STATE OF MICHIGAN

COURT OF APPEALS

FRANKENMUTH MUTUAL INSURANCE CO., Plaintiff-Appellant,	UNPUBLISHED January 31, 2012
v	No. 300481 Livingston Circuit Court
MITCH HARRIS BUILDING CO. INC., MITCH HARRIS, and JOANN WREFORD, Defendants-Appellees.	LC No. 10-025186-CK

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying its motion for summary disposition. We reverse.

This declaratory action relates to a complaint filed in *Wreford v Mitch Harris Bldg Co, Inc*, Livingston Circuit Case No. 07-023336-CH. In 2007, Wreford filed a complaint against Mitch Harris Building Company, Inc. (MHBC) and Mitch Harris, president and sole director of MHBC, among others. The allegations related to Wreford's purchase of a condominium unit in Cedar Creek Estates, which was developed by MHBC. According to Wreford, her property began to be inundated with flood waters due to defects and deficiencies in the common elements of Cedar Creek Estates. Wreford alleged numerous defects and deficiencies as it related to her property's drainage system, as well as the condominium association's roadways as they impacted drainage for her particular unit. Wreford alleged that MHBC made material representations about the land included within her unit, including that (1) the land was not in a flood plain, and/or not subject to flooding, (2) the land was suitable for use as a dog run, (3) the land was properly graded, (4) the drainage for her unit would be adequate, and (5) the development's common elements, specifically the roads and drainage system, would be adequate for her unit. Frankenmuth defended MHBC in the underlying lawsuit, where eventually all but three of Wreford's counts were dismissed. The remaining counts consist of fraud and misrepresentation, fraud in the inducement, and silent fraud.

On April 28, 2010, Frankenmuth filed the instant action seeking a declaration regarding its obligations, if any, to defend or indemnify MHBC against Wreford's claims in the underlying complaint. Shortly after filing its complaint, Frankenmuth filed a motion for summary disposition pursuant to MCL 2.116(C)(10). Frankenmuth argued that the commercial general

liability policy and the commercial umbrella policy that it had issued to MHBC only covered claims for damage caused by an "occurrence," which by definition meant that the insured's activities constituted an accident. Frankenmuth argued that because Wreford's remaining claims all required an intentional act, it had no duty to defend or indemnify MHBC on the three remaining pending counts of her complaint.

At a subsequent motion hearing, the trial court recognized that Wreford had alleged intentional counts with respect to fraud. However, the trial court looked beyond the labels placed on the allegations and determined that the claims may come within policy's coverage. Therefore, the trial court determined that Frankenmuth had a duty to defend, and thus denied Frankenmuth's motion and granted summary disposition on the issue of defense in favor of MHBC. The trial court also determined that the issue of indemnity was not ripe for adjudication. Frankenmuth now appeals.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Resolution of this appeal involves the proper interpretation of an insurance policy, a question of law that is also reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469; 663 NW2d 447 (2003).

In *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980), this Court explained that an insurer's duty to defend extends to all allegations even arguably within the policy coverage:

> The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured *even arguably* come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *Dochod v Central Mutual Ins Co*, 81 Mich App 63; 264 NW2d 122 (1978). The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. *Shepard Marine Construction Co v Maryland Casualty Co*, 73 Mich App 62; 250 NW2d 541 (1976). In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor.(citation omitted) [Emphasis in original.]

An insurer's duty to defend, however, does not necessarily last through the duration of the litigation. Rather, "insurers owe a duty to defend until the claims against the policyholder are confined to those theories outside the scope of coverage under the policy." *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 455; 550 NW2d 475 (1996).

The general liability policy in this case provides that the policy only applies to "bodily injury" and "property damage" that is caused by an "occurrence" that takes place in the coverage territory and during the policy period. "Property damage" is defined as follows:

> **a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> **b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

While not all of the damages alleged by Wreford fall within the policy's definition of "property damage," the allegation of loss of use does. And contrary to Frankenmuth's assertion, physical injury of the property is not required under the clear language of the policy. Nevertheless, our inquiry does not end there.

The general liability policy defines "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While "accident" is not defined by the policy, our Supreme Court has "repeatedly stated that 'an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.'" *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999) (citation omitted).

Here, the surviving allegations are fraud and misrepresentation, fraud in the inducement, and silent fraud. A claim of fraud requires a plaintiff to establish the following: (1) defendants made a material misrepresentation; (2) the representation was false; (3) when defendants made the representation, defendants either knew that the representation was false or recklessly lacked knowledge of its truth as a positive assertion; (4) defendants intended plaintiffs to act upon the representation; (5) plaintiffs relied on the representation; and (6) plaintiffs suffered damages. *Cummins v Robinson Twp*, 283 Mich App 677, 695–696; 770 NW2d 421 (2009). The elements of fraud in the inducement are essentially the same. See e.g., *Custom Data v Preferred Capital*, 274 Mich App 239, 242-243; 733 NW2d 102 (2006). A claim of silent fraud requires a plaintiff to allege that the defendant intended to induce him to rely on its nondisclosure and that defendant had an affirmative duty to disclose. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). These claims do not satisfy the "occurrence" requirement under the policy to trigger coverage because they all require an intentional or reckless act and are thus not, by definition, accidental in nature. And, "[I]ntentional acts on the part of the insured . . . cannot be considered accidents within the policy definition of occurrence." *Western Cas & Surety Group v Coloma Twp*, 140 Mich App 516, 521; 364 NW2d 367 (1985). The only remaining claims sounding in intentional acts rather than accident, Frankenmuth no longer had a duty to defend. It follows that Frankenmuth would also not have a duty to indemnify MHBC and Harris if liability is imposed upon them on the remaining counts sounding in intentional acts. Summary disposition was thus appropriate in Frankenmuth's favor.

Reversed. As the prevailing party, Frankenmuth may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto