STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF TRANSPORTATION, STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2002
v	No. 233976 Ingham Circuit Court
CNA INSURANCE and TRANSCONTINENTAL INSURANCE COMPANY, Defendants-Appellants.	LC No. 00-091345-ND

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting summary disposition in favor of plaintiff under MCR 2.116(C)(10). We affirm.

This is a breach of contract action in which plaintiff is seeking to recover certain damages for defending a suit that was filed against it in 1996. The suit underlying this case resulted from an accident that occurred on November 12, 1994, when several passengers in a van were injured and one was killed on I-75 in Saginaw County. The van left the roadway and was partially on the grassy median when it struck a sign and then struck the back of a truck on which a mounted attenuator was loaded. The truck was owned by Nationwide Fence and Supply Company and the truck was parked on the side of the road because of construction that Nationwide had undergone pursuant to a contract with plaintiff. The injured passengers in the van filed suit against Nationwide in the Saginaw Circuit Court and filed suit against plaintiff in the Court of Claims on March 11, 1996. Those cases were later consolidated before the same trial judge in the Saginaw Circuit Court.

In order to enter into the contract with plaintiff, Nationwide was required to obtain liability insurance, including plaintiff as a named insured, which was issued by defendants. On April 3, 1996, plaintiff requested by letter that defendants defend in the 1996 action. On April 26, 1996, defendants replied by letter that they would not indemnify, defend, or hold harmless plaintiff for the alleged negligent design of the road or all other matters that were separate and distinct from Nationwide's activity or conduct. Because defendants refused to defend, plaintiff

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

defended the suit itself. Ultimately, the suit settled following mediation evaluation in the amount of $130,000.

After settling the 1996 action against it, plaintiff filed the present suit against defendants for breach of contract because of defendants' failure to provide a defense or indemnify in the 1996 action. Defendants first moved to reassign the case under MCR 8.111(D) to the same trial judge who presided over the consolidated 1996 actions. The trial court denied the motion to reassign or consolidate. Both parties subsequently moved for summary disposition under MCR 2.116(C)(10). The trial court granted summary disposition in favor of plaintiff. Defendants now appeal from these two rulings of the trial court.

Defendants first argue that the trial court erred in granting summary disposition in favor of plaintiff under MCR 2.116(C)(10). A motion under this subsection tests the factual support of a plaintiff's claim and the trial court's ruling on the motion is subject to de novo review. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537; 620 NW2d 836 (2001).

The insurance policy issued by defendant to Nationwide on behalf of plaintiff provides owners' and contactors' protective liability coverage and states in relevant part:

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> > (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" and arises out of:
> >
> > > (i) Operations performed for you by the "contractor" at the location specified in the Declarations; or
> > >
> > > (ii) Your acts or omissions in connection with the general supervision of such operations; and
> >
> > (2) The "bodily injury" or "property damage" occurs during the policy period.

The insurance policy also states that defendant would have the "right and duty to defend" any suit seeking damages because of bodily injury or property damage and that defendants would pay those sums that the insured was legally obligated to pay as damages for bodily injury or property damage to which the insurance policy applied.

Defendants' contention throughout these proceedings has been that they were not obligated to defend or indemnify because the 1996 complaint involved allegations against plaintiff that were separate from acts or omissions of Nationwide. The trial court ruled that defendants had a duty to defend because there were allegations in the 1996 complaint that included plaintiff's vicarious liability for Nationwide's negligence and plaintiff's direct liability for negligent supervision. The trial court noted that defendants chose not to defend the 1996 action on plaintiff's behalf and the case later settled. The trial court concluded that there was no finding with respect to the basis for liability and that defendants were liable to indemnify plaintiff.

The duty to defend is broader than the duty to indemnify. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996). The duty to defend arises only with respect to insurance provided by the policy; therefore, if the policy does not apply, there is no duty to defend. *Id.* If the allegations of a third party against the insured even arguably come within the coverage of the policy, the insurer, must provide a defense, even if the claims are groundless or frivolous. *Id.* at 450-451. Further, an insurer has a duty to defend even if there are theories of liability asserted against the insured that are not covered under the policy, where there are any theories of recovery that do fall within the policy. *Id.* at 451, quoting *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980). If there is any doubt regarding whether the complaint against the insured alleges liability of the insurer under the policy, the doubt must be resolved in favor of the insured. *American Bumper, supra* at 452, quoting *Detroit Edison, supra* at 142.

A review of the 1996 complaint filed against plaintiff reveals that there were allegations against plaintiff on its own behalf for improper highway design. There are also allegations that concern work performed for plaintiff by Nationwide (vicarious liability) and allegations of negligent supervision by plaintiff over Nationwide. Based on these allegations, defendants had a duty to defend plaintiff because some of the allegations at least arguably come within the coverage of the insurance policy. Because defendants had a duty to defend, they are responsible for defense costs. *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 692; 572 NW2d 686 (1997). "Defense costs are those expenses related to developing and setting forth a theory establishing that the defendant is not liable or otherwise challenging liability." *Id.* Plaintiff has presented its claim of defense costs of $91,059.77 for attorney fees and $19,050.41 for other costs that it incurred in defending the 1996 suit. Therefore, defendants are liable for these defense costs for their failure to defend.

With respect to the duty to indemnify, indemnification costs are damages. An insurer is not obligated to indemnify until the insured's liability for the injury has been established. *Id.* Here, the 1996 action was settled in the amount of $130,000 after acceptance of the mediation evaluation. When an insurer breaches the insurance policy by refusing to defend the insured, the insurer is bound to pay the amount of any reasonable, good faith settlement between the insured and the third party. *Elliott v Casualty Ass'n of America*, 254 Mich 282, 287; 236 NW 782 (1931); *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989); *Detroit Edison, supra* at 144. Here, defendants have not shown that the settlement amount of $130,000 is unreasonable or was not made in good faith. Therefore, defendants are liable to indemnify for the settlement amount.

Accordingly, we conclude that the trial court did not err in granting summary disposition in favor of plaintiff because defendants have not shown that summary disposition should have been entered in their favor, as they contend, nor have they presented a genuine issue of material fact that would preclude summary disposition in favor of plaintiff.

Defendants next argue that the trial court erred when it denied their motion to reassign. Defendants rely on MCR 8.111(D)(1), which provides:

> (1) if one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge

The trial court ruled that the present action did not arise out of the same occurrence as the 1996 consolidated case filed in the Saginaw Circuit Court and that the present action is a completely separate action. Indeed, the present action is a breach of contract action filed by plaintiff against defendants for the failure to defend and indemnify under the terms of the insurance policy. While the present action arises out of the facts of the 1996 action in the Saginaw Circuit Court, we agree with the trial court's analysis that the present action is a completely separate suit that requires interpretation of the insurance policy and whether defendants were required to defend and indemnify under that policy. The 1996 suit against plaintiff related to its alleged liability relative to the accident that occurred on I-75 in Saginaw County on November 12, 1994. Further, the 1996 suit had concluded by the time that plaintiff filed its present breach of contract action.

Accordingly, the trial court did not err in denying defendants' motion to reassign.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Robert J. Danhof