STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY, Plaintiff-Appellant, v TAX CONNECTION WORLDWIDE, LLC, JOHN R. BEASON, TAX CONNECTION WORLD, and JACKSON'S FIVE STAR CATERING, INC., Defendants-Appellees.	UNPUBLISHED December 4, 2012 No. 306860 Kent Circuit Court LC No. 2010-006430-CK

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the declaratory judgment entered in favor of defendants in this dispute over whether a general liability business owner's insurance policy issued by plaintiff provides coverage for liability arising from the sending of unsolicited advertising facsimiles, allegedly in violation of federal law. We affirm.

On January 4, 2010, Jackson's Five Star Catering (hereafter "Jackson's") filed a class action complaint in the United States District Court for the Eastern District of Michigan against Tax Connection Worldwide, LLC ("Tax Connection") and John Beason, its member and manager, alleging that, on January 5, 2006, they sent an unsolicited facsimile advertisement to Jackson's and "at least 39 other recipients," without "prior express invitation or permission" to do so, in violation of the Telephone Consumer Protection Act, 47 USC § 227 *et seq*. (TCPA). On the date the unsolicited facsimile advertisement was allegedly sent to Jackson's and others, Tax Connection was insured by plaintiff under a general business owner's liability policy. That policy provided coverage for, among other things, property damage, personal injury, and advertising injury. Tax Connection tendered Jackson's Class Action Complaint to plaintiff seeking defense of the underlying TCPA action and the handling of the claim for coverage under the Policy, while also asserting that it did not advertise by facsimile. Plaintiff agreed to initially defend, pursuant to a reservation of rights.

On June 24, 2010, plaintiff filed the instant declaratory action against defendants and Jackson's, seeking a determination that it had no duty to defend or indemnify defendants against Jackson's TCPA complaint. Defendants answered plaintiff's declaratory action complaint,

denying all pertinent allegations and asking the trial court to declare that they "are entitled to indemnification" for, and that plaintiff has a duty to defend them with respect to, the underlying TCPA action instituted by Jackson's. Jackson's also filed a counterclaim seeking a declaratory judgment of coverage under the Policy. On the parties' cross-motions for summary disposition, the trial court determined that the allegations in Jackson's complaint fell under the policy language of "advertising injury" because it arises out of the written publication of material which violates a person's (in this case, a corporate person) right of privacy. Accordingly, the trial court granted in part Jackson's motion for judgment on the pleadings, ruling that plaintiff had the duty to defend in the underlying case.

Plaintiff later moved for summary disposition based upon the allegedly false statement that Tax Connection did not advertise by facsimile and that the facsimiles at issue were not sent by Tax Connection. According to plaintiff, the policy was void as a result of Tax Connections intentional concealment or misrepresentation of material fact regarding a claim under the policy. The trial court denied plaintiff's motion, declaring that plaintiff had a duty to defend and indemnify Tax Connection and Beason in the underlying lawsuit. Plaintiff appeals the latter summary disposition decision and the declaratory judgment entered in this matter.

We review de novo a trial court's decision to grant or deny summary disposition. *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). The interpretation of an insurance contract constitutes a question of law that we also review de novo. *Ile v Foremost Ins Co*, 293 Mich App 309, 314-315; 809 NW2d 617 (2011).

On appeal, plaintiff first contends that the trial court erred in concluding that sending unauthorized facsimiles in violation of the TCPA is covered by the policy at issue and thereby gave rise to a duty to defend on plaintiff's part. We disagree.

When reviewing a trial court's decision resolving a dispute over the coverage afforded by an insurance policy, this Court looks "to the language of [that] policy and interpret[s] the terms therein in accordance with Michigan's well-established principles of contract construction." *Citizens Ins Co v Pro-Seal Serv Group*, 477 Mich 75, 82; 730 NW2d 682 (2007), quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999).

> Accordingly, an insurance contract should be read as a whole and meaning should be given to all terms. The policy application, declarations page of the policy, and the policy itself construed together constitute the contract. The contractual language is to be given its ordinary and plain meaning. An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. Unless a contract provision violates law or one of the traditional contract defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. The judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to

> enforce unambiguous contractual provisions. [*Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005) (quotation marks and citations omitted).]

Terms not defined in an insurance policy are to be given their plain and ordinary meaning, which may be determined by consulting dictionaries. *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). Additionally, courts must be cognizant of legal terms of art, which are to be accorded their peculiar and appropriate meanings. *Allison v AEW Capital Mgt*, 481 Mich 419, 427; 751 NW2d 8 (2009); MCL 8.3a.

The construction of an unambiguous contract presents a legal question for which no factual development is necessary. *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). "Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). A contract is ambiguous when two provisions irreconcilably conflict with each other, or when a term is equally susceptible to multiple meanings. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 8; 792 NW2d 372 (2010). However, an ambiguity is not created merely because the definition of a word that has a common usage has been omitted, *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992), or because different dictionary definitions exist for an undefined term, *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 535 n 6; 676 NW2d 616 (2004). Likewise, surplusage alone does not make a policy ambiguous. *Mich Twp Participating Plan v Pavolich*, 232 Mich App 378, 388; 591 NW2d 325 (1998).

The duty of an insurance company to defend its insured "arise[s] from the policy language" and it is broader than its duty to indemnify. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 600 n 6; 575 NW2d 751 (1998); *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996). Specifically:

> The duty to defend arises in instances in which coverage is even arguable, though the claim may be groundless or frivolous. Consistent with this premise, any analysis of an insurer's duty to defend must begin with an examination of whether coverage is possible. If coverage is not possible, then the insurer is not obliged to offer a defense. [*Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 315; 575 NW2d 324 (1998)(internal citations omitted).]

The duty to defend

> 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. 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. 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. [*Detroit Edison Co v Mich Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (internal citations omitted).]

The duty to indemnify arises only after liability is found on the underlying claim – that is, after, the insured suffers a loss – and it is determined that the loss suffered is covered by the terms of the policy. See *American Bumper*, 452 Mich at 450-452.

Here, the trial court concluded that the Policy imposed a duty to defend and to indemnify defendants against Jackson's TCPA complaint, because the allegations set forth in that complaint constituted an "advertising injury" on the basis that the unsolicited facsimile advertisement sent by defendants constituted a "written publication of material that violates a person's right of privacy." The Policy at issue defines an "advertising injury" as an

> injury arising out of one or more of the following offenses:
>
> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan. [The Policy, Coverage Form Section F, § 1.]

At issue here is whether defendants' unsolicited facsimile advertisement, sent to Jackson's and others allegedly in violation of the TCPA, constitutes the "written publication of material that violates a person's right of privacy" under the Policy subsection (b). There is no assertion, and no basis for any assertion, that the offending facsimile falls within the other defined offenses constituting an "advertising injury" under the Policy.

Analysis of this issue begins with the language of the policy itself. *Citizens Ins Co*, 477 Mich at 82. The policy does not define "publication." Black's Law Dictionary (7th ed.) defines this term, however, as "generally, the act of declaring or announcing to the public." The first portion of subsection (b), above thus requires that a written announcement be made before the public. The trial court concluded that the facsimile advertisements constituted a written announcement before the public, and the parties do not challenge this on appeal.

The next portion of subsection (b) requires that this written public announcement be "of material that violates a person's right of privacy." *The American Heritage Dictionary of the English Language* (2006) defines "material" as "the substance or substances out of which a thing is or can be made." A faxed paper containing the advertisement clearly consists of a substance out of which something can be made.

Subsection (b) next requires that the written public announcement "violates a person's right of privacy." *The American Heritage Dictionary of the English Language* (2006) defines "person" as "a human or organization with legal rights and duties." Black's Law Dictionary (7th ed.) similarly defines this term both as a "human being" and "an entity (such as a corporation) that is recognized by law as having the rights and duties of a human being." Thus, corporations "come within the generally understood meaning of the word 'person.'" *Dombrowski v City of Omer*, 199 Mich App 705, 709; 502 NW2d 707 (1993).

While plaintiff asserts that the inclusion of the phrase "person or organization" in subsection (a) of the Policy's definition of an advertising injury indicates that subsection (b)'s reference solely to "person" and not to "person or organization," was meant to exclude reference to a corporate entity for purposes of that subsection, we disagree. First, Jackson's underlying complaint was brought on behalf of all persons who received defendants' unsolicited advertising facsimile. Thus, the allegations set forth in the complaint certainly could include persons within any meaning ascribed to that term in subsection (b). Because the duty to defend extends to any actions which even *arguably* come within the Policy coverage, even if one were to read subsection (b)'s reference to "person," as excluding corporations such reading would not, in and of itself, obviate plaintiff's duty to defend defendants against the underlying complaint. *Marlo Beauty Supply*, 227 Mich App at 315; *Detroit Edison Co*, 102 Mich App at 136. Second, where there is any ambiguity in a policy that cannot otherwise be resolved, the ambiguity is to be construed against the insurer. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41,60; 664 NW2d 776 (2003).

