STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN CROP IMPROVEMENT ASSOCIATION,

Plaintiff-Appellee,

v

COLONIA INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 29, 1999

No. 206668
Ostego Circuit Court
LC No. 95-006555 CK

Before: Holbrook, Jr., P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting summary disposition in favor of plaintiff and entering judgment against defendant in the amount of $127,351.95. We affirm.

This case arises from an insurance contract in which defendant Colonia Insurance Company agreed to insure the directors, officers and employees of plaintiff Michigan Crop Improvement Association (MCIA) for any wrongful act they might commit in performance of their duties for MCIA. The insurance contract excluded from coverage " . . . any actual or alleged damage to or destruction of any tangible property including loss of use thereof. . . "

In 1991, plaintiff's employee failed to detect the presence of bacterial ring rot, a serious potato disease, in a crop of potatoes that was eventually sold for use as potato seed. Three civil actions arose from this failure. In the first two actions, the buyers of the diseased potatoes sued the seller, defendant and plaintiff. These actions were consolidated and resulted in a consent judgment in which all of the parties except defendant agreed to collect on the judgment directly from defendant, the insurer.

In a third related action which is the subject of the instant appeal, plaintiff sued defendant for the costs associated with defending itself against the lawsuits brought by the buyers and seller of the diseased potato crop. The trial court consolidated this action with the post judgment garnishment proceedings from the two prior actions because they involved the same issue: whether the damages sustained by the farmers as a result of plaintiff's negligence were covered under the insurance contract. The trial court held that the property damage exclusion did not apply in these cases and that defendant

was liable for the damages in the garnishment proceedings and for plaintiff's costs in defending itself. Defendant appealed both decisions separately. In *Krueger Seed Farms, Inc v Szlarczyk*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 1999 (Docket No. 200249), this Court found that the trial court did not err in finding that the property exclusion did not apply and upheld the trial court's decision to issue a writ of garnishment directing defendant to pay the buyers and the seller of the diseased crop for their damages. *Id*. at 5.

The instant action involves defendant's appeal from an order granting summary disposition to plaintiff and entering judgment against defendant in the amount of $127,351.95 for attorney fees and costs incurred by plaintiff in the farmers' lawsuits. Defendant's argument in this appeal is identical to the argument it made in *Krueger Seed Farms, supra*. Notably, defendant does not argue on appeal that the policy language would not require it to reimburse plaintiff were this Court to find that the farmers' damages were covered by the policy. Rather, defendant argues that the trial court erroneously ordered it to reimburse plaintiff because the trial court should not have held that the farmers' damages were covered in the first place.

Because the issue of whether the farmers' damages were covered under the contract was previously determined by this Court in *Krueger Seed Farms, supra*, we decline to reconsider the issue in the instant appeal. The doctrine of collateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. *Dearborn Heights School Dist. No. 7 v. Wayne County MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998). Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in an earlier action. *Id*.

In this case, the issue of coverage under the insurance contract was actually and necessarily determined in *Krueger Seed Farms, supra*, and cannot be considered anew by this Court when the same parties are involved and defendant already had a full and fair opportunity to argue the issue in the earlier appeal. Therefore, we find that the doctrine of collateral estoppel bars reconsideration of the coverage issue in the instant appeal.

We now examine the language of the insurance contract to determine whether the trial court erred in requiring defendant to reimburse plaintiff for litigation costs in defense of the farmers' claims. The interpretation of the language of an insurance contract is an issue of law to be reviewed de novo on appeal. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). The language of an insurance contract is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996).

The insurance contract provides that the term "loss" includes "damages, settlements and Costs, Charges and Expenses . . ." The contract further provides that "'Costs, Charges and Expenses' shall mean reasonable and necessary legal fees and expenses incurred by the Directors and Officers in defense of any Claim and appeals therefrom . . ." The insurance contract also states:

> It shall be the duty of [plaintiff] Directors and Officers and not the duty of the Company [defendant] to defend Claims made against the Directors and Officers, provided that no Costs, Charges or Expenses shall be incurred without the Company's consent, such consent not to be unreasonable withheld. In the event of such consent being given, *the Company shall reimburse Costs, Charges and Expenses only upon the final disposition of any Claim* made against the Directors and Officers. (Emphasis added).

The plain language of the insurance contract clearly required defendant to reimburse plaintiff for all costs reasonably incurred by plaintiff in defending against lawsuits involving a covered loss. Defendant does not contend that the attorney fees and litigation costs were unreasonable or unnecessary and does not dispute that plaintiff repeatedly notified defendant of the litigation costs in accordance with the insurance contract. Therefore, we cannot find that the trial court erred in granting summary disposition to plaintiff and entering judgment against defendant for the attorney fees and costs incurred by plaintiff in defense of claims that this Court previously found to be covered under the insurance contract.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Brian K. Zahra