STATE OF MICHIGAN

COURT OF APPEALS

LINCOLN CENTER BREAD BASKET DELI and RONALD FORMAN,

Plaintiffs-Appellees,

v

SECURA INSURANCE,

Defendant-Appellant,

and

CITIZENS INSURANCE COMPANY OF AMERICA, WEST AMERICAN INSURANCE COMPANY, and BARACK & HOFFMAN AGENCY,

Defendants.

UNPUBLISHED
March 18, 2004

No. 242686
LC No. 2000-028092-CK

LINCOLN CENTER BREAD BASKET DELI and RONALD FORMAN,

Plaintiffs-Appellees,

v

SECURA INSURANCE,

Defendant-Appellant,

and

CITIZENS INSURANCE COMPANY OF AMERICA, WEST AMERICAN INSURANCE COMPANY and BARACK & HOFFMAN AGENCY,

Defendants.

No. 244565
LC No. 2000-028092-CK

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

PER CURIAM.

In this business liability insurance coverage dispute, defendant Secura Insurance appeals separately as of right from (1) an order awarding plaintiffs, Lincoln Center Bread Basket Deli and deli manager Ronald Forman, $41,205.63, which represents a portion of the expenses that plaintiffs incurred in an underlying lawsuit against them by a former employee, Lizzie Hunter, plus penalty interest, attorney fees and costs (Docket No. 242686); and (2) an order awarding plaintiffs additional attorney fees and costs of $7,782.50 (Docket No. 244565). We affirm in part, reverse in part, and remand.

I

Defendant first contends that the circuit court mistakenly granted plaintiffs partial summary disposition with respect to the questions of defendant's duty to defend plaintiffs against Hunter's lawsuit, and defendant's duty to indemnify plaintiffs for the expenses they incurred arising from Hunter's claim that plaintiffs negligently hired and retained her co-workers, who assaulted and battered her.[1]

A

Defendant's contention raises questions of insurance contract interpretation that are guided by the following principles:

> An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained within the policy. If the insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. If a term is not defined in the policy, it is to be interpreted in accordance with its commonly used meaning. Clear and unambiguous language may not be rewritten under the guise of interpretation.
>
> Courts may not create ambiguities where none exists and must construe ambiguous policy language in the insured's favor. Policy language is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. "However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not

[1] Hunter's complaint against plaintiffs also contained counts alleging that plaintiffs discriminated against her on the basis of age and intentionally inflicted emotional distress. The parties agree that these claims do not fall within the scope of plaintiffs' coverage under defendant's policy.

> be said to be ambiguous or fatally unclear." [*Heath v State Farm Mut Auto Ins Co*, 255 Mich App 217, 218-219; 659 NW2d 698 (2002) (citations omitted), quoting *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).]

"Clear and specific exclusionary clauses must be given effect, but are strictly construed in favor of the insured." *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). The proper interpretation of clear contractual language and the determination whether a contract's language qualifies as ambiguous both constitute questions of law that this Court reviews de novo. *Heath, supra* at 218.

This Court likewise reviews de novo a circuit court's summary disposition ruling. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). In reviewing the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(10), which tests the factual support for a claim, this Court considers in the light most favorable to the nonmoving party all relevant pleadings, admissions, depositions and other documentary evidence to determine whether any genuine issue of material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

B

On appeal, the parties do not dispute that the "Businessowners Liability Coverage Form" (BLCF) portion of defendant's policy provides plaintiffs coverage against Hunter's claim that she suffered bodily injury because of plaintiffs' negligent hiring and retention of her co-workers. Defendant insists, however, that the "Employment-Related Practices Exclusion" to the BLCF removes Hunter's negligent hiring and retention claim from the scope of policy coverage. To ascertain whether this exclusion encompasses Hunter's negligent hiring and retention allegations against plaintiffs, we must compare the exclusionary language with the allegations within Count III of Hunter's complaint against plaintiffs. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995).

Hunter's complaint set forth the following specific allegations in support of her negligent hiring and retention count:

> 61. That defendant FORMAN hired Sam Quick, Tony Brooks, Eric Clayton, and John (Last Name Unknown), knowing (or should have known) that they had histories of violence, and were prone to abuse fellow employees.
>
> 62. That despite Sam Quick, Tony Brooks, Eric Clayton, and John (Last Name Unknown) proneness [sic] towards violence, and *actual acting out violently*, including *committing assaults and batteries on plaintiff's person*, defendant FORMAN negligently retained them.
>
> 63. That defendant FORMAN had a duty towards plaintiff to not hire and retain violent co-employees and negligently breached said duty.

> 64. That the negligence of defendants FORMAN and BREAD BASKET DELI *caused plaintiff to incur great injury both physically and mentally*. [Emphasis added.]

In summary, Hunter alleged that plaintiffs negligently hired and retained her co-workers, who assaulted and battered her, causing her great physical and mental injury.

The "Employment-Related Practices Exclusion" contains the following relevant language:

> This insurance does not apply to:
>
> 1. "*Bodily injury*" . . . to:
>
> a. *A person* arising out of any:
>
> * * *
>
> (3) *Employment-related* practices, policies, *acts or omissions*, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination *directed at that person* . . . . [Emphasis added.]

The exclusion thus plainly precludes coverage for (1) bodily injury to a person, (2) arising from employment-related acts or omissions, (3) that the employer directed at the injured person.

C

The dispositive exclusionary language in this case constitutes the requirement that the injury must arise from an employment-related act or omission *directed at the injured person*. The words "directed at," which the policy does not specifically define, clearly and unambiguously embody the employer/insured's intentional or purposeful application or infliction of an employment-related act or omission on the person suffering bodily injury.[2] The common and ordinary dictionary definitions of "direct" include "to manage or guide," "to regulate the course of; control," and "to aim or send toward a place or object," while the dictionary definition of "directed" includes "guided or managed" and "subject to direction, guidance, etc." *Random House Webster's College Dictionary*, p. 380-381 (2d ed, 1997). Consequently, according to the plain and ordinary meaning given "directed at," for the exclusion to apply the employer must

[2] "[A] policy is not rendered ambiguous by the fact that a relevant term is not defined." *Heath*, *supra* at 219. When the policy does not provide the definition of a term, the court must interpret the term according to its commonly used meaning. *Id.* at 218. In determining what a typical layperson would understand a particular term to mean, it is customary to turn to dictionary definitions. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).

have aimed or guided at the injured person an employment-related act or omission that resulted in bodily injury to the person.

In this case, Hunter's complaint did allege employment-related acts or omissions by plaintiffs that caused Hunter bodily injury—specifically, plaintiffs' negligent hiring and retention of Hunter's co-workers, who assaulted and battered her. Hunter clearly did not allege within Count III, however, that her bodily injury occurred because plaintiffs *directed at her* their negligent hiring or retention decisions, but that her injuries arose from omissions directed more toward her co-workers. Because Count III of Hunter's complaint simply contains no allegations that the bodily injuries she suffered arose from employment-related acts or omissions that plaintiffs directed at her, Hunter's bodily injuries fall outside the scope of the clear and unambiguous employment-related practices exclusion.[3]

D

Defendant attempts to frame Hunter's negligence claim as "a transparent attempt to trigger coverage by characterizing allegations of tortious conduct under the guise of 'negligent' activities," from which no duty to defend arises. This Court has recognized that in determining whether an insurer has a duty to defend, the duty "is not determined solely on the basis of the terminology used in the plaintiff's pleadings in the underlying action. Rather, a court focuses on the cause of the injury to determine whether coverage exists." *State Farm Fire & Cas Co v Basham*, 206 Mich App 240, 242; 520 NW2d 713 (1994).

We reject defendant's suggestion that Hunter's negligent hiring and retention count against plaintiffs reflects Hunter's transparent effort to denominate tort claims as negligent activities. Plaintiffs did not themselves inflict assaults and batteries on Hunter. Accordingly, Hunter's claim against plaintiffs, which derived from the assaults and batteries inflicted by her co-workers, had to rely on the extent to which plaintiffs should have prevented the assaults and batteries, but failed to do so; thus, plaintiffs alleged negligence. Therefore, this case is factually distinguishable from *Smorch v Auto Club Group Ins Co*, 179 Mich App 125; 445 NW2d 192 (1989), cited by defendant. In *Smorch*, the plaintiff pleaded guilty to an assault and battery of his girlfriend, who subsequently filed a civil action against the plaintiff alleging that he negligently assaulted her. *Id*. at 127. This Court rejected the plaintiff's claim that the defendant insurer had to provide a defense against the girlfriend's claim, finding it a transparent attempt to characterize *intentional acts committed by the plaintiff*, for which the policy denied coverage, as negligent in character. *Id*. at 128-129. In this case, plaintiffs themselves did not commit the alleged assaults and batteries, but only allegedly committed negligence in permitting their occurrence.

Because the employment-related practices exclusion plainly does not encompass Hunter's allegations of bodily injury due to plaintiffs' negligent hiring and retention of her co-workers, and defendant does not contest on appeal that Hunter's alleged bodily injuries within

[3] None of the cases from other jurisdictions cited by defendant in its brief on appeal involve an insurance policy exclusion applicable to employment-related practices "directed at" the injured employee.

Count III otherwise qualify for coverage under the business owner liability provisions of defendant's policy, we conclude that the circuit court properly granted plaintiffs summary disposition pursuant to MCR 2.116(C)(10) with respect to the issues of defendant's duty to defend plaintiffs against Hunter's lawsuit[4] and obligation to indemnify plaintiffs against Hunter's claim for damages within Count III of her complaint.

II

Defendant next argues that the circuit court erroneously ordered that it pay the entire amount of costs and expenses that plaintiffs incurred in defending Hunter's lawsuit, less the combined amounts of plaintiffs' settlements with the other insurers that plaintiffs initially sued, instead of a pro-rata one-third share of the amount of plaintiffs' expenses. To the extent that our review of a court's award of damages involves a question of law, we review these questions de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

We find that defendant's brief on appeal with respect to this question contains inadequate facts or law to support defendant's position. As the circuit court observed, the sole case on which defendant relies on appeal, *Frankenmuth Mut Ins Co, Inc v Continental Ins Co*, 450 Mich 429; 537 NW2d 879 (1995), does not establish the proposition that defendant and the other two insurers initially sued by plaintiffs share pro-rata responsibility for reimbursing plaintiffs' damages arising from the Hunter lawsuit. First, the Supreme Court's equivocal statements on which defendant rests its proration argument appear to constitute dicta: "In circumstances not presented today, it may be difficult to clearly designate a primary insurer. . . . If there is exactly concurring coverage [by more than one policy], it might be appropriate to prorate the costs of defense." *Id*. at 438. See *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 95; 610 NW2d 597 (2000) (explaining that a court's statements concerning a principle of law not essential to the determination of the case are obiter dictum without the force of an adjudication).

Second, the *Frankenmuth Mutual* decision is factually distinguishable from this case because it did not address an insurer's *liability to an insured* for damages potentially subject to overlapping coverage under a separate policy of insurance, but instead involved the rights and liabilities among multiple insurers of multiple insureds. *Id*. at 433-436.

Third, defendant's proration argument presumes that the Citizens and West American insurance policies contained terms pursuant to which these companies incurred the obligation to cover plaintiffs' Hunter litigation expenses to the same precise extent that defendant had to cover the expenses under its policy. However, defendant provides absolutely no references to any terms of the Citizens or West American policies or to any other facts tending to show that the three insurance companies should reimburse equivalent portions of plaintiffs' expenses incurred

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[4] Defendant apparently does not dispute that if its policy covered any count of Hunter's complaint, it owed a duty to defend plaintiffs against all claims that Hunter leveled against them. *Smorch*, *supra* at 128 (explaining that an insurer has a duty to defend if there are any theories of recovery that fall within the policy, despite the presence of additional theories of liability asserted against the insured that are not covered under the policy).

in Hunter's lawsuit. For example, plaintiffs alleged that each company's policy applied to different periods of time, and defendant offers this Court no facts concerning which of the injuries alleged by Hunter, which spanned many years, occurred during the effective date of which insurer's policy.

Because defendant's argument on appeal does not provide facts or law sufficient for this Court to conclude that the circuit court erred by ordering defendant to pay plaintiffs $9,784.68 of their expenses in the Hunter litigation, we decline to consider this issue further. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003) (observing that an appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position).

III

Defendant also challenges the timeliness of plaintiffs' request for sanctions, and the circuit court's decisions to award plaintiffs costs and attorney fees pursuant to MCL 600.2591, and penalty interest pursuant to MCL 500.2006. This Court reviews (1) for an abuse of discretion the circuit court's determination that a party timely filed a motion for sanctions, *In re Attorney Fees & Costs*, 233 Mich App 694, 699; 593 NW2d 589 (1999), (2) for clear error the circuit court's finding under the circumstances of a particular case that a claim or defense asserted qualifies as frivolous, *id*. at 701, and (3) for an abuse of discretion the circuit court's calculation of an appropriate award of sanctions, *id*. at 705.

A

Defendant's first suggestion that plaintiffs improperly and untimely requested sanctions lacks merit. Although defendant bemoans that plaintiffs neither specifically requested sanctions within their initial complaint nor sought to amend their complaint to include a request for sanctions, no language within MCL 600.2591 conditions an award of sanctions on a party's request for sanctions within a pleading. Instead, the plain language of § 2591(1) states only that a party must file a "motion" for sanctions. *Dep't of Natural Resources v Bayshore Assoc, Inc*, 210 Mich App 71, 89; 533 NW2d 593 (1995). In light of the unambiguous language of MCR 2.119(A)(1), that motions in civil actions can either be "made during a hearing or trial" or be in writing, we find that plaintiffs' oral requests for awards of sanctions and interest at the March 11, 2002 evidentiary hearing constituted proper motions on which the circuit court could award sanctions.

With respect to defendant's related suggestion that plaintiffs did not timely move for sanctions, we conclude that plaintiffs' request for sanctions did not qualify as untimely under the circumstances of this case. A motion for costs under MCL 600.2591 must be filed within a reasonable time after the prevailing party is determined. *In re Costs & Attorney Fees*, 250 Mich App 89, 107; 645 NW2d 697 (2002).

> In *Maryland* [*Cas Co v Allen*, 221 Mich App 26, 31-32; 561 NW2d 103 (1997)], this Court found that a motion for sanctions brought five months after the grant of summary disposition was brought within a reasonable time. In *Avery [v Demetropoulos*, 209 Mich App 500, 501-502; 531 NW2d 720 (1994)], the

> prevailing party waited until this Court decided the appeal in the underlying matter before bringing a motion under MCL 600.2591(3). The trial court then found that the plaintiff's claim had been frivolous, and it awarded costs and attorney fees to the defendant. *Avery*, *supra* at 501. The plaintiff appealed. This Court, *id*. at 503, ruled: "The appropriate standard to apply to the statute is whether the motion for costs was filed within a reasonable time after the prevailing party was determined. See *Giannetti Bros Construction Co, Inc v Pontiac*, 152 Mich App 648; 394 NW2d 59 (1986)." In *Giannetti Bros*, *id*. at 655-657, this Court found that a postjudgment motion for mediation sanctions, brought nineteen months after judgment and fifty-five days after this Court decided the appeal, was filed within a reasonable time . . . . [*Id*. at 107-108.]

In this case, plaintiffs moved for sanctions within six months of the circuit court's entry of its September 2001 order granting plaintiff partial summary disposition on the basis that defendant owed plaintiffs a duty to defend and indemnify. The motion was filed before the court entered a final order in the case with respect to what damages defendant owed. Furthermore, as early as the filing of plaintiffs' reply brief in support of their motion for summary disposition, plaintiffs characterized defendant's positions as "fraudulent," "ludicrous," "silly," and in "bad faith," and requested that the court "schedule a hearing to determine Plaintiffs' damages—including its bad faith damages against Secura." Defendant had the opportunity to cross-examine plaintiffs' counsel at length regarding the costs and attorney fees plaintiffs sought, and to respond in writing to plaintiffs' motion for sanctions. Under these circumstances, we cannot conclude that the circuit court abused its discretion to the extent that it implicitly rejected defendant's claims that plaintiffs untimely moved for sanctions. *Maryland Casualty Co*, *supra* at 30-32.

B

The next question becomes whether the circuit court properly deemed defendant's defense frivolous according to MCL 600.2591(1), which mandates that a court award costs and fees to a prevailing party if the court "finds that a civil action or defense to a civil action was frivolous."[5] The circuit court concluded that defendant's "legal position was devoid of arguable legal merit."[6] MCL 600.2591(3)(a)(iii). We disagree.

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[5] "The Legislature chose to make *a* frivolous defense sanctionable. The use of 'a' instead of 'the' supports the conclusion that the statute . . . does not require that the entire defense or all the asserted defenses be found frivolous in order for sanctions to issue. Rather, sanctions may issue if any defense is frivolous." *In re Costs & Attorney Fees*, *supra* at 103. Accordingly, we focus on the sole defense defendant asserts on appeal to Count III of Hunter's complaint—the employment-related practices exclusion.

[6] Defendant asserts that the circuit court applied an incorrect legal standard when it concluded that "[h]ere, defendant's position lacked legal merit." Although the court within its conclusion omitted the statutory adjective "arguable" before "legal merit," we find that the court recognized and applied the proper standard. The court plainly was aware of the applicable standard because

(continued…)

Although we find that the contract language was unambiguous and the exclusion did not apply to Hunter's negligence claim, this conclusion does not mandate that defendant's position was "devoid of *arguable* legal merit." Defendant's position is untenable because we determined that the phrase "directed at" pertained to the clause immediately preceding it, i.e., the "employment related practices, policies, acts or omissions . . . ." But if the phrase "directed at" is interpreted as pertaining to the bodily injury, defendant's assertion that the exclusion was applicable certainly had arguable legal merit.

Moreover, it is arguable that plaintiffs' negligence was "directed at" Hunter and all other employees, in that plaintiffs' conduct placed all employees in a potentially dangerous work environment given plaintiffs' knowledge that Hunter's co-workers were prone to violence against other employees. "[M]erely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position." *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). Therefore, we conclude that the trial court clearly erred in finding defendant's position regarding the exclusion's interpretation frivolous because it lacked arguable legal merit. *Id.* at 661-662.

C

Defendant lastly challenges the circuit court's award of penalty interest pursuant to MCL 500.2006. The relevant subsections of § 2006 provide as follows:

> (1) A person must pay on a timely basis to its insured . . . the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured . . . 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice *unless the claim is reasonably in dispute*.
>
> * * *
>
> (4) When benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, *if the claimant is the insured* or an individual or entity directly entitled to benefits under the insured's contract of insurance. Where the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute and the insurer has refused payment in bad faith, such bad faith having been determined by a court of law. [Emphasis added.]

(…continued)

the court quoted the definitional language of MCL 600.2591(3) immediately before it made its ruling.

Section 2006 imposes the twelve-percent interest rate as a penalty against insurers who procrastinate in paying meritorious claims not reasonably in dispute. *Arco Industries Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143, 148; 594 NW2d 74 (1998).

In light of our conclusion that defendant's refusal of coverage on the basis of the employment-related practices exclusion was not frivolous, we find that the circuit court committed clear error in finding that plaintiffs' claim for coverage did not qualify as reasonably in dispute, and in awarding plaintiffs penalty interest pursuant to MCL 500.2006(1) and (4).

IV

Finally, defendant contends that the circuit court lacked jurisdiction to modify the final judgment by awarding plaintiffs additional attorney fees and costs after defendant filed its claim of appeal. We decline to address this issue because of our conclusion that the trial court erred in finding (1) defendant's position frivolous pursuant to MCL 600.2591 and (2) the claim was not reasonably in dispute pursuant to MCL 500.2006. Instead, we vacate the portion of the September 30, 2002 order granting plaintiffs' additional attorney costs and fees and remand to the trial court for a recalculation of the attorney costs and fees that plaintiffs are entitled to as the prevailing parties on the issue of the applicability of the insurance policy's exclusion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

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