The final portion of subsection (b) requires that the written public announcement of material violate a person's right of privacy. "Right of privacy" is not defined in the Policy. "Privacy" is, however, defined in *The American Heritage Dictionary of the English Language* (2006) as "the state of being free from unsanctioned intrusion." Jackson's class action complaint alleged that Tax Connection sent unsolicited facsimile advertisements in violation of the TCPA, which caused it damages. Jackson further alleged that it had not given Tax Connection express invitation or permission to send such facsimile and that the facsimile caused Jackson and others to lose paper and toner consumed in the printing to Tax Connection's faxes, wasted Jackson's employee time, and interrupted Jackson's privacy interest. The TCPA makes it unlawful for any person to use any facsimile machine to send an unsolicited advertisement. 47 USC 227(b)(1)(C). The TCPA thus involves an interest in and protection of some sort of privacy right. See, e.g., *Park University Enterprises, Inc. v American Cas Co of Reading, PA*, 442 F3d 1239 (CA 10, 2006).

At its most basic level, the sending of unsanctioned advertising facsimiles in this case falls within the coverage language of an "advertising injury" as broadly defined in the policy at issue. Such a finding is consistent with other state Supreme Court decisions called upon to interpret the exact same language as the policy language at issue. In *Penzer v Transportation Ins Co*, 29 So 3d 1000, 1003 (2010), for example, the Florida Supreme Court was asked to determine whether an insurance company was required to provide commercial liability insurance coverage for an advertising injury where its insured was sued in a class action lawsuit for sending unauthorized advertising facsimiles. The insurance policy at issue provided coverage for advertising injuries and defined the same as among other things, an "Oral or written publication

of material that violates a person's right of privacy." *Id.* The Court found that based upon a plain meaning analysis, the specific language in the "advertising injury" section of the policy provided coverage for facsimile advertising in violation of the TCPA. *Id.* at 1008. The Massachusetts Supreme Court reached the same result when interpreting the exact same language, noting that had the insurers wished to limit their policy coverage to, for example, only those violations of privacy created by the content of the material itself, they could have drafted their polices to effect that intent. See *Terra Nova Ins Co v Fray-Witzer,* 449 Mass 406, 418; 869 NE2d 565 (2007).

In sum, comparing the allegations in the TCPA complaint with the insurance Policy at issue's "advertising injury" provision, we find that the Policy affords coverage for the underlying lawsuit. The plain meaning of the undefined Policy terms leads to such a conclusion as do the unbinding but persuasive analyses in *Penzer,* 29 So 3d 1000 and *Terra Nova Ins Co,* 449 Mass 406. To the extent that the undefined terms are ambiguous, we construe them in favor of the insured. See, *Scott v Farmers Ins Exchange,* 266 Mich App 557, 561; 702 NW2d 681 (2005)("If an ambiguous term exists in the contract, courts should generally construe the term against the contract's drafter . . .").

Plaintiff next argues that in granting summary disposition to defendants, the trial court erred in concluding that Beason's initial statement that Tax Connection did not send the facsimiles did not render the policy void. We disagree.

Plaintiff claims the Policy is void and it owes no coverage based upon the following Policy provisions:

> This policy is void in any case of fraud by you at any time as it relates to this policy. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:
>
> 1. This policy;
>
> 2. The Covered Property;
>
> 3. Your interest in the Covered Property; or
>
> 4. A claim under this policy.

It is undisputed that when Beason tendered the complaint in the underlying lawsuit to plaintiff, he also sent a letter stating that Tax Connection does not advertise via facsimile and that the advertisements at issue were not from Tax Connection. It also appears undisputed that at some point during discovery in the underlying lawsuit that Beason became aware that one of his employees did, in fact, contract with a company to send the facsimiles at issue. It is thus clear that Beason's initial statement is false.

A fact is material "if it is reasonably relevant to the insurer's investigation of a claim." *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997). An insured's denial of the allegations in an underlying complaint is certainly material to the insurer's defense. Indeed, Jackson's does not challenge the

trial court's conclusion that Beason's representation was both false and material. The trial court thus did not err by concluding that there was no genuine issue of material fact that Beason made a material misrepresentation regarding a claim under the Policy when he tendered the TCPA complaint to plaintiff on Tax Connection's behalf. The only question, then, is whether there was likewise an absence of any genuine issue of material fact as to whether the misrepresentation was made "intentionally" within the meaning of the Policy. If there was no genuine issue of material fact that the misrepresentation was intentionally made, then the Policy is void; if, however, there is no issue of fact that it was not made "intentionally" then plaintiff's claim in this regard fails.

"Intentional" means "done deliberately; intended," *The American Heritage Dictionary of the English Language (2006)*, and "done with the aim of carrying out the act", Black's Law Dictionary (7th ed.). Thus, to do something "intentionally," means to do it deliberately, with the aim of carrying out an act. The trial court concluded that there was no genuine issue of material fact that Beason did not know that the statement was false when he made it and the record supports this conclusion; plaintiff does not argue or present evidence otherwise.

Plaintiff argues, however, that knowledge of Tax Connection's facsimile advertising is imputed to Beason by virtue of his status as the person in control of Tax Connection, and thus, that his misrepresentation must be deemed to be intentional by virtue of this imputed knowledge. Plaintiff cites case law imputing knowledge to those in charge of a corporation of the ratification of a lease by acquiescence, where the corporation "occupied the premises and paid rent," *Carnahan v MJ & BM Buck Co*, 250 Mich 198, 200; 229 NW 513 (1930); of the payment of expenses authorized by the corporate president and duly entered on the corporate books, *Lorren v Baroda Mfg Co*, 334 Mich 405, 408-409; 54 NW2d 702 (1952); and of knowledge by corporate employees that a chemical by-product was leaking from a storage tank, where those employees submitted documentary evidence of the leaks to their supervisors, *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 202-203; 476 NW2d 392 (1991). However, none of these cases involve an allegation, or finding, of an intentional misrepresentation based on imputed knowledge. And, while, as plaintiff asserts, a corporation may be held to have the sum total of all knowledge possessed by those persons representing the corporation and performing corporate responsibilities, *New Props Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 134; 762 NW2d 178 (2009), such does not alter the undisputed facts presented to the trial court that Beason did not actually know that his statement was false when he made it; that is, he did not purposely or intentionally make the misrepresentation at issue here as required by the Policy.

Plaintiff next argues that a statement made recklessly can constitute an intentional misrepresentation, and thus, that Beason's statement, made without any knowledge of its truth, should be deemed intentional. In *Mina*, 218 Mich App at 686, this Court stated that:

> To void a policy because the insured has willfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made *or that it was made recklessly, without any knowledge of its truth*, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it.

Here, the trial court observed that Beason "pushed the recklessness envelope pretty hard," and did not make "any particular effort to ascertain the true facts before making the statement." However, it also noted that Beason had been aware that a previous, similar suit had been filed against Tax Connection, which was dismissed, and thus "perhaps he felt buoyed up with the notion that his business was not involved in any actionable conduct or wrongdoing which would be cognizable under any statute or theory of recovery." While Beason admittedly failed to investigate whether Tax Connection advertised via facsimile before making his statement, generally, the "failure to properly investigate and verify facts does not indicate actual malice," and "[r]eckless disregard [of the truth of a statement] is not measured by whether a reasonably prudent man would have published [the statement] or would have investigated before publishing, but by whether the publisher *in fact entertained serious doubts concerning the truth of the statement* published." *Spreen v Smith*, 153 Mich App 1, 9; 394 NW2d 123 (1986) (citations and internal quotation marks omitted, emphasis added).

Moreover, our Supreme Court has instructed that "[w]here an insurance policy provides that an insured's concealment, misrepresentation, fraud or false swearing voids the policy, the insured *must have actually intended to defraud* the insurer." *West v Farm Bureau Mut Ins Co of Mich*, 402 Mich 67, 69; 259 NW2d 556 (1977) (emphasis added). There is nothing in the record presented to the trial court to suggest that Beason "actually intended' to made the misrepresentation at issue, so as to defraud plaintiff. And, "[w]hether misrepresentations or false statements void an insurance policy depends upon the intent to defraud and this is a question of fact for the jury." *Id*. at 70, citing *Bernadich v Bernadich*, 287 Mich 137, 144-145; 283 NW 5 (1938). Plaintiff argues that intent to defraud can be inferred from Beason's tendering of the underlying complaint, with the statement that the advertisement was not from Tax Connection. While a jury might be free to infer that Beason had an intent to defraud plaintiff by way of his statements, see *West*, 402 Mich at 70, Beason specifically denied any such intent in his affidavit, and plaintiff did not establish the absence of a genuine issue of material fact as to his intent so as to warrant summary disposition in its favor.

Finally, plaintiff does not indicate that it would have acted any differently, or that defendants would not have been entitled to a defense and indemnification in exactly the same manner, had Beason simply made no statement pertaining to liability. Indeed, the determination of whether there is a duty to defend is wholly dependent on the allegations set forth in the underlying complaint; an insurer has a duty to defend its insured "even as to "actions which are groundless, false or fraudulent so long as the allegations against the insured even arguably come within the policy coverage." *Detroit Edison Co*, 102 Mich App at 141-142. Thus, plaintiff had a duty to defend defendants against the TCPA complaint, regardless whether Beason's statements were true (meaning that the allegations in the TCPA complaint were false), or whether his statement was false (meaning that defendants likely faced liability under the TCPA), if and so long as the TCPA claims "even arguably come within" the coverage afforded by the Policy for an "advertising injury." *Id*. Consequently, plaintiff failed to establish that Beason intended that plaintiff rely on his statement so as to cause plaintiff to act any differently than it would have acted absent the statement. Accordingly, the trial court did not err by concluding that plaintiff failed to establish that it was entitled to summary disposition on its claim that Beason's statement voided the Policy on this basis.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto