# STATE OF MICHIGAN

# COURT OF APPEALS

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DAIMLERCHRYSLER CORPORATION,

Plaintiff-Appellee,

v

PROFESSIONAL CORPORATE INTELLIGENCE, INC., and FIRST MERCURY INSURANCE COMPANY,

Defendants-Appellants.

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UNPUBLISHED
December 22, 2005

Nos. 254107; 256290
Wayne Circuit Court
LC No. 01-112090-CK

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In this consolidated appeal, defendants appeal from orders of the circuit court granting summary disposition to plaintiff and awarding plaintiff case evaluation sanctions. We affirm in part, reverse in part and remand.

Plaintiff (DC) retained the services of defendant Professional Corporate Intelligence (PCI) to do private investigative work at plaintiff's facility in the St. Louis, Missouri, area. Specifically, PCI was to look into criminal activity at the facility. PCI agents allegedly made purchases of marijuana from plaintiff's employees at the facility, as well as discovered other evidence of criminal activity.

The employees involved were arrested and criminally charged, though ultimately acquitted. Plaintiff, however, immediately terminated the employment of those employees following their arrest. Additionally, various facts regarding the investigation were made public. Thereafter, the employees filed suit against both plaintiff and PCI, seeking damages arising out of the investigation and subsequent events. Ultimately, those suits were either dismissed or settled by payments from PCI's insurance company, defendant First Mercury Insurance Company (FMIC). The settlements included a release of plaintiff as well.

The instant action arises from a suit filed by plaintiff seeking reimbursement for its legal expenses in defending the suits by the former employees. Plaintiff's contract with PCI included an indemnification clause. Additionally, plaintiff was listed as an additional named insured under PCI's insurance coverage from FMIC. Ultimately, the trial court granted summary disposition in favor of plaintiff, awarding plaintiff over $100,000 in damages and over $30,000 in case evaluation sanctions.

Defendants first argue that the trial court erred in granting summary disposition because they had no obligation to provide a defense for plaintiff. We agree in part. We review a trial court's decision to grant summary disposition de novo. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 567; 702 NW2d 539 (2005). Furthermore, where the language of a contract is clear and unambiguous, construction of the contract is a question of law. *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997).

Turning first to the issue whether FMIC owes coverage under the insurance policy, FMIC argues that there is no coverage because the claims by the plaintiffs in the underlying suits do not allege "bodily injury." FMIC additionally argues that, even if claims come within the definition of "bodily injury," there is no coverage because the claims do not arise out of the work performed by PCI, but rather arise out of actions by plaintiff after the completion of PCI's work, and that there is no coverage under the policy for plaintiff's actions.

We begin by looking to the policy to determine exactly what is covered. Coverage A under the policy provides for coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." While defendants' brief focuses on this coverage, there is also Coverage B, which provides for coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this insurance applies."

Section V of the policy defines "bodily injury," "personal injury," and "advertising injury" as follows:

> 1. "Advertising injury" means injury arising out of one or more of the following offenses:
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> 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;
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> b. Oral or written publication of material that violates a person's right of privacy;
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> c. Misappropriation of advertising ideas or style of doing business; or
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> d. Infringement of copyright, title or slogan.
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> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
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> 10. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:
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> a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;

d. 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; or

e. Oral or written publication of material that violates a person's right of privacy.

Turning to the complaints in the underlying litigation, we first look at the claims raised by Truman Brewer. Count I alleged Malicious Prosecution, claiming that plaintiff and PCI made a complaint to the police which falsely accused Brewer of having committed the crime of delivering a controlled substance at plaintiff's Fenton, Missouri, plant. The complaint further alleged that that resulted in Brewer's prosecution, which ultimately resulted in acquittal. Brewer alleged that, as a result of the malicious prosecution, he suffered the loss of his employment, embarrassment, ridicule, pain and suffering, and attorney fees and costs in defending himself. Count II was a claim of false imprisonment arising out of his arrest based upon the complaint to the police. Brewer again claimed that he suffered humiliation, embarrassment, emotional distress and the incurring of legal fees as a result. Count III sounded in libel, alleging that an employee of PCI made false written statements in reports that Brewer had sold the employee marijuana and that plaintiff and PCI had published those reports, with the St. Louis County Prosecutor reading those reports and the reports being made public in the news media. Brewer again claimed that those actions resulted in him suffering humiliation, embarrassment and emotional distress.

The second complaint was filed by William Allen and five other plaintiffs. The initial complaint alleged false arrest, libel and slander resulting in the plaintiffs suffering shame, embarrassment, loss of employment, loss of income, fear of incarceration, attorneys' fees and humiliation. The Allen plaintiffs thereafter filed a new complaint in which it alleged false imprisonment, malicious prosecution, libel and slander. The plaintiffs claimed that these alleged torts resulted in their sustaining lost wages, embarrassment, ridicule, pain and suffering, and attorney fees in defending themselves.

At first blush, it would appear that the claims clearly come within the policy coverages for "personal injury" (as well as within "advertising injury" with respect to the defamation claims). Defendant's brief presumes that there is coverage only for "bodily injury" without adequately explaining the basis for that presumption. But we assume that it arises from the "additional insured" provisions of the policy. The additional insured endorsement provides in part as follows:

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization (called "additional insured") shown in the Schedule but only with respect to liability for "bodily injury" or "property damage" arising solely out of "Your work" for the additional insured(s) at the location designated above.

We read that clause as clearly and unambiguously limiting coverage under the policy for additional insured to the bodily injury and property damage coverages. And we do not agree with plaintiff that the injuries alleged by the plaintiffs in the underlying suits come within the definition of "bodily injury."

The definition of "bodily injury" provided by the policy is not particularly helpful because it is circular in nature. Looking to the plain and ordinary meaning of the phrase, *Meagher, supra* at 722, we find guidance in Black's Law Dictionary (5th ed), which states that "bodily injury" generally "refers only to injury to the body, or to sickness or disease contracted by the injured as a result of injury." Despite DC's assertion to the contrary, we do not read claims of the plaintiffs in the underlying suits as alleging injuries to the body or sickness or disease arising from an injury to the body.

DC also argues that FMIC's settlement of the claims against PCI creates presumptive evidence of liability. While at first this appears to be a compelling argument, it overlooks the fact that PCI, as a named insured, enjoyed greater coverage than did DC as an additional insured. As a named insured, PCI had coverage for personal injury and advertising injury, which, as discussed above, covers the claims by the plaintiffs in the underlying suits. DC, however, as an additional insured only enjoyed coverage for bodily injury and property damage. Accordingly, it is quite possible for FMIC to be liable under the policy to provide a defense and coverage for PCI but not for DC.

For the above reasons, we conclude that no coverage existed under the policy for any of the claims against DC. While it is true that the duty to defend is broader than the duty to indemnify, the allegations of the underlying suit must at least arguably fall within the coverage of the policy to trigger a duty to defend. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 137-138; 240 NW2d 134 (2000). Because the allegations in the underlying complaints do not even arguably fall within the coverage of the policy, there was no duty to defend. Accordingly, the trial court erred in granting summary disposition in favor of plaintiff. In light of the resolution of this issue, we need not address the additional arguments presented by defendants as to why there was no coverage under the insurance policy.

Turning to the issue of PCI's liability to DC, we are not persuaded that the trial court erred in granting summary disposition in favor of plaintiff. The agreement between PCI and DC included the following indemnification clause:

> The Company [PCI] agrees to indemnify and hold the Client [DC], its agents and employees, harmless from and against any and all claims and causes of action brought against Client and from any and all damages, losses, expenses, attorneys' fees, costs and liabilities sustained by Client, its agents and employees, arising out of any claimed act or omission of the company or its agents and employees in connection with or related to the services set forth herein. The Company will also maintain, at its sole expense, insurance in amounts and coverages satisfactory to Client to cover all claims hereunder.

Defendants argue that plaintiff is not entitled to indemnification under the agreement because the claims against plaintiff in the underlying suits did not arise "out of any claimed act or omission

of" PCI. Rather, defendants argue, the claims arose out of plaintiff's own acts in making statements to the media, requesting prosecution of the employees and so forth. We disagree.

The complaints in the underlying suits base liability virtually exclusively on the acts or omissions of PCI. In the Brewer complaint, the claim for malicious prosecution is based upon the allegation that PCI made a complaint to the St. Louis County Police. Similarly, the false imprisonment claim alleges that PCI intentionally and unlawfully instigated the plaintiff's arrest. Likewise, the libel claim is based upon written reports prepared by PCI. DC's alleged liability in the Brewer complaint is one of respondeat superior for having retained PCI and, arguably, for taking action on the allegedly false information supplied by PCI.

The Allen complaint is similarly based upon the actions of PCI, even in the claims against DC. The false imprisonment claim bases DC's liability on a failure to properly supervise its agent (PCI), while the malicious prosecution claim alleges that the prosecution was initiated by PCI, and the libel claim is based upon the reports prepared by PCI.

Clearly each of these claims is based upon the conduct of PCI and they sought to hold DC liable for the actions of its agents. At most, there are vague allegations that DC is responsible in part for its own actions that were taken based upon the information supplied by PCI. It is equally clear to us that the damages suffered by DC, namely the attorney fees and costs incurred in defending against these lawsuits, are damages "arising out of any claimed act or omission of" PCI. Even if we accept defendants' view that DC's liability arises, in whole or in part, out of the actions it took on its own, those actions were taken based upon the information supplied by PCI. Accordingly, the claims against DC still arise out of the claimed acts or omissions of PCI. That is, even if DC alone is responsible for requesting the arrest and prosecution of the employees, and for making public the information in PCI's report to DC, those actions were taken based upon the information derived by PCI in its investigation. In other words, DC's conduct arose from the acts or omissions of PCI. Or to view it another way, the claims against DC would have merit only if PCI supplied inaccurate information. If PCI accurately reported to DC that the employees had engaged in criminal acts, then their arrest and prosecution would not be false or malicious, nor would the publication of those true facts be defamatory. Thus, the employees' claims against DC must, of necessity, be based upon a claim that PCI failed to properly investigate and report accurate information to DC and the police. Absent an allegation that DC contributed its own inaccurate information in the material turned over to the police and the prosecutor, or in the material made public, all of the claims must arise out of the acts or omissions of PCI.[1] And we see no such allegations in the Brewer and Allen complaints.

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[1] We also note that it would be insufficient for PCI to show that, in fact, it was DC's actions alone that gave rise to the liability. The indemnification agreement does not merely indemnify DC for claims arising out of PCI's actions. Rather, it broadly indemnifies DC for any damages arising out of any *claimed* act or omission of PCI. Thus, indemnification is owed even if the underlying complaint inaccurately claims an act by PCI. Here, the acts claimed in the underlying complaints are attributed to PCI. Therefore, whether those actions were taken by PCI, DC, or by

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In sum, we believe that the clear and unambiguous language of the agreement provides for indemnification of plaintiff by PCI for the claims in the underlying lawsuits.

Defendants also briefly argue that, even if they owed indemnification to plaintiff for those claims that are based upon respondeat superior liability, that obligation was satisfied because a defense was effectively provided by the defense provided to PCI on those same claims. We disagree. First, as discussed above, indemnification was not owed merely on those claims based upon a theory of respondeat superior, but on all claims because all claims arise out of the claimed acts or omissions of PCI. Second, the agreement does require PCI to provide a defense; it requires PCI to indemnify DC. Black's Law Dictionary (5th ed) defines indemnify as follows:

> To restore the victim of a loss, in whole or in part, by payment, repair, or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. To make good; to compensate; to make reimbursement to one of a loss already incurred by him.

Thus, the unambiguous terms of the contract require PCI to reimburse DC for the expenses that DC incurred in defending itself, not to provide the defense. While the parties could certainly have agreed that PCI could discharge its obligation to indemnify by providing a common defense, nothing in the indemnification clause obligated DC to accept those terms. Accordingly, absent an agreement to the contrary, DC was within its rights to provide its own defense and then look to PCI for reimbursement of those costs under the indemnification clause.

For these reasons, we conclude that plaintiff is entitled to indemnification under the agreement. Summary disposition to plaintiff was properly granted as to PCI.

Our resolution of the above issue also renders an easy resolution of the remaining issue raised by defendants. Defendants argue that plaintiff cannot show that it suffered any damages because any of the attorney fees incurred would have been occurred even absent any of the claims in the underlying suit based upon respondeat superior. This argument, however, is based upon the presumption that PCI is only obligated to indemnify those claims that are based upon respondeat superior. As discussed above, PCI was obligated to indemnify DC for all claims. Accordingly, PCI was obligated to indemnify DC for all attorney fees and costs incurred in the litigation.

As for defendants' argument that PCI is not obligated to indemnify DC for approximately $10,000 in attorney fees incurred before suit was filed, we do not agree. The fees were incurred in anticipation of potential litigation, litigation that did come to be filed. While it is arguably the case that indemnification is not owed if suit is never filed, nothing in the indemnification agreement limits the damages that are recoverable to those incurred after suit is actually filed. Because suit was filed, clearly the indemnification agreement now applies. That agreement indemnifies DC for all attorney fees and costs incurred, without limitation to when those fees and

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neither one is immaterial to resolution of this issue. So long as the plaintiffs in the underlying suit based their allegations upon the claimed acts of PCI, indemnification is owed.

costs were incurred or, for that matter, without regard to whether those fees and costs were either necessary or reasonable[2]. In short, the clear and unambiguous terms of the contract entitled plaintiff to be indemnified by PCI for the attorney fees incurred in anticipation of litigation.

Having concluded that FMIC was not obligated to provide a defense to plaintiff, but that PCI was obligated to indemnify plaintiff for all fees and costs incurred in defending the underlying lawsuits, we turn to the issue raised in the companion appeal, the awarding of case evaluation sanctions. We begin by noting that because we conclude that the trial court erred in granting summary disposition to plaintiff as to FMIC, the case evaluation sanctions against FMIC must be set aside. With respect to sanctions against PCI, we agree in part with defendants' argument.

First, defendants argue that the trial court erred in accepting the hourly rate requested by plaintiff, $250 per hour for time worked by partners and $175 per hour for associate's time. MCR 2.403(O)(6)(b) provides for the awarding of an attorney fee based upon a reasonable hourly or daily rate. We are not persuaded that the trial court abused its discretion in determining that the proposed hourly rates were reasonable. *Zdrojewski v Murphy*, 254 Mich App 50, 73; 657 NW2d 721 (2003).

Second, defendants argue that the trial court erred in awarding various expenses billed as costs of litigation. We agree in part. Under MCR 2.403(O)(1), "actual costs" are awardable as case evaluation sanctions. MCR 2.403(O)(6) defines "actual costs" as those costs taxable in any civil action and a reasonable attorney fee. Plaintiff's bill of costs included items such as telephone toll charges, photocopy charges, travel expenses, etc. Taxation of costs is governed by Chapter 24 of the Revised Judicature Act, MCL 600.2401 *et seq.*, and such items are not provided for by the statute. Accordingly, while the time spent by an attorney on such activities may be awardable as attorney fees, the expense items incurred are not awardable as a taxable cost. That is, for example, where an attorney makes a phone call, the billable time spent on the call may be awarded as part of the reasonable attorney, but the long distance toll charge incurred in making the telephone call is not awardable as a taxable cost. On remand, the trial court shall revisit this issue and deduct from the award any expense items that do not qualify as a taxable cost.

Third, defendants argue that the trial court improperly awarded costs for the expert witness fee of attorney Gordon Ankney. We agree. Attorney Ankney was the lead attorney representing plaintiff in the underlying lawsuits in Missouri. Ankney's testimony in his deposition related to the billings by his firm to plaintiff from representing plaintiff in those underlying lawsuits. We agree with defendant that Ankney was a fact witness, not an expert

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[2] That is not to suggest that it is inherently unreasonable to incur fees and costs in advance of litigation. It is neither unusual nor unreasonable for parties to potential litigation to incur attorney fees and other costs associated with litigation before the lawsuit is even filed. Indeed, potential litigants, and their attorneys, are to be encouraged to settle their matters without the need to even file suit.

witness. Accordingly, plaintiff is not entitled to treat any fee paid Ankney as a taxable cost as an expert witness fee.

On remand, the trial court shall recalculate the amount of the case evaluation sanctions award against PCI by deducting the amount of expenses which were previously awarded but do not qualify as taxable costs and by treating attorney Ankney as a fact witness rather than an expert witness.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant FMIC only may tax costs, the remaining parties not having prevailed in full.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter