STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN EDUCATIONAL EMPLOYEES MUTUAL INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED January 27, 2004
v	No. 242967 Oakland Circuit Court
EXECUTIVE RISK INDEMNITY, INC., Defendant-Appellee.	LC No. 00-026590-NI

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Plaintiff Michigan Educational Employees Mutual Insurance Company (MEEMIC) appeals as of right from the trial court's order granting defendant Executive Risk Indemnity, Inc.'s motion for summary disposition on its action for declaratory judgment. We affirm.

Plaintiff's declaratory judgment action stems from an underlying case involving an action by plaintiff to recoup money it paid on a homeowners insurance policy that was originally issued through its wholly owned subsidiary, MEEMIC Insurance Services. In order to recoup the money paid out on the homeowners policy, plaintiff filed a complaint alleging that an independent insurance agent acting for MEEMIC Insurance Services negligently executed the application for homeowners insurance because the agent issued the policy despite the fact that the home contained two wood-burning furnaces. Plaintiff brought this action against defendant seeking a declaration that, based on the errors and omissions insurance policy (E & O policy) defendant issued to MEEMIC Insurance Services, defendant must indemnify the independent insurance agent for his alleged negligent acts or omissions, and then pay directly to plaintiff any judgment in plaintiff's favor against the insured.

In response, defendant moved for summary disposition. Defendant argued that plaintiff did not have standing to seek a declaratory judgment and that plaintiff was not entitled to coverage under the errors and omission policy because plaintiff was not the insured party under the E & O policy. Essentially, defendant argued that plaintiff could not seek a declaration of coverage under an insurance policy that plaintiff was not a party to. In turn, plaintiff argued that it did have standing because plaintiff was an interested party entitled to have its rights adjudicated and because it was a subrogee of the homeowner, who had standing because she suffered an injury in fact. Plaintiff also argued summary disposition was inappropriate because the E & O policy contained latent ambiguities and parol evidence was necessary to demonstrate

the parties true intent. Plaintiff argued that certain bargained for modifications regarding the E & O policy demonstrated the parties' intent to allow plaintiff to directly assert claims against defendant for any independent agent's errors and omissions committed in the sale of MEEMIC insurance. The trial court determined as a matter of law that the E & O policy was unambiguous and that parol evidence related to the alleged bargained for modifications to the E & O policy could not be considered. The court granted defendant's motion for summary disposition, however, on the ground that plaintiff was not an insured under the E & O policy and, therefore, could not seek a declaration of rights under that policy.

Defendant's motion for summary disposition was brought pursuant to MCR 2.116(C)(8) and (C)(10). On appeal, although plaintiff frames the issue as whether there are genuine issues of material fact regarding their declaratory judgment claim, the actual issues decided by the trial court and presented to this Court are purely questions of law: (1) whether plaintiff has standing to seek a declaratory judgment action and (2) whether the errors and omissions insurance policy at issue here is an unambiguous, fully integrated contract so as to bar the introduction of parol evidence. Therefore, review under MCR 2.116(C)(8) is more appropriate.

This Court reviews de novo a trial court's grant or denial of summary disposition brought pursuant to MCR 2.116(C)(8). *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Id*. Such a motion is granted when the plaintiff has failed to state a claim on which relief can be granted. *Id*. at 129-130. The construction of an insurance policy and the determination of whether the policy language is ambiguous are questions of law that are also reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Therefore, we first consider whether an injured third party has standing to seek a declaratory judgment against a liability insurer before the insured tortfeasor's underlying liability has been determined. "'Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.'" *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (internal citiations omitted). The grant of a declaratory judgment is within the trial court's discretion and can only be granted where there is an actual controversy. MCR 2.605(1); *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). Without an actual controversy, the court lacks subject-matter jurisdiction to enter a declaratory judgment. *Genesis Ctr, PLC v Comm'r of Financial & Ins Services*, 246 Mich App 531, 544; 633 NW2d 834 (2001). An actual controversy exists when a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve his legal rights. *Id.*

Initially, we observe that the concept of an injured third party seeking a declaration of rights of the insured tortfeasor against the insurer has received little attention by Michigan courts. However, Michigan case law has recognized that when an insurer files a declaratory judgment action to decide coverage as to its insured, the injured party is a proper party to that declaratory judgment action. For instance, in *Cloud v Vance*, 97 Mich App 446, 448; 296 NW2d 68 (1980), the injured party sued the insured for damages arising from an automobile accident. The insured refused to cooperate with the insurer, and the insurer obtained by default, a declaratory judgment that no coverage was owed under the insurance policy. *Id.* The injured party was never given notice of the declaratory judgment action and was not a party to the

proceeding. *Id*. The plaintiff-injured party then obtained a default judgment against the insured and sought collection from the insurer by writ of garnishment under the insured's insurance policy. *Id.* at 448-449. The insurer, relying on the prior declaratory judgment it obtained against the insured, moved for summary disposition against plaintiff arguing that the declaratory judgment against the insured barred the plaintiff from asserting that the insurer was liable. *Id.* at 449.

The *Cloud* Court stated that the issue before it was whether the plaintiff was entitled to have notice of a hearing where an insurer attempted to declare the obligations owed to the insured under the defendant insurer's policy. *Id.* The Court first declared that plaintiff had a "substantial interest" in the insurance policy between defendant insurer and the insured because by obtaining a judgment against the insured, the plaintiff was entitled to pursue a writ of garnishment against the insurer. *Id.* at 449-450, citing *Meirthew v Last*, 376 Mich 33, 40; 135 NW2d 353 (1965). The *Cloud* Court then held that plaintiff had a "legitimate interest in litigating the coverage issue with the insurer" because the plaintiff had an independent interest in the insurance policy *from the time of the accident* that was contingent upon his recovery against the insured. *Id.* at 451-452; emphasis added. The Court reasoned that it was "merely affording plaintiff a trial on the merits regarding whether or not defendant insurance company is obligated under the terms of the insurance policy with respect to the judgment of this plaintiff against the insured." *Id.* at 452.

Similar to the instant case, in *Hayes, supra*, the defendant insurer argued that the injured party did not have standing in its declaratory judgment action because the injured party was a "stranger to the contract" between insurer and insured. *Id.* at 62. In its analysis, the Court first observed that MCR 2.605, confirms a court's power to "'declare the rights and other legal relations of an interested party seeking a declaratory judgment' '[i]n a case of actual controversy within its jurisdiction.'" *Id.* at 65. Under this court rule, the *Hayes* Court determined that an actual controversy existed between defendant insurer and the injured party because the very nature of declaratory relief is to declare interests not yet vested. *Id.* at 63. The interest that was "not yet vested," but nonetheless a possibility, was the injured party's possible recovery against the insured, and then a subsequent garnishment action against the insurer. *Id.* at 61.

We note that other jurisdictions have allowed an injured party to seek a declaratory judgment against a liability insurer before the insured tortfeasor's underlying liability has been determined. 1 Holmes' Appleman on Insurance Law and Practice (2d ed), § 142.1(C). For instance, the Maryland Court of Appeals in *Howard v Montgomery Mut Ins Co*, 145 Md App 549, 565; 805 A2d 1167 (2002), held that an injured party has standing to bring a declaratory judgment action against the tortfeasor's insurer during the pendency of a related tort suit, before judgment in that suit, so long as the coverage issues are "independent and separable" from the underlying issues related to the tortfeasor's liability. In *Allstate Ins Co v Atwood*, 319 Md 247; 572 A2d 154 (1990), the Maryland Supreme Court provided examples of those instances where the declaratory judgment actions were sufficiently "independent and separable" from the claims asserted in a pending suit by an injured third party.

> Examples include contentions that the insured failed to comply with contractual cooperation or notification provisions, or failed to pay premiums; interpretation of coverage language in a policy; interpretation of language of endorsement extending insurance coverage to insured; interpretation of policy exclusion

> denying coverage when insured airplane was not operated by two named pilots. [*Id.* at 252; citations omitted.]

We find this concept of "independent and separable claims" a worthy consideration.

With the above law in mind, we find that there is no material difference between the insurer asking the court for declaratory relief and the injured party asking the court for declaratory relief. In either situation, the standing requirement for the injured party is still satisfied because the interest in the litigation is present regardless of who institutes the action. In an action such as this, there exists the possibility that plaintiff may be entitled to recover against defendant insurer in a garnishment action. The "legal rights" to be preserved in this case are whether defendant would provide coverage for its insured and thus whether plaintiff may seek indemnity from the insurer. Therefore, we hold that a third party has standing to seek declaratory relief as to its rights provided that the coverage issues are "independent and separable" from the underlying issues related to the tortfeasor's liability. And the trial court erred in concluding otherwise.

In this case, we find that plaintiff's declaratory judgment action against defendant is sufficiently "independent and separable" from its underlying action against the insured. Plaintiff's declaratory judgment action has no bearing on the underlying liability question of whether the independent agent was negligent in the manner in which he issued a MEEMIC homeowners policy. Plaintiff's declaratory judgment action relates only to whether the independent agent was covered under the E & O policy. Consequently, we conclude that plaintiff has standing to seek a declaration regarding whether an independent insurance agent is an insured and whether defendant must indemnify the agent under the policy.

Because plaintiff does have standing to seek a declaratory judgment action against defendant, we next consider whether the trial court erred as a matter of law in ruling that parol evidence could not be considered to support plaintiff's claim that certain bargained for modifications exist which would allow it to pursue a claim against defendant under the E & O policy. Plaintiff argues that parol evidence regarding those modifications should have been considered by the trial court because not all of the agreed upon terms were incorporated in the final draft of the policy. Plaintiff does not point to any specific ambiguity in the contract itself, but instead argues that the policy is ambiguous because not all of the bargained for terms are expressed in the written policy. Therefore, the question is whether the E & O policy was a final and complete expression of the parties' agreement.

An insurance policy is much the same as any other contract; it is an agreement between the parties. In construing an insurance contract a court will determine what the agreement was and effectuate the intent of the parties. *Heath v State Farm Mut Automobile Ins Co*, 255 Mich App 217, 218; 659 NW2d 698 (2002). To this end, courts must determine the intent of the parties from the words used in the document itself and courts may not "'make a different contract for the parties or [] look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.'" *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998) (internal citations omitted).

As evidence that the parties intended the written instrument to constitute a final and complete expression of the agreement concerning the matters covered, the court should consider whether the writing contains a merger or integration clause that explicitly states the document represents the full and accurate agreement of the parties. *UAW-GM, supra* at 493-494. When the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete "on its face" and, therefore, parol evidence is necessary for the "filling of gaps." *Id.* at 502, quoting 3 Corbin, Contracts, § 578, p 411.

Here, under part IV, the disputed agreement contains the following clause:

> (L) **Entire Agreement**
>
> The **Insureds** agree that this Policy, including any endorsements and the application attached to and forming part of this Policy and any materials submitted in connection with such application, which materials are on file with the Underwriter and are part of this Policy as if physically attached, *constitutes the entire agreement* existing between the **Insureds** and the Underwriter or any of its agents relating to this insurance. [Emphasis in italics added.]

This clause evidences an intent by the parties that the agreement constitutes a complete expression of their understanding. The effect of a valid integration clause is to prevent the introduction of parol evidence of other, contemporaneous agreements by the parties that are not contained in the contract. *UAW-GM, supra* at 495. Accordingly, parol evidence of negotiations surrounding the execution of the document is not admissible unless, as noted above, there is some evidence of fraud or it is apparent that the agreement was incomplete "on its face." In this case, there were no allegations of fraud and we find nothing in the language of the E & O policy which demonstrates that the policy is "on its face" incomplete. Therefore, the trial court did not err in ruling that parol evidence could not be considered. Plaintiff concedes that without the inclusion of certain modifications to the contract represented by the parol evidence, it cannot pursue its claim against defendant. Hence, the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly