STATE OF MICHIGAN

COURT OF APPEALS

RICHARD PAYLOR and ORPAH PAYLOR,

Plaintiffs-Appellees,

v

FIRST MOUNTAIN MORTGAGE CORPORATION, BRIAN WINBORN, ERIC STANLEY, and KELLI HACHEY,

Defendants,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Garnishee Defendant-Appellant.

UNPUBLISHED
October 9, 2008

No. 278076
Washtenaw Circuit Court
LC No. 03-000639-CK

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Garnishee defendant Citizens Insurance Company of America appeals as of right from an order granting summary disposition in favor of plaintiffs Richard and Orpah Paylor and awarding them a money judgment of $480,000 against Citizens Insurance, plus interest, to satisfy the full amount of a $480,000 judgment entered in favor of the Paylors against Citizens Insurance's insured, First Mountain Mortgage Corporation ("First Mountain"), following a bench trial. Because the injuries suffered in the underlying negligence action fall within the personal injury "special broadening endorsement" to a business liability policy, we affirm.

I. Background

In June 2003, the Paylors filed an action against First Mountain and two of its employees, Brian Winborn and Eric Stanley, to recover damages for Winborn's and Stanley's allegedly tortious dealings with the Paylors in connection with a residential mortgage. The Paylors alleged that they wrote various checks to Winborn totaling $63,968.50 before closing on the mortgage, but ultimately received no credit for the amount paid. They sought to recover the $63,968.50 and other damages from First Mountain, Stanley, and Winborn, alleging claims for fraudulent misrepresentations, breach of the Michigan Consumer Protection Act, MCL 445.901 *et seq.*,

conversion, negligence, breach of contract, unjust enrichment, and intentional infliction of emotional distress.

The Paylors obtained a default judgment against Winborn and Stanley, and proceeded to trial on their claims against First Mountain. The principal issue at trial was whether First Mountain negligently trained and oversaw the work of Winborn and Stanley. The trial court found that Stanley and Winborn defrauded and took advantage of the Paylors, and that First Mountain was negligent for failing to train and oversee their work. The court awarded the Paylors noneconomic damages of $480,000 for First Mountain's negligence.

After a final judgment was entered, the Paylors served Citizens Insurance with a writ of garnishment. Citizens Insurances denied having any funds owed to First Mountain. The Paylors moved for summary disposition under MCR 2.116(C)(10), seeking full payment of the $480,000 judgment from Citizens Insurance on the basis that First Mountain was entitled to insurance coverage for that amount under a business owner's liability policy issued to it by Citizens Insurance.

Before the hearing on the Paylors' motion, the trial court entered a judgment on March 7, 2007, in favor of First Mountain in its separate action against Citizens Insurance in which First Mountain sought coverage under an employee dishonesty provision in a business owner's special property coverage form (hereafter "property policy") issued to it by Citizens Insurance. In that action, the trial court limited First Mountain's recovery for the $480,000 judgment to the property policy's limit of $100,000.

When ruling on the Paylors' motion for summary disposition, the trial court rejected Citizens Insurance's argument that, under the doctrine of res judicata, the March 7, 2007, judgment barred the Paylors' garnishment claim based on the liability policy. The court entered a garnishment order for the full amount sought by the Paylors based on its determination that the liability policy provided coverage for bodily and personal injuries.

II. Standard of Review

Disputes concerning a garnishee's liability are governed by MCR 3.101(M), which generally provides for the dispute to be tried in the same manner as other civil actions. The plaintiff's verified statement serves as the complaint and the garnishee defendant's disclosure serves as the answer. MCR 3.101(M)(2). But in the absence of an admission to the contrary in a garnishee's disclosure, the failure to plead a defense specifically does not waive the defense. *LeDuff v Auto Club Ins Ass'n*, 212 Mich App 13, 18; 536 NW2d 812 (1995).

Summary disposition pursuant to MCR 2.116(C) may be granted where a question of law has been raised in a garnishment dispute. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 310; 486 NW2d 351 (1992). We review the trial court's decision de novo. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* at 120. The motion is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 44; 742 NW2d 624 (2007).

III. Res Judicata

Citizens Insurance argues that the trial court erred in rejecting its argument that the Paylors' garnishment claim based on the liability policy was barred by res judicata. Like a motion for summary disposition, we review a trial court's application of res judicata de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Sewell v Clean Cut Mgt*, 463 Mich 569, 575; 621 NW2d 222 (2001). The second action is barred when "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair, supra* at 121. With respect to the second requirement, it has been said:

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. *Baraga Co v State Tax Comm*, 466 Mich 264, 269-270; 645 NW2d 13 (2002). The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. *Id.*, quoting *Baraga Co v State Tax Comm*, 243 Mich App 452, 456; 622 NW2d 109 (2000), citing *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998). [*Adair, supra*, at 122.]

The Paylors were not parties to the separate action between First Mountain and Citizens Insurance, and we agree with the trial court that the requisite privity between the Paylors and First Mountain was not established. Contrary to what the Paylors argue on appeal, however, we do not find any support for treating them as third-party beneficiaries to the insurance policy in reaching this conclusion. A person is a third-party beneficiary only if the promisor undertakes a promise directly to or for the person. MCL 600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). The insurance policy itself must be considered to determine if a person is a third-party beneficiary. *Id.* at 429. The mere fact that the Paylors obtained a money judgment against First Mountain does not make them third-party beneficiaries under First Mountain's insurance policy with Citizens Insurance.

Nonetheless, it is clear that an injured party has a potential interest in an insurance policy, irrespective of whether the injured party is a third-party beneficiary. See *Allstate Ins Co v Hayes*, 442 Mich 56; 499 NW2d 743 (1993). And if the injured party is placed in the shoes of the insured for purposes of garnishment proceedings against the insurer, it is logical to conclude that the injured party should be bound by a coverage decision rendered in a separate case with respect to the insurance policy. *Cloud v Vance*, 97 Mich App 446, 451; 296 NW2d 68 (1980). This can be accomplished by giving the injured party an opportunity to be heard in the insurance case, but does not establish the necessary privity to bind the injured party. *Allstate Ins Co, supra* at 67 n 12; *Cloud, supra.* Privity is lacking because the injured party and the alleged tortfeasor have an adversary relationship. Cf. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556-557; 540 NW2d 743 (1995), aff'd on other grounds 459 Mich 500 (1999).

Thus, the trial court correctly determined that the requisite privity was lacking. Because this element of res judicata was not met, it is unnecessary to address the parties' arguments regarding the other requirements of res judicata. Additionally, Citizens Insurance's argument that the Paylors' garnishment action is precluded by the compulsory joinder rule in MCR 2.203(A) is not properly before us, as this issue was not raised in the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In any event, while this rule might be consistent with res judicata principles, *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 395 n 12; 596 NW2d 153 (1999) (Taylor, J., dissenting), Citizens Insurance has failed to demonstrate that it applies to a person who is not a party to a lawsuit or itself provides a remedy for a violation.

IV. Liability Coverage

Because the doctrine of res judicata did not preclude the Paylors' garnishment action, we consider the merits of the trial court's decision granting the Paylors' motion for summary disposition with respect to whether First Mountain had coverage under the liability policy for the $480,000 judgment against it.

With respect to Citizens Insurance's claim that First Mountain was not entitled to coverage for failure to comply with contractual notice requirements in the liability policy, we conclude that Citizens Insurance did not properly preserve this issue for appeal by presenting it to the trial court. Further, considering Citizens Insurance's cursory treatment of this issue, we decline to consider it. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

We also note that the Paylors' argument that Citizens Insurance should be estopped from denying coverage on any ground not set forth in its July 10, 2003, letter to First Mountain with respect to the liability policy, while raised in their motion for summary disposition, was not decided by the trial court. In any event, estoppel is generally not available where its application would broaden coverage under an insurance policy. *Smit v State Farm Mut Automobile Ins Co*, 207 Mich App 674, 680; 525 NW2d 528 (1994). The dispositive issue before us is whether the trial court correctly found as a matter of law that the liability policy provided coverage for bodily and personal injuries. We are not persuaded that the Paylors have established any basis for applying the estoppel doctrine to this issue.

A proper resolution of this case depends on the construction of the liability policy. Summary disposition was appropriate under MCR 2.116(C)(10) only if the liability policy was unambiguous. *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). A contract will generally be read as a whole and in accordance with its plain and ordinary meaning to determine the parties' intent. *Cole v Auto Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). Dictionary definitions may be used to determine the plain and unambiguous meaning of undefined terms in an insurance policy. *State Farm Fire & Cas Co v Couvier*, 227 Mich App 271, 275; 575 NW2d 331 (1998). An ambiguity will be found if two contractual provisions irreconcilably conflict or a term is equally susceptible to more than one meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

Paragraph A of the liability policy provides that coverage exists for "bodily injury" only if it is "caused by an 'occurrence' that takes place in the 'covered territory.'" "Bodily injury" is defined in a special broadening endorsement to mean

> bodily injury, sickness or disease sustained by a person, this includes mental anguish, mental injury shock, fright or death resulting from such bodily injury, sickness or disease.

Under the unambiguous language used to define "bodily injury," mental anguish must result from bodily injury. Here, there was no evidence of an actual bodily injury, but only evidence that the Paylors' mental anguish had physical manifestations. We therefore hold that the trial court erred as a matter of law in finding the requisite bodily injury for coverage under the policy. Cf. *Fitch v State Farm Fire & Cas Co*, 211 Mich App 468, 472-473; 536 NW2d 273 (1995) (plaintiff could not claim coverage for emotional injuries under policy definition of bodily injury that excluded an emotional and mental disorder or disturbances unless "it arises out of actual physical injury" where the claimed injuries were "apparently without physical manifestation or injury and, most importantly, did not stem from an actual physical injury").

Because there was no evidence of a bodily injury, it is unnecessary to consider Citizens Insurance's argument that there also was no "occurrence" for purposes of coverage. We note, however, that the question whether there was an occurrence is generally analyzed from the standpoint of the insured in Michigan. *Allstate Ins Co v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002). Further, the weight of authority takes this approach in cases specifically involving an employer's negligent hiring, training, or supervision of an employee. See *Colombia Cas Co v Westfield Ins Co*, 217 W Va 250, 252; 617 SE2d 797 (2005); see also *Westfield Ins Co v Tech Dry, Inc*, 336 F3d 503 (CA 6, 2003); *King v Dallas Fire Ins Co (On Rehearing)*, 85 SW3d 185, 191-192 (Tex, 2002).[1]

Given the absence of bodily injury, we are left to determine whether the garnishment order could be upheld, in whole or in part, on the basis of a personal injury. Under ¶ A of the liability policy, the insurance also applies to "'personal injury' caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you." "Personal injury" is defined in ¶ F(13) to mean

> injury, other than "bodily injury", arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;

[1] We further note that only bodily injury and property damage coverage requires an occurrence. The personal injury coverage only requires that the personal injuries arise out of the business of the insured. Coverage, ¶ A(1)(a)(b)(2)(a)

c. The wrongful eviction from . . . a room , dwelling or premises that a person occupies . . . ;

d. Oral or written publication of material that slanders or libels a person . . . ;

e. Oral or written publication or material that violates a person's right of privacy.

A special broadening endorsement adds the following "offense."

f. Discrimination or humiliation (unless insurance is prohibited by law) that results in injury to the feelings or reputation of a natural person, but only if such discrimination or humiliation is:

(1) Not done intentionally by or at the direction of:

(a) The insured; or

(b) Any officer of the corporation, director, stockholder, partner or member of the insured; and

(2) Not directly or indirectly related to an "employee", nor to the employment, prospective employment or termination of any person or persons by an insured.

We disagree with Citizens Insurance that the trial court erred in finding evidence to support a personal injury arising from humiliation. The trial court found that there was a personal injury within the meaning of the policy because its determination of mental anguish at the bench trial included humiliation. The trial court explained that although it did not mention the word "humiliation," it had found humiliation predicated on evidence that Richard Paylor was losing his home and had become dependent on his children. The trial court stated, "Whether you want to call that mental distress or mental suffering or humiliation, it is what it is and it was a serious impact on this man and his family." Such statement is further supported by the record in the underlying negligence action by the uncontroverted evidence of plaintiffs' hurt feelings, embarrassment, constant crying jags, and loss of self worth. Ordinarily, "[i]n the world of liability insurance policies, coverage for 'personal injury' liability depends not primarily on the type of *injury* sustained, but whether the injuries arose from the commission of certain *offenses*." *Titan Holdings Syndicate, Inc v City of Keene*, 898 F2d 265, 270 (CA 1, 1990), citing Appeleman, 7 Insurance Law, § 4501.14 (emphasis in original); see also *Kitsap Co v Allstate Ins Co*, 136 Wash 2d 567, 580; 964 P2d 1173 (1998). Coverage is afforded for defined risks. *City of Delray Beach v Agricultural Ins Co*, 85 F3d 1527, 1533-1534 (CA 11, 1996).

It is apparent from the list of offenses in the personal injury definition of the liability policy that it applies to various forms of tortious or wrongful conduct. The offenses are not defined by the form of damages, but rather the conduct itself, such as a false arrest or wrongful eviction, albeit the offense of humiliation is limited by the requirement that it result in injury to feelings or reputation. This is consistent with the commonly understood meaning of the word

"offense" itself. Although an "offense" can be a "transgression of the law," it is also defined as a "violation or breaking of a social or moral rule" and "something that offends or displeases." *Random House Webster's College Dictionary* (1997). However, in this regard, counsel for Citizens Insurance at argument interpreted the "special broadening endorsement" and admitted that the personal injury coverage extends not only to an act or offense of humiliation, but resultant humiliation from other acts.

The word "humiliation" is itself undefined in the definition of personal injury, albeit there is no covered personal injury if the offense of humiliation is done intentionally by or at the direction of "the insured." The use of the definite article "the," combined with the singular word "insured," is an indication that the offense of humiliation is examined from the standpoint of a particular insured. See generally *Hashem v Les Stanford Oldsmobile, Inc,* 266 Mich App 61, 79; 697 NW2d 558 (2005) ("the" particularizes the subject spoken by reference to that object).[2] "Humiliation" has been defined as "an act or instance of humiliating or being humiliated" and the "state or feeling of being humiliated." *Random House Webster's College Dictionary* (1997). The word "humiliate" means to "to cause (a person) a painful loss of pride, self-respect, or dignity; mortify, abase." *Id.*

The wrong committed by First Mountain was in the nature of negligent training and supervising employees. As with any negligence action, the plaintiff must establish a duty owed by the defendant and that a breach of that duty caused an injury. *Lelito v Monroe,* 273 Mich App 416, 418-419; 729 NW2d 564 (2006). The thrust of such a negligence claim is that the employer acted unreasonably in letting an employee, whom it has a duty to control, commit a wrong against the plaintiff. See generally *United States Fidelity & Guaranty v Toward,* 734 F Supp 465, 470 (SD Fla, 1990). The employee's actual commission of some wrong is necessary for the plaintiff to show damages. *Id.* Here the factual predicate of the underlying negligence action is uncontested by Citizens Insurance. There was evidence in this case that First Mountain set in motion the chain of events that enabled Winborn and Stanley to obtain the Paylors' money through fraud. And, while a court may conclude that a claim based on resultant humiliation is insufficient to meet an offense of humiliation so as to invoke personal injury coverage, see, *Air Line Pilots Ass'n v Twin City Fire Ins Co,* 803 A2d 1001 (DC, 2002), such is not the case when the insurer interprets its own contract to include resultant humiliation as conceded by counsel.

---

[2] Consistent with this understanding, the liability policy also contains a separation-of-insureds clause, which provides:

> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each insured against whom claim is made or "suit" is brought.

Citizens Insurance, therefore, argues that its exclusion for violation of a penal statute or ordinance, (B)(i)(p)(3), applies because employees qualify as "an insured." But the exclusion requires that "the insured" commit or consent to the violation. The definite article "the" particularizes the subject spoken to that object. *Hashem, supra* at 79. Also, as discussed earlier, a separation of insureds clause is contained within the liability policy provision. The effect of a separation of insureds provision on an exclusion depends on the terms of the exclusion. *Bituminous Cas Corp v Maxey*, 110 SW3d 203, 214 (Tex App, 2003). If Citizens Insurance wished to exclude coverage arising out of the violation of a penal statute, regardless of which insured committed the violation, it could have done so by using the phrase "any insured." Because the phrase "the insured" was used, it is plain that the application of the exclusion must be determined by reference to a particular insured. Therefore, Winborn's and Stanley's wrongful conduct is irrelevant in applying the exclusion. As a matter of law, First Mountain committed acts that either amounted to an offense of humiliation or resulted in humiliation by negligently supervising and training Winborn and Stanley, the exclusion does not apply. Cf *Silverband Amusement, Inc v Utah home Fire Ins Co*, 842 F Supp 1151, 1158 (WD Ark, 1994), aff'd 33 F3d 1476 (1994) (exclusion for willful violation of penal statute by or with consent of "the insured" did not apply to employer who allegedly negligently hired and supervised the employee who committed the violation.)

While the trial court found both bodily injury and personal injury coverage applied, it is clear from the record that all the damages experienced by plaintiffs either constituted injury to plaintiffs' feelings, or resulted from the injury to plaintiffs' feelings, as contained in the "special broadening endorsement" personal injury coverage.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald