STATE OF MICHIGAN

COURT OF APPEALS

JANEANE WILCOX,

Plaintiff-Appellant,

v

JOHN B. MUNGER, Personal Representative of the Estate of KEITH PHILLIP HEIKA,

Defendant/Cross-Defendant,

and

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY,

Defendant/Cross-Plaintiff/Appellee.

UNPUBLISHED
December 20, 2007

No. 275329
Oakland Circuit Court
LC No. 06-071889-CK

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting summary disposition in defendant's favor and denying her request for summary disposition. We reverse.

On April 25, 2004, plaintiff called the Southfield police to report that her boyfriend had slashed the tires on her vehicle. Several officers, including Keith Heika, responded. According to plaintiff, Heika followed her into her home while she was retrieving some paperwork regarding the incident and, while in her home, sexually assaulted her. Heika committed suicide shortly after the incident. Plaintiff thereafter initiated a civil rights lawsuit (under 42 USC § 1983) in federal court against Heika's estate. According to plaintiff, despite the fact that Heika was covered by an insurance policy issued by defendant, defendant denied during the federal action (and would likely continue to deny) that any coverage was available. Plaintiff thus initiated the present lawsuit, seeking a declaration that defendant has liability under the policy and that coverage under the policy applies to Heika's actions. Defendant filed a cross-claim seeking a declaration that it has no obligation to indemnify or defend with respect to Heika's actions because Heika was not a "member" covered by the policy and because Heika's actions fell within a policy exclusion. On the parties' cross-motions, the trial court granted defendant's motion for summary disposition and denied plaintiff's motion.

We review de novo a decision on a motion for summary disposition. *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). MCR 2.116(C)(8) allows for summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." In reviewing a motion brought under this subrule, "we assume that all factual allegations in the nonmoving party's pleadings are true and determine if there is a legally sufficient basis for the claim." *Salinas v Genesys Health System*, 263 Mich App 315, 317; 688 NW2d 112 (2004).

Summary disposition is appropriate under MCR 2.116(C)(10) if no factual dispute exists and the moving party is entitled to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id.* at 31.

The determination whether an insurer is contractually obligated under its policy to defend certain claims requires interpretation of the insurance contract. *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004). The interpretation of an insurance policy is a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469; 663 NW2d 447 (2003).[1]

On appeal, plaintiff contends that the trial court erred in concluding that Heika's actions were not a violation of plaintiff's civil and constitutional rights. What the trial court specifically ruled, however, was that because sexual assault is not within an officer's official duties, and because the acts of police officers in the ambit of their personal, private pursuits fall outside of 42 USC 1983, Heika was not a "member" of the group of persons afforded insurance coverage by defendant.

Defendant's coverage documents provide, at section 1:

> A. MMRMA will pay on behalf of the Member all monies the Member becomes legally obligated to pay as damages to another person because of an occurrence first taking place or commencing during the period of membership in MMRMA for subjects of coverage 1-6 below. MMRMA has the right and the duty to defend any lawsuit seeking money damages. . .

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[1] We fully recognize defendant's assertion that it was not an insurer nor were the coverage documents an insurance policy. The similarities between the purpose and content of defendant's coverage documents and traditional insurance policies, however, coupled with the fact that this matter is solely concerned with a dispute over the terms of the coverage documents leads us to conclude that the most appropriate analysis would be the same as that given disputes over insurance policy language. Moreover, defendant has suggested no other applicable analysis and relies on cases concerning the interpretation of insurance contracts to support its position.

1. Bodily injury:

2. Property damage;

3. Personal injury;

4. Medical malpractice. . .

5. Motor vehicle liability. . .

6. Wrongful act.

"Personal injury" is further defined as including the "violation of civil, statutory or constitutional rights, discrimination or harassment arising out of employment or law enforcement operations." "Member" is defined in the coverage documents as a municipal corporation and also includes any former or present employee "while acting within the scope of their official duties or operations on behalf of the Member." At issue in the instant matter is whether Heika was acting within the scope of his official duties or operations on behalf of the Southfield Police Department when he allegedly sexually assaulted plaintiff, such that his estate is entitled to a defense or coverage from defendant in the federal lawsuit.

According to defendant, summary disposition was appropriate because Heika was acting outside the scope of his employment when he committed the alleged sexual assault. Defendant contends that the sexual assault was not authorized or ratified by his employer, and that by committing the act, Heika had stepped outside of his official duties to satisfy a personal desire. Defendant does not dispute that Heika was present at plaintiff's home as a fully uniformed and armed police officer responding to a call, and that his initial presence would be within the scope of his duties as a police officer. Heika then entered plaintiff's home to either give her some paperwork or wait for her to retrieve paperwork relating to the incident for which Heika had been initially called to the home. Clearly, but for Heika's status as a police officer and his response to a call as part of his official duties, he would not have gone inside plaintiff's home. Nevertheless, defendant contends that when Heika committed the sexual assault, he temporarily took off his police officer hat, figuratively speaking, and at the singular moment of the sexual assault, was not acting within the scope of his duties.

The problem this Court sees with this rationale finds its basis in the very language of the coverage documents. On the one hand, the documents purport to provide coverage for claims against an employee seeking damages for personal injury (including constitutional and civil rights violations) or wrongful acts so long as the employee is acting within the scope of his employment duties. On the other hand, defendant encourages a reading of the coverage documents that would exclude coverage *because* Heika's actions could be categorized as causing personal injury (or a wrongful act). Per the coverage documents, Heika is afforded coverage for the claim of sexual assault (wrongful act) committed while he was acting within the scope of his employment, yet by virtue of committing the personal injury (or wrongful act) action, is deemed to have not been acting with the scope of his employment. This language is ambiguous, indeed circular, and leaves this Court to ponder when causing personal injury or committing a wrongful act would be part of one's employment duties or fall within the scope of one's employment such that he would be afforded coverage for claims alleging a wrongful act.

The language, as written would always allow for the carving out of a complained of specific act and categorize it as outside of one's official employment duties. For example, one could argue that an officer's action in pulling a vehicle over would be within the scope of his employment. But, if it is alleged that he pulled the vehicle over because of some racial bias, defendant could always separate the specific action alleged to be wrongful (or violative of constitutional or civil rights) and claim that the narrow action complained of (using racial bias as a basis for pulling over a vehicle) fell outside the scope of employment (discrimination presumably never falling within the scope of one's employment duties) and that coverage was thus not available.

"Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract." *Klapp, supra*, 468 Mich at 469. Thus, the fact finder must interpret the contract's terms, looking to extrinsic evidence of intent and meaning and if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean the rule of contra proferentem (ambiguities are to be construed against the drafter of the contract) applies.

The only extrinsic evidence presented for this Court's review is the self-serving affidavit of one of defendant's employees, Timothy Belanger. In the affidavit, Mr. Belanger asserted that defendant did not desire or intend, in creating its coverage documents, to provide coverage for an individual who committed the type of act Heika is accused of committing. The affidavit, however, appears to be more of a restatement of defendant's position given that there is no indication that Mr. Belanger assisted in the drafting of the coverage documents or otherwise has an independent knowledge concerning defendant's intent in drafting of the documents. The extrinsic evidence being unhelpful, we apply the rule of pro con proferentem and resolve the ambiguity in the coverage documents against defendant as drafter of the documents. Due to the above, and recalling that "the duty to defend arises if the underlying allegation even arguably come within the policy coverage" (*Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997)), defendant must defend defendant in the underlying federal action.[2]

With respect to defendant's assertion that an exclusion contained within the coverage documents precludes coverage even if Heika's estate would otherwise be entitled to the same, we note the specific language in the exclusion:

> Coverage is not provided for any demand, notice, claim or lawsuit alleging bodily injury, property injury, personal injury or other subjects of coverage as set forth in Section 1 resulting directly, indirectly or consequentially from, in, or due to any of the following:

[2] Defendant indicated at oral argument that it was voluntarily defending Heika's estate in the federal action though it was under no obligation to do so. Under our holding, defendant is, in fact, obligated to defend the estate.

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> G. Any criminal act, as to the person or entity proven, admitted, or non-contested to have committed such act. . .

As the exclusion applies to persons proven, admitted, or non-contested to have committed the criminal act and it does not appear to have as yet been proven, admitted, or non-contested that Heika committed the criminal act of sexual assault, the above exclusion is inapplicable.

Reversed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto