STATE OF MICHIGAN

COURT OF APPEALS

BERNARD WOJNICKI, Personal Representative of the Estate of GLENNA WOJNICKI,

Plaintiff,

v

WARREN GERIATRIC VILLAGE, INC., a/k/a BORTZ HEALTH CARE OF WARREN, INC., d/b/a BORTZ HEALTH CARE OF WARREN,

Defendant,

and

MANISHA GUPTA, M.D.,

Defendant-Third-Party Plaintiff/Appellee,

v

ANCHOR SENIOR MEDICAL SERVICES, P.L.L.C., d/b/a/ GRAND RIVER MEDICAL CENTER,

Third-Party Defendant/Appellant.

UNPUBLISHED
October 15, 2009

No. 286783
Macomb Circuit Court
LC No. 2005-004699-NH

Before: Saad, C.J., and O'Connell and Zahra, JJ.

PER CURIAM.

In this employment contract dispute, third-party defendant/appellant Anchor Senior Medical Services, P.L.L.C., doing business as Grand River Medical Center (Grand River), appeals as of right from a final order granting summary disposition to defendant-third-party plaintiff/appellee Manisha Gupta, M.D., pursuant to MCR 2.116(C)(10). We affirm.

Gupta worked as a primary care internist at Grand River between August 2002 and December 2003. In the employment contract between Grand River and Gupta, Grand River agreed "to provide professional liability insurance in the amount of $100,000/300,000 to

employed Physician" as a benefit of employment. Apparently, Grand River provided Gupta with malpractice insurance by having Gupta apply for insurance and then paying the premiums for her. Gupta applied and was approved for individual professional liability insurance from MHA Insurance Company (MHA) under a claims-made policy that provided up to $100,000 in coverage for each medical incident and an aggregate of $300,000 in coverage.

Gupta left her employment with Grand River in December 2003. On March 8, 2004, Gupta again contacted MHA and asked that they cancel her malpractice insurance effective February 8, 2004. In response to the March letter, MHA sent a letter informing Gupta that her insurance coverage was terminated effective February 8, 2004. In the letter, MHA also recommended that because Gupta was covered by a claims-made policy, she should purchase "tail coverage" that would cover claims arising from her employment with Grand River that were made after her employment with Grand River ended. However, Gupta chose not to purchase the coverage, and MHA closed its file for her on April 12, 2004.

In late 2005, Bernard Wojnicki, the plaintiff in the underlying case, filed a malpractice claim against Gupta on behalf of the estate of his wife, Glenna Wojnicki, who had died on June 21, 2003. During her work at Grand River, Gupta had apparently treated Glenna, a resident of a nursing home run by Bortz Health Care of Warren, during Glenna's stay at the nursing home between September 18, 2002, and May 26, 2003. In the underlying litigation in this case, Bernard sued Gupta and the nursing home on behalf of Glenna's estate, claiming that Gupta had engaged in malpractice contributing to Glenna's death. The parties in the underlying case entered a confidential settlement that was approved by the trial court on June 4, 2007. According to Gupta, this case settled for $190,000, with Gupta contributing $12,500 to the settlement.

Soon after the underlying litigation commenced, Gupta filed a third-party complaint against Grand River, alleging claims of breach of contract and detrimental reliance/promissory estoppel and claiming that pursuant to the terms of her employment contract with Grand River, Grand River was obligated to provide her with the insurance needed to cover any malpractice that might have arisen from her treatment of Glenna Wojnicki. Gupta was awarded summary disposition pursuant to MCR 2.116(C)(10), after the trial court determined that the parties' employment contract unambiguously required Grand River to cover Gupta for liability arising from her employment and denying Grand River's equitable estoppel claims.

Grand River argues that its employment contract with Gupta is ambiguous because the provision indicating that Grand River would provide Gupta with "professional liability insurance" did not specify whether Grand River would provide Gupta with a "claims made" or an "occurrence" policy.[1] This panel disagrees. We review de novo whether a trial court has

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[1] In *Stine v Continental Cas Co*, 419 Mich 89, 97-98; 349 NW2d 127 (1984), our Supreme Court discussed the difference between a "claims made" and an "occurrence" policy:

> As a general proposition, although not in every case and indeed not in this case, a "discovery" or "claims made" policy is one in which indemnity is provided no matter when the alleged error or omission or act of negligence

(continued…)

properly granted or denied a motion for summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* We also review de novo questions involving the proper interpretation of a contract. *Pickering v Pickering*, 268 Mich App 1, 13; 706 NW2d 835 (2005).

The applicable provision of the employment contract between the parties indicates that Grand River agreed "to provide professional liability insurance in the amount of $100,000/$300,000 to the employed Physician."

(…continued)

> occurred, provided the misdeed complained of is discovered and the claim for indemnity is made against the insurer during the policy period. Some "claims made" policies, and this case involves one of them, are written to provide coverage only for negligent acts or omissions which occur during the policy period and for which the claim is made against the insurer during that period.
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> An "occurrence" insurance policy, on the other hand, generally is one in which indemnity is provided no matter when the claim is brought for the misdeed complained of, providing it occurred during the policy period.
>
> One writer described the difference between "claims made" and "occurrence" policies as follows:
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> > "The major distinction between the 'occurrence' policy and the 'claims made' policy constitutes the difference between the peril insured. In the 'occurrence' policy, the peril insured is the 'occurrence' itself. Once the 'occurrence' takes place, coverage attaches even though the claim may not be made for some time thereafter. While in the 'claims made' policy, it is the making of the claim which is the event and peril being insured and, subject to policy language, regardless of when the occurrence took place". Kroll, The Professional Liability Policy "Claims Made", 13 Forum 842, 843 (1978).
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> Or, as the United States Supreme Court put it:
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> > "An 'occurrence' policy protects the policyholder from liability for any act done while the policy is in effect, whereas a 'claims made' policy protects the holder only against claims made during the life of the policy". *St Paul Fire & Marine Ins Co v Barry*, 438 US 531, 535, fn 3; 98 S Ct 2923, fn 3; 57 L Ed 2d 932 (1978).

> The goal of contract construction is to determine and enforce the parties' intent on the basis of the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Henderson* [*v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).] "Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists." *Id.* [*St Clair Medical, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006).]

To properly interpret a contract, we "'read the contract as a whole and give meaning to all the terms contained within the policy.'" *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 383; 591 NW2d 325 (1998), quoting *Royce v Citizens Ins C*o, 219 Mich App 537, 542-543; 557 NW2d 144 (1996). Further, we give the contractual language its ordinary and plain meaning in order to avoid technical and strained constructions. *Id.* Whether contract language is clear or ambiguous is a question of law. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), or "when [a term] is *equally* susceptible to more than a single meaning," *City of Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). "Courts must not create ambiguity where it does not exist." *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). If the contract is unambiguous, it must be enforced as written. *Michigan Twp Participating Plan*, *supra* at 383.

We conclude that this contract provision is not ambiguous. The plain language of the employment contract affords only one interpretation: Grand River agreed to provide professional liability insurance to Gupta that would cover the period of her employment. The alleged malpractice that gave rise to the underlying suit occurred during the period of Gupta's employment with Grand River. Therefore, Grand River was contractually obligated to provide insurance that would cover this malpractice.

Grand River tries to create an ambiguity in the contract by claiming that the contract does not specify *how* it should provide this insurance, i.e., whether it should provide a "claims-made" or an "occurrence" policy. However, the type of insurance that Grand River provided Gupta is irrelevant. Grand River was free to provide insurance through either type of policy, as long as it fulfilled its obligation to provide the agreed-upon malpractice coverage for any malpractice claim against Gupta that might arise in the course of her employment with Grand River. Accordingly, the trial court did not err when it held that the employment contract was not ambiguous and that, as a result, any failure by Grand River to provide insurance covering malpractice claims arising in the course of Gupta's employment was a breach of the parties' employment contract, irrespective of when the underlying malpractice claim might be filed.

Grand River also discusses the circumstances surrounding Gupta's selection of a claims-made insurance policy, apparently in an attempt to demonstrate that a question of fact exists concerning whether Grand River was liable to Gupta for the expenses she incurred in the underlying medical malpractice action. However, because the applicable terms of the

employment contract between Gupta and Grand River are not ambiguous, we need not consider any extrinsic evidence in determining the nature of the parties' agreement.

Next, Grand River claims that the trial court should have used the doctrine of estoppel by laches to bar Gupta's claim. We review equitable issues de novo, and we review the trial court's findings of fact supporting its decision for clear error. *Webb v Smith* (*After Remand*), 204 Mich App 564, 568; 516 NW2d 124 (1994).

> The doctrine of laches is concerned with unreasonable delay that results in "circumstances that would render inequitable any grant of relief to the dilatory plaintiff." *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000). The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). Laches does not apply unless the delay of one party has resulted in prejudice to the other party. *City of Troy v Papadelis* (*On Remand*), 226 Mich App 90, 97; 572 NW2d 246 (1997). "'It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.'" *Id.*, quoting *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 578; 485 NW2d 129 (1992). The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant. *Gallagher*, *supra* at 369-370. [*Yankee Springs Twp v Fox*, 264 Mich App 604, 611-612; 692 NW2d 728 (2004).]

Grand River claims that Gupta engaged in unreasonable delay by obtaining, renewing, and canceling the claims-made policy without telling Grand River that she expected it to continue to cover any post-employment claims made against her arising from her actions while employed at Grand River. In particular, Grand River notes that Gupta never asked it to pay for "tail" coverage when she cancelled her policy; Grand River appears to insinuate that this failure by Gupta precluded it from having the opportunity to purchase the coverage. However, Grand River has failed to establish how any failure by Gupta to ask it to pay for tail coverage resulted in prejudice. In particular, Grand River fails to present any evidence indicating that it did not know that Gupta was covered by a claims-made malpractice insurance policy or that she left Grand River's employment by the end of 2003. The plain language of the parties' employment contract indicates that Grand River was obligated to provide malpractice insurance covering the period of Gupta's employment with Grand River. Nothing that Gupta did prevented Grand River from having the opportunity to determine whether Gupta's claims-made insurance policy would cover any malpractice claims arising during the entire period of her employment, even if the claim was filed after Gupta stopped working for Grand River. Grand River had the information necessary to determine whether it was paying for insurance that provided sufficient coverage for malpractice claims that might arise during the period of Gupta's employment, as specified in the parties' employment contract, regardless of Gupta's employment status at the time the claim was made. Therefore, enforcement of Gupta's claims against Grand River was not inequitable, and Grand River's claim that the doctrine of laches should be used to preclude enforcement of Gupta's cause of action lacks merit.

Grand River also claims that the trial court should have used the doctrine of equitable estoppel to bar Gupta's claim.

> "Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." [*Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002), quoting *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999).]

Equitable estoppel is applied only when a party justifiably relies and acts on the belief that misrepresented facts are true.

Grand River claims that Gupta's cause of action is also barred by the doctrine of equitable estoppel because Gupta represented her belief that the claims-made policy that she selected satisfied Grand River's requirement to provide her with malpractice insurance according to the terms of her employment agreement. In so doing, Grand River argues, Gupta represented to Grand River her belief that the claims-made policy satisfied the terms of the employment contract, and Grand River relied on her belief, apparently by not providing her with further malpractice coverage. Yet these representations are irrelevant because the plain language of the contract indicates the liability coverage that Grand River had agreed to provide, and Grand River never alleges that Gupta induced it to believe that she was covered by any insurance policy other than the claims-made policy that Grand River apparently knew she had. Accordingly, Grand River's defense of equitable estoppel lacks merit.[2]

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

[2] Because the trial court correctly granted summary disposition to Gupta pursuant to MCR 2.116(C)(10), we need not consider Grand River's argument that the trial court should have granted summary disposition in its favor pursuant to MCR 2.116(I)(2).