

STATE OF MICHIGAN
COURT OF APPEALS

EMIR IBRAHIMOVIC,

Plaintiff/Counter Defendant-
Appellee,

v

MEDMARC CASUALTY INSURANCE
COMPANY,

Defendant/Counter Plaintiff/Cross-
Plaintiff-Appellant,

and

DAVID ZIMMERMAN,

Defendant/Cross-Defendant-
Appellee.

UNPUBLISHED
January 19, 2012

No. 298469
Macomb Circuit Court
LC No. 2010-000053-CK

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

In this declaratory action to determine insurance coverage, Medmarc Casualty Insurance Company (Medmarc), appeals as of right from the trial court's order denying its motion for summary disposition and granting summary disposition in favor of Emir Ibrahimovic (plaintiff), and David Zimmerman (Zimmerman). We affirm the trial court's decision that Medmarc has a duty to defend, reverse the trial court's holding that Medmarc was barred from raising the exclusion governing joint venture and partnerships, reverse the trial court's premature finding that coverage exists for these claims, and remand for proceedings consistent with this opinion.

Plaintiff, a Bosnian immigrant, was injured in the workplace and retained Zimmerman to handle his claim. Plaintiff was satisfied with Zimmerman's services. Later, plaintiff was injured in an automobile accident and was referred to attorney Robert J. Mazzara to handle the claim. Zimmerman and Mazzara shared the same office suite and administrative services. The two attorneys had discussed the possibility of forming a partnership, and Zimmerman prepared letterhead in anticipation of the partnership, but an agreement was never executed.

Dissatisfied with Mazzara's representation, plaintiff fired him and hired attorney Rita Kostopoulos to represent him. Zimmerman and Mazzara went to plaintiff's home. Although Zimmerman could not recall the specific details, plaintiff and his daughter asserted that Zimmerman assured them that he would make sure things "got done" regarding his auto claims if he returned to his "original attorneys." Plaintiff agreed to return to his "original attorneys" for representation, and plaintiff sent a letter to that effect to Kostopoulos. The letter was drafted by either Mazzara or Zimmerman, was signed by Zimmerman as a witness, and contained the heading "Zimmerman Mazzara & Associates," but also specified that it was a "nonpartnership." Mazzara negotiated settlements for plaintiff's automobile claims. However, Mazzara was later disbarred, convicted of embezzlement from clients, and committed suicide.

Plaintiff filed an underlying complaint against Zimmerman, Mazzara's estate, and Fifth Third Bank, alleging legal malpractice, breach of contract, fraud, breach of fiduciary duty, conversion and conspiracy, violation of the Michigan Consumer's Protection Act (MCPA), and intentional infliction of emotional distress. Zimmerman's insurance company, Medmarc, provided a defense. In this underlying case, the trial court granted Zimmerman's motion for summary disposition with regard to all claims except legal malpractice. The trial court held that there were factual issues regarding "whether Mazzara and Zimmerman were engaged in some form of partnership or joint venture sufficient to impose liability on Zimmerman for Mazzara's malpractice." Thereafter, plaintiff filed this declaratory action, asserting that Medmarc advised that it did not have a duty to defend or indemnify Zimmerman in the underlying action because joint ventures and de facto partnerships were excluded from coverage pursuant to the terms of the policy. The parties submitted cross-motions for summary disposition regarding the duty to defend and the timeliness of Medmarc's assertion of an exclusion pertaining to joint ventures and de facto partnerships. The trial court denied Medmarc's motion for summary disposition and granted summary disposition in favor of plaintiff and Zimmerman, holding that plaintiff's allegations did not arise out of a partnership relationship. The trial court also held that Medmarc was estopped from denying a duty to defend and indemnify based on a policy exclusion that was not timely raised, and the failure to timely raise the issue caused Zimmerman prejudice. Medmarc appeals as of right.

Medmarc first alleges that the trial court erred in holding that it had a duty to defend and cover Zimmerman for vicarious liability premised on theories of partnership and joint venture when the clear policy language excluded those claims from coverage. We disagree. The trial court's decision regarding a motion for summary disposition is reviewed de novo, with the evidence examined in the light most favorable to the nonmoving party. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). Summary disposition pursuant to MCR 2.116(C)(10) is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing the trial court's decision, the appellate court considers "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.*

When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distrib Co*, 482 Mich 136, 142; 753 NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701

NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent upon credibility, summary disposition should not be granted. *Id.* at 136. The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, 482 Mich at 142-143. Application of disputed facts to the law present proper questions for the jury or trier of fact. *Id.* at 143.

The interpretation of the language of the insurance contract is reviewed de novo. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007). The language of the contract must be given its plain and ordinary meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47-48; 664 NW2d 776 (2003). “The policy must be enforced according to its terms, and a court may not hold an insurer liable for a risk it did not assume.” *Liparoto Constr, Inc v General Shale Brick, Inc*, 284 Mich App 25, 35; 772 NW2d 801 (2009).

The insurance company’s duty to provide a defense to its insured is contingent on whether the conduct falls within the scope of the policy. *Citizens Ins Co*, 477 Mich at 84. The duty to defend is broader than the duty to indemnify; it “arises in instances in which coverage is even arguable.” *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). The duty to defend an insured is not limited to meritorious suits, but also may extend to claims that are groundless, false, or fraudulent, provided that the allegations even potentially fall within the policy coverage. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 480-481; 642 NW2d 406 (2001). When theories of liability which are not covered under the policy are raised with theories of liability that are covered under the insured’s policy, the insurer has a duty to defend. *Protective Nat’l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991) (citation omitted). The duty to defend is not contingent on the precise language of the pleadings; rather, the insurer must examine the underlying allegations in the third-party complaint to determine whether coverage is possible. *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74-75; 755 NW2d 563 (2008) (citation omitted). When there is a doubt regarding whether or not the complaint against the insured raises a theory of liability governed by the policy, the doubt is resolved in the insured’s favor. *Id.* Because the insurer has a duty to provide a defense when the allegations even arguably come within the policy coverage, summary disposition is inappropriate when the court cannot determine whether the conduct at issue falls within the exclusion clause, and fairness requires that the duty to defend continue until such a determination has been made. *Polkow v Citizens Ins Co of America*, 438 Mich 174, 180-181; 476 NW2d 382 (1991).

In the present case, Medmarc contends that section V(J) of Zimmerman’s policy governs exclusions from coverage, and theories of vicarious liability for partnerships and joint ventures are excluded from coverage. However, the determination regarding the duty to defend is not contingent on the policy language alone, *Citizens Ins Co*, 477 Mich at 84, but rather, the allegations contained in the underlying complaint also must be examined to determine whether coverage is possible, *Citizens Ins Co*, 279 Mich App at 75. The duty to defend is broad and arises when coverage is even arguable. *Auto-Owners Ins Co*, 446 Mich at 15. When theories of liability which are not covered are raised with theories of liability that are included in the insured’s policy, the insurer has a duty to defend. *Protective Nat’l Ins*, 438 Mich at 159. A

review of the declaratory complaint and the underlying complaint reveals that plaintiff raised legal malpractice premised on vicarious liability arising out of a joint venture. However, paragraph sixteen of plaintiff's complaints raised breaches of duty by his *attorneys* that included neglect of legal matters and misrepresentation. Because the complaint contains allegations that fall within the policy coverage provisions as well as the exclusion provisions, there is a duty to defend. *Protective Nat'l Ins*, 438 Mich at 159.

Further, summary disposition is inappropriate where the court cannot determine whether the conducts falls within the exclusion clause, *Polkow*, 438 Mich at 180-181, and where factual issues or issues of credibility are presented, *In re Handelsman*, 266 Mich App at 437. In this case, Zimmerman testified that he did not form a partnership with Mazzara; rather, the two attorneys merely shared office space and administrative services. On the contrary, there was evidence that the attorneys advertised together and created letterhead. Furthermore, plaintiff and his daughter presented evidence that Zimmerman made representations following the firing of Mazzara to cause plaintiff to return to his "original attorneys." They alleged that this meeting included a financial payment by Zimmerman, an assertion that Zimmerman denied. Zimmerman could not specifically recall statements made at plaintiff's home, but acknowledged that he was trying to maintain referrals from the Bosnian community. The disparity in the factual evidence regarding the relationship between Mazzara and Zimmerman and the statements made by Zimmerman regarding the services he would provide to induce plaintiff to return to his "original attorneys," cannot be resolved by summary disposition. *Id.* Additionally, plaintiff may amend his pleadings at any time, even after judgment, to conform to proofs if they establish independent individual liability by Zimmerman. MCR 2.118(C)(1). Accordingly, the trial court did not err in holding that Medmarc had a duty to defend.

Medmarc next contends that the trial court erred in concluding that it was estopped from raising the exclusion addressing joint ventures and de facto partnerships. We agree. "[W]hen an insurance company undertakes the defense of its insured, it has a duty to give reasonable notice to the *insured* that it is proceeding under a reservation of rights, or the insurance company will be estopped from denying its liability." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999) (emphasis in original). "The application of waiver and estoppel is limited, and usually, the doctrines will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy." *Id.* at 593-594. The doctrines of waiver and estoppel cannot be invoked to create liabilities contrary to the express provisions of the terms of the contract. *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 654; 177 NW 242 (1920). An insurance company should not be required to pay for a loss for which it failed to charge a premium. *Kirschner*, 459 Mich at 594.

There are two classes of exceptions to the rule precluding application of waiver and estoppel and require an insurer to pay a risk that it did not assume and for which it did not charge a premium. *Lee v Evergreen Regency Coop*, 151 Mich App 281, 286; 390 NW2d 183 (1986). First, insurance companies that reject requests for coverage and deny the request to defend their insured in underlying litigation are estopped from raising issues that could or should have been raised in the underlying action. *Id.* at 286-287. In the second exception, an insurer will be forced to pay for a risk for which it did not charge a premium when the inequity of the forced payment is "outweighed by the inequity suffered by the insured because of the insurance

company's actions." *Id.* at 287. This class of cases is invoked where the insurance company misrepresents the policy terms to the insured or defends the insured without reserving the right to deny coverage. *Id.*; *Kirschner*, 459 Mich at 594-595. "[W]hen an insurer undertakes to defend its insured without reservation of rights, continues to defend although it possesses sufficient information concerning a possible policy exclusion, and subsequently gives notice of its intent to deny coverage, a showing of actual prejudice is not required for the application of estoppel." *Multi-States Transport, Inc v Michigan Mut Ins Co*, 154 Mich App 549, 556; 398 NW2d 462 (1986). Rather, a presumption of prejudice arises which will establish prejudice as a matter of law if unrebutted. *Id.* An insured is not prejudiced by the addition of defenses by the insurer when the insurer "never misled the insured to believe it had more coverage than it actually had and since the policy clearly explains" the coverage. *Lee*, 151 Mich App at 287-288. An insured cannot claim prejudice because he would have pursued a different theory or settlement option when the insured was free to discover the terms of the policy. *Id.* at 288. An insured's reliance on a reservation of rights or denial letter is not justifiable when it conflicts with the policy terms. *Id.*

In the present case, the legal malpractice action was filed and submitted to Medmarc. Within two months of the filing of the underlying complaint, Medmarc acknowledged its duty to defend subject to a reservation of rights. This reservation addressed specific policy provisions that may exclude coverage, but also indicated that all rights under the policy were not waived. One year later, Medmarc submitted a supplemental reservation of rights, raising section V(J), the exclusion of coverage for joint ventures and partnerships. A presumption of prejudice does not arise because Medmarc undertook the defense and submitted a reservation of rights, retaining the ability to raise all rights contained within the policy. *Multi-State Transport*, 154 Mich App at 556. Additionally, Zimmerman cannot rely on the representations regarding vicarious liability by Medmarc's agent because he was aware of the terms of the policy and was not entitled to more coverage than the policy allowed. *Lee*, 151 Mich App at 287-288.¹ Accordingly, the trial court erred in holding that Medmarc was barred from raising the exclusion governing joint venture and partnerships, and the trial court erred in concluding that as a matter of law defendant's insurance policy provided coverage for these claims. A decision on whether coverage exists for these claims should await further development of the facts.

¹ The trial court's reliance on *Meirthew v Last*, 376 Mich 33; 135 NW2d 353 (1965), was misplaced. The *Meirthew* decision involved an attorney who represented an insured, and the attorney failed to timely identify the policy exclusion at issue. The attorney settled the action for the insured, but went on to represent the insurer and refused to pay the claim, citing the policy exclusion that was never identified in the underlying action. *Id.* at 35-38. The application of waiver and estoppel in *Meirthew* was appropriate under the circumstances of that case. Such egregious conduct and a conflict of interest did not occur in the present case.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell