STATE OF MICHIGAN

COURT OF APPEALS

YALE PUBLIC SCHOOLS,

Plaintiff-Appellee,

v

MASB-SEG PROPERTY CASUALTY POOL,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 250053
Ingham Circuit Court
LC No. 02-000972-CZ

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals the circuit court's judgment granting plaintiff's request for a declaratory judgment awarding damages for defendant's breach of contract. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff entered into an agreement with Devon Capital Management, Inc., for investment advice. Financial Management Sciences, Inc. (FMS), sold investments to school districts, including plaintiff. FMS agreed to repay purchasers the principal amount invested, plus specified earnings. FMS transferred cash to plaintiff in the amount of $1,771,421 for claims made by plaintiff against Devon. Subsequently, the bankruptcy trustee for FMS filed suit against plaintiff alleging that the transfers of cash made by FMS to plaintiff were fraudulent, and therefore were voidable and recoverable. The complaint alleged fraudulent conveyance, money had and received, unjust enrichment, and conversion. Plaintiff sought a defense and indemnity from defendant under an errors and omissions insurance policy. Defendant denied coverage.

The errors and omissions policy provided that defendant had "the right and duty to defend any action or suit brought against the Insured alleging a Wrongful Act, even if such action or suit is groundless, false or fraudulent . . . ." The policy defined "Wrongful Act" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the performance of duties for" plaintiff. The policy contained a number of exclusionary clauses, including Exclusion (d), which provided that the policy did not apply to "any claim arising out of the gaining in fact of any personal profit or advantage to which the Insured is not legally entitled . . . ." Defendant denied plaintiff's request for coverage for defense costs and/or indemnification, asserting that various exclusionary clauses, including (d), precluded coverage.

Plaintiff filed the instant suit seeking damages, declaratory judgment, and equitable relief. Plaintiff alleged that defendant breached its contract of insurance by failing to provide a defense and indemnification for the FMS suit, and sought a declaration that defendant was required to provide coverage, including for costs incurred by the necessity of obtaining other counsel for the FMS suit. The circuit court concluded both that Exclusion (d) did not apply because no evidence showed that plaintiff gained a personal profit or advantage by receiving payments from FMS, and that the allegations against plaintiff met the policy's definition of a wrongful act. The circuit court awarded plaintiff $81,574.53 plus interest as damages incurred in obtaining alternative representation in the bankruptcy suit.

An insurance contract should be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). An insurance contract is clear and unambiguous if it fairly admits of but one interpretation. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). An insurance contract is ambiguous if, after reading the entire contract, its language can reasonably understood in different ways. *Id*. at 566-567. Ambiguities are to be construed against the insurer. *State Farm Mutual Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001).

The duty of an insurer to provide a defense depends on the nature of the allegations in the underlying complaint. *United States Fidelity & Guaranty Co v Citizens Ins Co*, 201 Mich App 491, 493; 506 NW2d 527 (1993). The duty to defend is broader than the duty to indemnify, and is properly invoked if the underlying claims are even arguably within the scope of the coverage. *Polkow v Citizens Ins Co*, 438 Mich 174, 179-180; 476 NW2d 382 (1991). Any doubt pertaining to the duty to defend is resolved in favor of the insured. *Guerdon Industries, Inc v Fidelity & Casualty Co*, 371 Mich 12, 18-19; 123 NW2d 143 (1963).

In *Unionville-Sebewaing Area Schools v MASB-SEG Property Casualty Pool, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2004 (Docket No. 242084), the plaintiff received funds from FMS for claims asserted against Devon. The bankruptcy trustee for FMS brought suit against the plaintiff seeking to recover the funds, and alleging the same claims as were alleged against plaintiff here. The defendant refused to defend and indemnify the plaintiff, citing Exclusion (d) of the errors and omissions policy issued to the plaintiff. The trial court granted the plaintiff's request for a declaratory judgment, finding that Exclusion (d) was inapplicable because no evidence showed that the plaintiff gained a personal profit or advantage by receiving payments from FMS. In affirming the trial court's decision, the *Unionville-Sebewaing* Court distinguished *Jarvis Christian College v National Union Fire Ins Co*, 197 F3d 742 (CA 5, 1999), on which defendant relies in this appeal, on the ground that no evidence showed that the school district profited from the receipt of funds.[1] *Unionville-Sebewaing*, *supra*, slip op at 3.

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[1] In *Jarvis*, a trustee of the plaintiff college recommended that the college invest in a company in which he held an undisclosed interest. Subsequently, the college filed suit against the trustee and
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The decision in *Unionville-Sebewaing* is not precedentially binding, MCR 7.215(C)(1). Nevertheless, we find its reasoning to be persuasive, and adopt it. In the instant case plaintiff, as did the plaintiff in *Unionville-Sebewaing*, *supra*, received funds from FMS for claims made against Devon. No evidence showed that plaintiff gained any profit or advantage as a result of receiving funds from FMS. Exclusion (d) must be strictly construed against defendant, *McKusick*, *supra*, and any doubt regarding defendant's duty to defend must be resolved in favor of plaintiff. *Guerdon Industries*, *supra*. In addition, we conclude, as did the *Unionville-Sebewaing* Court, that the allegations that plaintiff received funds to which it was not entitled arguably met the policy definition of a wrongful act, and therefore defendant was required to defend, if not indemnify, plaintiff in the bankruptcy action. *Polkow*, *supra*.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly

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the company. The defendant insurer denied the college's request for defense and indemnity, citing a personal profits exclusion similar to Exclusion (d). The court held that the defendant had no duty to defend or indemnify the college because the trustee had gained a personal profit from the transaction and in doing so had breached his fiduciary duty to the college. *Id*. at 746-747.