absent any allegation that the violations or conditions were accidental in nature, there has been no "occurrence" which would obligate defendant to defend their insured.

Second, we find the word "damages" as used in the policy to be clear and unambiguous. . . . the insured's duty to defend extended to "any suit against the insured seeking damages on account of such bodily injury or property damage." . . . Here, the suit by Mendon sought an abatement of a nuisance and thus injunctive relief only. **The suit did not allege injury to Mendon's property which could, in any way, have required plaintiffs to pay money damages to Mendon.** . . . We conclude that the word "damages," given its ordinary and plain meaning, cannot encompass strictly injunctive action.

We also note that a complaint seeking costs or attorney fees is not a complaint seeking money damages. [*Jones, supra* at 28-29, citations omitted.]

The underlying action in *Jones* was for a public nuisance, was brought by a village against the defendant hogfarmers only, and sought only abatement of the public nuisance. Further, the underlying action was tried and an injunction entered before the plaintiffs sued their insurer for its failure to defend. The Gipsons' suit, in contrast, named ABI, several individual employees of ABI, the owner of the property ABI leased, and Metamora Township; alleged a private nuisance, for which damages are available under Michigan law, did not limit its prayer for relief to injunctive relief only, and was pending when the instant cross-motions for summary disposition were heard.

Under these circumstances, we conclude that the circuit court erred in narrowly construing the underlying complaint to preclude any possibility of money damages.

Reversed and remanded for further proceedings, including consideration of the remaining issues raised in defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Edward R. Post