STATE OF MICHIGAN

COURT OF APPEALS

KRUEGER SEED FARMS, INC.,

Plaintiff/Counter Defendant/Garnishor-Appellee,

v

DONALD SZLARCZYK, MARY KAY SKLARCZYK d/b/a SKLARCZYK SEED FARM and SKLARCZYK MINI SPUDS,

Defendants/Counter Plaintiffs/Third-Party Plaintiffs-Appellees.

and

MICHIGAN CROP IMPROVEMENT ASSOCIATION,

Defendant/Third-Party Defendant-Appellee,

and

COLONIA INSURANCE COMPANY,

Garnishee Defendant-Appellant.

UNPUBLISHED
March 9, 1999

No. 200249
Otsego Circuit Court
LC No. 92-005342-CZ

DUANE R. BASEL, TERRY L. BASEL d/b/a BASEL SEED FARM, and PAUL A. SCHALK, MARY S. SCHALK d/b/a SCHALK SEED FARM,

Not participating,

v

No. 200250

Otsego Circuit Court
LC No. 93-005615-CZ

DONALD SKLARCZYK, MARY KAY SKLARCZYK d/b/a SKLARCZYK SEED FARM and SKLARCZYK MINI SPUDS,

Defendants/Third-Party Garnishors-Appellees.

and

MICHIGAN CROP IMPROVEMENT ASSOCIATION,

Defendant-Appellee,

and

KRUEGER SEED FARMS,

Third-Party Defendant-Appellee,

and

COLONIA INSURANCE COMPANY,

Garnishee Defendant-Appellant.

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

In these consolidated appeals, garnishee defendant Colonia Insurance Company appeals as of right from a January 2, 1997 order of the circuit court granting summary disposition in favor of the garnishors pursuant to MCR 2.116(C)(10). We affirm.

In late 1991 and early 1992, Sklarczyk farms sold approximately 546 hundred-weight certified seed potatoes to Krueger, approximately 12,000 pounds to Basel, and approximately 120 hundred-weight to Schalk. Sklarczyk represented to the buyers that the potatoes were Snowden variety and "blue tag grade," meaning that the seed potatoes would not be infected with bacterial ring rot disease.[1] Sklarczyk's seed potatoes had been inspected and certified by the Michigan Crop Improvement Association (MCIA).[2] Specifically, Jeff Axford, an employee of the potato division of the MCIA, inspected Sklarczyk's farm and he did not detect the presence of bacterial ring rot. In 1992, however,

Axford detected the symptoms of bacterial ring rot on some potato seeds on the Krueger, Basel, and Schalk farms, and the disease was traced to the seller (Sklarczyk).

Only seed potatoes carrying MCIA certification are qualified to grow a crop that may be sold as certified seed. Thus, under an administrative rule, a seed lot is not eligible for certification if the farm from which it came was exposed to bacterial ring rot. Accordingly, following the detection of the ring rot, the farms were decertified by the Michigan Department of Agriculture and the farmers sustained economic damages because the seed potatoes grown in the fields where the infected tubers and plants had been found were not eligible for sale as certified seed. However, the potatoes could be, and were, sold as table stock.

On September 17, 1992, Krueger filed its complaint (lower court number 92-005342-CZ) against Sklarczyk, alleging negligence, gross negligence, and breach of implied and express warranties. Sklarczyk then filed a third-party complaint against MCIA, alleging negligence and breach of an express warranty. Sklarczyk also filed a counter complaint against Krueger, alleging breach of implied and express warranties and negligence on the basis that the presence of the ring rot disease was detected in potatoes from seed that Sklarczyk had purchased from Krueger in 1991.

On July 12, 1993, Basel and Schalk filed a complaint (lower court number 93-005615-CZ) against Sklarczyk, alleging breach of implied and express warranties and negligence. Sklarczyk later filed a third-party complaint against Krueger, alleging breach of implied and express warranties and negligence on the basis that the presence of the ring rot disease was detected in potatoes from seed that Sklarczyk had purchased from Krueger in 1991. Sklarczyk also filed a cross complaint against MCIA, alleging negligence and breach of an express warranty, and Krueger filed a cross claim against MCIA, alleging negligence. Ultimately, following stipulated dismissals of certain claims, consent judgments were entered on May 24, 1995, in which Krueger was awarded a judgment against MCIA in the amount of $125,000, Basel and Schalk were awarded judgments of $37,500 each against MCIA,[3] and Sklarczyk was awarded a judgment against MCIA in the amount of $150,000. The consent judgments were entered to attempt to achieve a resolution of the claims and to provide the plaintiffs and third-party plaintiffs an opportunity to pursue their claims for damages against MCIA's liability carrier.

Colonia had issued an insurance policy to MCIA providing coverage for the term of December 31, 1992 to December 31, 1993. On December 16, 1994, Colonia responded to MCIA's request for a determination regarding coverage and formally denied coverage based on the policy's exclusion providing that Colonia would not be responsible to make any payment for loss arising out of any actual or alleged damage to or destruction of any tangible property. On August 15, 1995, Sklarczyk, Krueger, Basel, and Schalk, having received consent judgments against MCIA, filed writs for garnishment. On August 8, 1996, Krueger then filed a motion for summary disposition contending that the exclusion in the insurance policy did not apply and that there was no genuine issue of material fact with regard to this question. Sklarczyk later joined in Krueger's motion for summary disposition. MCIA also filed a motion for summary disposition, contending that none of the farmers attempted to prove that the alleged negligence of MCIA's inspectors caused any actual or alleged damage to or destruction of any tangible property, the exclusion did not apply, and the policy should be interpreted to cover MCIA's costs of defending the claims.

The trial court ultimately ruled that the exclusion did not preclude coverage for the alleged damages suffered by the farmers, specifically finding that there was no damage to tangible property within the meaning of the policy's language. The issue on appeal is whether the trial court erred in so ruling. We review de novo the trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The policy at issue is a directors and officers indemnity policy. An insurance policy is a contract between the parties. To decide whether a policy covers a particular act, the court must determine what the parties agreed to in the policy. *Fire Ins Exchange v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996). To determine what the parties agreed to, the court applies a two-part analysis. First, the court must decide if the general insurance agreement of the policy includes a particular act. If so, the court must then decide if coverage is denied under one of the policy's exclusions. *Id.*

Appellant Colonia does not contest its liability to pay under the "insuring clause" of the policy on appeal, nor did it so contest in the lower court.[4] Rather, Colonia's sole contention is that the following exclusion denies coverage:

> The Company [Colonia] shall not be liable to make any payment for Loss in connection with any Claim made against the Directors or Officers based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:
>
> (2) any actual or alleged bodily injury, sickness, disease or death of any person, *or any actual or alleged damage to or destruction of any tangible property including loss of use thereof*, or any actual or alleged invasion of privacy, wrongful entry, eviction, false arrest, false imprisonment, malicious prosecution, assault, battery, mental anguish, emotional distress, or loss of consortium. [Emphasis added].

Policy exclusions that preclude coverage for the general risk are strictly construed against the insurer. *Id.*, p 687. Further, under the rule of reasonable expectation, there will be coverage under the policy if the policyholder is led to a reasonable expectation of coverage upon reading the policy. *Id.* However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume. *Id.*

Colonia argues that the potatoes and land infected with or exposed to the bacterial ring rot constitute damaged tangible property. We do not disagree with Colonia that the potatoes and farmland constitute tangible property. The evidence, however, was that the bacterial ring rot required that the potatoes could not be eligible for certification as seed potatoes. Rather, the farmers had to sell the potatoes as table stock. Thus, the potatoes were still edible and usable, and the potatoes could have been cut up and used for seed (but not certified seed). Moreover, the farmers can continue to farm the land and harvest potatoes; however, those potatoes cannot be certified as seed potatoes. According to Axford, almost all of the potatoes grown on the Krueger, Basel, and Schalk farms were not physically harmed and were sold at a lower price than otherwise sold as certified seed potato. The farmers'

complaint was that they lost profits because they can make more money by selling the potatoes as certified seed potatoes rather than as table stock. Because of this significant fact, the narrow issue is whether economic damages (lost profits) to the farmers constitutes damage to tangible property within the meaning of the insurance exclusion.

In *Fitch v State Farm Fire & Casualty Co,* 211 Mich App 468; 536 NW2d 273 (1995), this Court held that the plaintiff's claim in the underlying tort action did not constitute property damage to come under the coverage section of the insurance policy. Specifically, the claim was for economic damages as a result of alleged defamation and intentional infliction of emotional distress. This Court noted that there was no allegation in the underlying tort action that the plaintiff's tangible property was damaged or destroyed as a result of Fitch's statements. This Court further noted that economic damages normally do not constitute property damage. See *id.,* p 474.

In the present case, while the potatoes were admittedly infected with bacterial ring rot, they were sold as table stock and were usable for consumption. Thus, the potatoes were not "damaged" in the usual sense of the word because the potatoes were still usable. The farmers merely lost profits for sale of the potatoes as seed potatoes. These lost profits do not constitute damage to tangible property. See also, *Snug Harbor Ltd v Zurich Ins,* 968 F2d 538, 542 (CA 5, 1992), and cases cited at footnote 13.

Accordingly, the trial court did not err in holding that there was no damage to tangible property within the meaning of the policy's language. Colonia is required to defend and indemnify MCIA in this case.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[1] Apparently, bacterial ring rot is one of the most serious of all potato diseases. It is a highly infectious bacterial disease that will cause rejection of the fields for seed certification, and can cause yield reduction and storage rots.

[2] MCIA had field inspection agreements with Sklarczyk, Krueger, Basel, and Schalk providing for visual field inspection for varietal purity, visual field inspection for presence of disease, and visual field inspection for overall crop management.

[3] The claims of the Basels and the Schalks were settled on appeal, thus, they were dismissed as parties on appeal pursuant to a stipulation in Docket No. 200250.

[4] Under the insuring clause, Colonia is required to reimburse the directors, officers, and MCIA for loss against any of them for a wrongful act. Wrongful act is defined in the policy as "any actual or alleged negligent act, error, omission, misstatement, misleading statement, neglect or breach of duty by the

Directors or Officers, individually or collectively, in the discharge of their duties solely in their capacity as Directors or Officers of the Organization." Further, an endorsement to the policy added employees being under the term "Directors and Officers." Thus, MCIA's employees, Jeff Axford, Jeff Howard, and Davis Bliss (originally named as defendants with MCIA) are covered by the policy.