STATE OF MICHIGAN

COURT OF APPEALS

WESTPORT INSURANCE CORPORATION,

Plaintiff-Appellant,

v

AL BOURDEAU INSURANCE SERVICES, TERRI'S LOUNGE, and AARON THERIAULT,

Defendants-Appellees.

UNPUBLISHED
April 15, 2010

No. 287920
Genesee Circuit Court
LC No. 07-086821-CK

Before: MARKEY, P.J., and ZAHRA, and GLEICHER, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff appeals as of right from the trial court's order denying its motion for summary disposition and granting defendant Al Bourdeau Insurance Company's ("Bourdeau") countermotion for summary disposition. We reverse and remand for entry of an order of summary disposition in favor of plaintiff.

I. BASIC FACTS AND PROCEEDINGS

This case arises out of an action filed in January 2005 by Aaron Theriault, as assignee of Terri's Lounge, to hold Bourdeau liable in negligence for a $3 million default judgment that Theriault obtained in a dramshop action against Terri's Lounge. On September 19, 2006, following a bench trial, Theriault was awarded damages of $1.5 million against Bourdeau. Bourdeau thereafter pursued postjudgment remedies, including an appeal to this Court. Bourdeau also provided plaintiff, its professional liability insurer, with written notice of the Theriault negligence judgment. Bourdeau completed a "general liability notice of occurrence/claim" form, dated December 1, 2006, and sought indemnification for the $1.5 million judgment. In a letter dated May 2, 2007, plaintiff denied coverage under its claims-made insurance policy based on Bourdeau's breach of reporting and notice requirements in the policy. Plaintiff explained that coverage was denied because Bourdeau "did not report the claim until almost one year after the policy expired," which was not as soon as reasonably possible, and that plaintiff was prejudiced by the untimely notice.

On August 8, 2007, plaintiff filed the instant action for declaratory relief. Plaintiff sought a declaration that coverage was precluded because Bourdeau's late notice of Theriault's negligence case and Bourdeau's lack of cooperation violated the general terms and conditions in its policy. Bourdeau's appeal of the judgment in Theriault's negligence case was pending in this

Court when the trial court considered cross-motions for summary disposition brought by Bourdeau and plaintiff. The court determined that plaintiff waived any argument that the insurance policy had expired and, alternatively, that Bourdeau's December 1, 2006, "claim" was validly made under a policy issued by plaintiff for the period December 14, 2005, to December 14, 2006 (hereafter the "2005-2006 policy"). The trial court also determined that Bourdeau's December 1, 2006 notice was untimely and violated the policy's requirement that written notice of a "claim" be made as soon as practical. However, the trial court found that plaintiff failed to present evidence of actual prejudice caused by the late notice and, accordingly, could not rely on the late notice to deny coverage. This appeal followed.

II. JURISDICTION AND MOOTNESS

Before turning to plaintiff's arguments, we shall consider Bourdeau's claims that this Court lacks jurisdiction over this appeal and that the appeal is moot. Questions concerning this Court's jurisdiction are always within the scope of our review. *Chen v Wayne State Univ*¸ 284 Mich App 172, 191; 771 NW2d 820 (2009). "A court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage of the proceedings." *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). We disagree with Bourdeau's argument that this appeal was filed prematurely because no monetary relief was ordered by the trial court.

This Court has jurisdiction of an appeal of right filed from a final order or final judgment, as defined in MCR 7.202(6). See MCR 7.203(A)(1). In a civil case, "final order" or "final judgment" is defined, in pertinent part, as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(i). This case was filed by plaintiff solely as a declaratory action, and a review of the trial court's summary disposition ruling indicates that it was accordingly limited to declaratory relief. Declaratory actions are governed by MCR 2.605(A)(1), which provides that "[I]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." An actual controversy will be found where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 126; 693 NW2d 374 (2005). MCR 2.605 also provides:

> (E) Effect; Review. Declaratory judgments have the force and effect of, and are reviewable as, final judgments.
>
> (F) Other Relief. Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment.

This Court recently indicated in *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 450-451; 773 NW2d 29 (2009), lv pending, that MCR 2.605(F) provides a basis for a defendant to seek relief without filing a counterclaim. In that case, however, this Court was not presented with any jurisdictional issue. Further, unlike the circumstances in *Children's Hosp of Michigan v Auto Club Ins Ass'n*, 450 Mich 670; 545 NW2d 592 (1996), in which our Supreme Court found that an appeal was prematurely filed, this case does not involve either a pleaded claim for

monetary relief or a court order that contemplated further proceedings. Bourdeau's request for an evidentiary hearing in its motion for summary disposition did not establish a pleaded claim for monetary relief because a motion is not a pleading. MCR 2.110(A). Further, merely raising an issue in a motion for summary disposition does not convert it to an issue tried by consent. *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999); see also MCR 2.118(C)(1), and *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002).

Because the pleadings in this case were limited to a claim for declaratory relief, the trial court's order granting declaratory relief was the "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(i). Although additional relief was permitted if necessary and proper pursuant to MCR 2.605(F), the trial court had discretion to grant only declaratory relief. *Durant v Michigan*, 456 Mich 175, 209-210; 566 NW2d 272 (1997); see also *P T Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 141; 715 NW2d 398 (2006); *Stein, Hinkle, Dawe & Assoc, Inc v Continental Cas Co*, 110 Mich App 410, 426; 313 NW2d 299 (1981). In addition, the trial court's statement in its order that "this is a final order closing the case," while not dispositive of the finality of the order, *Faircloth v Family Independency Agency*, 232 Mich App 391, 400; 591 NW2d 314 (1998), indicates that it did not intend to grant further relief. Therefore, this Court has jurisdiction over plaintiff's appeal.

We note that Bourdeau could have moved for rehearing or reconsideration under MCR 2.119(F)(3) of the trial court's September 8, 2008, order if it believed that the court should have ultimately ordered further relief. "The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). Furthermore, if Bourdeau wished to contest the trial court's failure to grant further relief, it should have filed a cross appeal with this Court. Although an appellee may urge alternative grounds for affirmance that were rejected by the trial court without filing a cross appeal, an appellee cannot obtain a decision more favorable than the decision rendered by the trial court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Therefore, we shall limit our review to the declaratory relief embodied in the trial court's summary disposition ruling.

We also disagree with Bourdeau's claim that this appeal is moot in light of this Court's reversal of the $1.5 million judgment Theriault received against Bourdeau in Theriault's negligence action. See *Theriault v Al Bourdeau Ins Service, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2008 (Docket No. 278643). "Questions of justiciability may be raised at any stage of the proceedings, even sua sponte." *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 374; 716 NW2d 561 (2006) (opinion by Young, J). Nonetheless, this Court has previously considered and rejected this argument, first when denying Bourdeau's first motion to dismiss after this Court decided *Theriault*, and again after our Supreme Court denied Theriault's application for leave to appeal in that case.[1] Under the law of the case doctrine, we need not revisit this issue. *City of*

[1] See *Westport Ins Corp v Al Bourdeau Ins Services*, unpublished order of the Court of Appeals, entered December 8, 2008 (Docket No. 287920), and *Westport Ins Corp v Al Bourdeau Ins* (continued…)

Kalamazoo v Dep't of Corrections (After Remand), 229 Mich App 132, 135-136; 580 NW2d 475 (1998); *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). But this Court's conclusion in its December 8, 2008, order that this appeal is not "fully and finally moot" does not mean that some of the issues presented may not be considered moot. Accordingly, we shall briefly address the question of mootness.

A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief. *Id.* Here, it is clear that the question whether plaintiff has a duty to indemnify Bourdeau for the $1.5 million judgment in Theriault's negligence case is now moot in light of this Court's reversal of that judgment and our Supreme Court's denial of Theriault's application for leave to appeal. But because Bourdeau has not abandoned its claim that plaintiff may still be liable for post-notice defense costs arising from plaintiff's duty to defend, the coverage issue is not fully moot. Although an insurer's duty to defend is broader than the duty to indemnify, if there is no coverage possible, then there is no duty to defend. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-452; 550 NW2d 475 (1996); *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2001).

III. SUMMARY DISPOSITION

We review de novo a trial court's summary disposition ruling in a declaratory judgment action. *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43; 742 NW2d 624 (2007). Because the record presented to the trial court was not limited to the pleadings, we review the trial court's decision under MCR 2.116(C)(10), which tests the factual support for a claim. *Id.* at 43-44. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 44. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

To the extent that the parties' dispute requires this Court to interpret the parties' insurance contract or to engage in statutory construction, we review these issues de novo as questions of law. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). "A court must construe and apply unambiguous insurance policy provisions as written, unless a policy provision is illegal or a traditional defense to the enforceability of a contract applies." *Sherman-Nadiv v Farm Bureau Gen Ins Co*, 282 Mich App 75, 78; 761 NW2d 872 (2008). "The insurance policy is read as a whole, and meaning should be attributed to all terms." *Id.*

Turning first to plaintiff's challenge to the trial court's determination that the 2005-2006 policy applies to Bourdeau's claim, we agree that the trial court erred in finding that the 2005-2006 policy was applicable based on the "retroactive" provision for "full prior acts." Plaintiff's

(…continued)

Services, unpublished order of the Court of Appeals, entered August 24, 2009 (Docket No. 287920).

policy was a "claims made" policy. In a "claims made" policy, this type of provision is generally used to allow coverage for acts that occurred before the policy period. *Stine v Continental Cas Co,* 419 Mich 89, 113; 349 NW2d 127 (1984). Unlike an "occurrence" policy, which generally relates to a definite and easily identifiable event, such as an automobile accident, the "claims made" policy generally protects the insured only against claims made during the life of the policy. *Id.* at 98. Such policies were "developed primarily to deal with situations in which the error, omission, or negligent act is difficult to pinpoint and may have occurred over an extended period of time." *Id.* at 98-99. From an underwriting perspective, these types of acts make it difficult to fix premium rates and establish reserves. *Id.* at 99.

> "Claims made" policies meet such difficulties by enabling the insurer to underwrite the risk, compute the premiums, and establish reserves with greater accuracy, safe in the assumption that liability will be limited to claims actually made during the term of the policy for which the premium is computed. When the policy term expires, the insurer knows exactly what its exposure is, at least in terms of the nature and number of "claims made". As a result, the insurer is better able to predict the limits of its exposure and more accurately estimate the premium rate schedule necessary to accommodate the risk undertaken. [*Stine,* 419 Mich at 99-100.]

Here, the terms "potential claim" and "claim" are defined in the 2005-2006 policy's general terms and conditions in a manner consistent with a claims-made policy. A "claim" includes, but is not limited to, notice of any suit and the receipt of "a summons, a subpoena, or any other notice of legal process." A "potential claim" means that an insured "has become aware of a proceeding, event, or development which has resulted in or could in the future result in the institution of a 'claim' against the insured."

Further, it is clear from form W-1004B (O6/00) of the 2005-2006 policy, which contains the insuring agreement specific to the insurance industry professional liability coverage unit, that the insuring agreement applies to "'potential claims' and 'claims' first made against an insured during the 'policy period' arising out of a 'wrongful act' taking place on or after the 'retroactive date' as shown in the Declarations and within the coverage territory" "Wrongful act" is defined as "any negligent act, error, omission, or 'personal injury' of an insured or any person for whose acts the insured is legally liable in rendering services for others." The policy also contains an express exclusion for prior claims when they are based on acts occurring before the effective date of the policy that are known by the insured.

The evidence submitted to the trial court discloses that there is no genuine issue of material fact that Bourdeau knew of the "claim" before the effective date of the 2005-2006 policy, because it received notice in May 2005 of Theriault's negligence case. Therefore, the 2005-2006 policy does not apply to the claim as a matter of law.

We disagree with Bourdeau's position that the 2005-2006 policy should be treated as part of a continuing policy that covers the full period of its contractual relationship with plaintiff. Although the declaration section of the 2005-2006 policy indicates that it is a renewal of the 2004-2005 policy, it also lists the specific forms and endorsements that make up the policy. In general, "[r]enewal implies a fixed contract and the expiration of the original contract." *Attorney Gen v Lapeer Farmers Mut Fire Ins Ass'n,* 297 Mich 174, 183; 297 NW 232 (1941). There

being no evidence of a contrary intent in the 2005-2006 policy, we conclude that it constitutes a new and separate contract. *Russell v State Farm Mut Automobile Ins Co,* 47 Mich App 677, 680; 209 NW2d 815 (1973). Therefore, the trial court erred in applying the 2005-2006 policy. Rather, only the 2004-2005 policy, which has a policy period from December 14, 2004, to December 14, 2005, applies to the "claim" made against Bourdeau in Theriault's negligence case in May 2005.

Examined in this context, we agree with plaintiff that the trial court erred in determining that it was required to show prejudice in order to use Bourdeau's late notice of the claim to deny coverage. In this regard, we note that the trial court determined, and we agree, that no notice was provided to plaintiff until after the $1.5 million judgment was entered against Bourdeau on September 19, 2006, in Theriault's negligence case. We find no merit to Bourdeau's suggestion that information it provided to plaintiff in a renewal application in November 2005 with respect to unreported claims provided evidence of notice. The renewal application did not identify any specific claim. Under the general terms and conditions of the 2004-2005 policy, Bourdeau was required to provide written notice of a "claim" "as soon as practical." Reasonable minds could not differ in concluding that Bourdeau violated this notice requirement by waiting until after entry of the $1.5 million judgment to provide notice. Indeed, the deposition testimony of Bourdeau's agent, David Bourdeau, indicates that a formal notice-of-claim form was completed only because plaintiff required that Bourdeau do so in order to obtain a quote for it to provide liability coverage for another year.

We also reject Bourdeau's claim that MCL 500.3008 affords a basis for coverage, notwithstanding its late notice. There is no question that MCL 500.3008 applies to a claims-made liability policy's notice provision. *Stine,* 419 Mich at 106. The statute requires, in pertinent part, that the policy contain "a provision that failure to give any notice required to be given by such policy within the time specified therein shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible." MCL 500.3008. As an example, the statute would apply to a claims-made policy "in the situation in which a claim was made against the insured during the policy period, but notice could not have been given to the insurer within the specified number of days after the policy expired." *Id.* at 106-107. In this case, however, there is no evidence to support an inference that it was not reasonably possible for Bourdeau to give notice within the prescribed time. Thus, MCL 500.3008 does not preclude plaintiff from denying coverage.

Nonetheless, prejudice to the insurer has been considered a material element in determining whether the insured provided reasonable notice. *Wendel v Swanberg,* 384 Mich 468; 185 NW2d 348 (1971). Our Supreme Court in *Koski v Allstate Ins Co,* 456 Mich 439, 444; 572 NW2d 636 (1998), stated that it is a "well-settled principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish prejudice to its position."

But, as this Court indicated in *Schubiner v New England Ins Co,* 207 Mich App 330, 331; 523 NW2d 635 (1994), the requirement of prejudice developed in the context of "occurrence" policies. The Court in *Schubiner* declined to apply prejudice principles to a claims-made policy where there was no genuine issue of fact regarding the insured's failure to provide notice as soon

as reasonably possible. *Id.* The Court stated that "[g]iven the facts of this case, and the clear discussion of 'claims made' policies in *Stine, supra*, we see no basis for applying that principle here." *Id.* at 331. Thus, based on *Schubiner,* it was not necessary that plaintiff demonstrate prejudice.

Having concluded that Bourdeau was not entitled to coverage under the 2004-2005 policy, we turn to plaintiff's challenge to the trial court's ruling that it waived the right to argue that the 2004-2005 policy expired. In general, "once an insurance company has denied coverage to an insured and stated its defenses, the insurance company has waived or is estopped from raising new defenses." *Kirschner v Process Design Assoc, Inc,* 459 Mich 587, 592; 592 NW2d 707 (1999). This doctrine is limited, however, and will ordinarily not be applied to broaden coverage. *Id.*; see also *Lee v Evergreen Regency Coop,* 151 Mich App 281; 390 NW2d 183 (1986).

Here, the trial court relied on reporting requirements for a "potential claim" to conclude that plaintiff waived any argument that the 2004-2005 policy expired by not relying on this defense in its May 2, 2007, letter denying coverage. The trial court's decision confuses issues affecting coverage under the 2004-2005 policy and its expiration date. It also fails to give appropriate consideration to the separate notice requirements for a "potential claim" and a "claim" in the policy.

Plaintiff's denial letter is clearly responsive to a specific "claim," not a mere "potential claim" made by Bourdeau on December 1, 2006, for the $1.5 million judgment in Theriault's negligence case. The letter provides notice that the claim was being denied because of Bourdeau's failure to comply with reporting and notice requirements. It is also clear from the denial letter that plaintiff considered the applicable policy to have expired. The letter states that Bourdeau "did not report the claim until almost one year after the policy expired."

Because the denial letter provided Bourdeau with notice that plaintiff considered the policy expired, the trial court erred in concluding that plaintiff waived any argument that the policy had expired. Further, given the evidence that Bourdeau failed to satisfy "claim" notice requirements, it is immaterial whether Bourdeau satisfied the "potential claim" notice requirements during the policy period. In any event, because the claim at issue was instituted during the policy period, the denial letter as a whole was adequate to preserve a defense based on both "claim" and "potential claim" notice requirements. Regardless, recognizing a waiver of the policy expiration date would, in substance, have the effect of broadening "claims made" coverage beyond the terms of the 2004-2005 policy. As a matter of law, the trial court erred in using the "potential claim" notice requirements to find such a waiver. There are no inequities that warrant a waiver. *Lee,* 151 Mich App at 287. Therefore, we reverse the trial court's determination that plaintiff waived any claim that the 2004-2005 policy had expired.

Reversed and remanded for entry of an order of summary disposition in favor of plaintiff with respect to its complaint for declaratory relief. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher