STATE OF MICHIGAN

COURT OF APPEALS

J. COLLINS INC.,

Plaintiff-Appellee,

v

CLEANING SOLUTIONS INC.,

Defendant

and

CITIZENS INSURANCE COMPANY INC.

Garnishee/Defendant-Appellant.

UNPUBLISHED
January 24, 2006

No. 265124
Kent Circuit Court
LC No. 01-011069-CK

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant-appellant appeals by right the trial court's June, 2005, order granting summary disposition for plaintiff, holding that plaintiff was entitled to garnishment against defendant-appellant based on an insurance policy with defendant. We affirm.

I. Basic Facts and Procedure

Plaintiff is the manufacturer and wholesale distributor of RHINO All Purpose Cleaners. The cleaners are marketed to be colorless and odorless. In December, 1998, plaintiff contracted to have defendant reconstitute a concentrated form of its cleaning product with four parts water, after which defendant would bottle, label, and package the finished product. In the course of reconstituting the cleaning solution, defendant added an anti-foaming agent[1] to allow for faster bottling. Along with the anti-foaming agent, defendant added a preservative, gluteraldahyde. The preservative was intended to prevent the cleaning solution from "fermenting" in the bottles, because of the addition of anti-foaming agent, and being ruined. The gluteraldahyde, though, did not have the intended effect because it was substantially diluted by the addition of water to the

[1] Referred to in the record as Lubrizol, the trade name.

concentrate. The end result was spoilage of the cleaning product that had been treated with the anti-foaming agent. Plaintiff recalled contaminated batches of the cleaning solution, which had acquired a foul odor and slimy viscosity. In November, 2003, a Consent Judgment against defendant was entered in favor of plaintiff for $150,000. Pursuant to the order of judgment, defendant also assigned its rights against defendant-appellant to plaintiff. In December, 2003, plaintiff requested the trial court issue a writ of non-periodic garnishment against defendant-appellant in the amount of $150,000. Defendant-appellant moved for summary disposition pursuant to MCR 2.116(C)(10).

The trial court denied defendant-appellant's motion. The trial court stated its reasons for the denial as follows:

> [T]he building and personal property coverage provisions of the policy issued by Citizens Insurance Company of America, the garnishee defendant, do apply to these circumstances. I'm of the opinion that while I'm certain the consequence of this intentional action was not itself intended, the purposeful action of adding an ingredient to that property which was entrusted to the . . . defendant company, did damage the product, which damages were reflected in the judgment which the court entered into sometime previous.

The trial court then, *sua sponte*, granted summary disposition in favor of plaintiff. Subsequently, the trial court granted defendant-appellant's motion for reconsideration and affirmed its original ruling. On appeal, defendant-appellant contends that the trial court erred in granting summary disposition because defendant's intentional action of adding the anti-foaming agent to the cleaning solution were not an "occurrence" as contemplated by the parties to the policy and that plaintiff's garnishment action is time-barred by the terms of the policy.[2] We disagree.

II. Analysis

A. Standard of Review

We review de novo a trial court's decision to grant summary disposition. *Devillers v Auto Club Ins. Ass'n.*, 473 Mich 562, 567; 702 NW2d 539 (2005). Additionally, "questions

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[2] On appeal, defendant-appellant also sought a declaratory judgment from this Court as to the insurance policy's applicability under a separate section. Because we affirm the trial court's determination, i.e., that the damaged property at issue was covered by the policy's Building And Personal Property Coverage Form, defendant-appellant's request for declaratory relief is moot. See *Michigan Dept. of Education v. Grosse Pointe Public Schools*, 266 Mich App 258; 701 NW2d 195 (2005). "A reviewing court will not reach moot issues or declare principles or rules of law that have no practical effect on the case before it unless the issue is one of public significance that is likely to recur, yet evade judicial review. This Court can grant declaratory relief only if there is an actual controversy. Because of the requirement of an actual controversy, this Court may not decide moot questions in the guise of giving declaratory relief. *Id* at 266-267. [Citations omitted.]

involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo. In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v. Continental Ins. Co*., 473 Mich 457, 464; 703 NW2d 23 (2005).

B. Meaning of Occurrence

We agree with defendant-appellant that damage to plaintiff's property is covered by the policy only if there is an "occurrence" that causes the damage. The policy's Building And Personal Property Coverage Form's §C. LIMITS OF INSURANCE reads: "The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations." Thus, the parties to the contract agreed that any damage must be caused by an "occurrence" if the language is to be given its plain meaning. *Devillers*, *supra*, at 582. With such a condition in place, we now turn to the meaning of "occurrence."

The word "occurrence" does not appear under §H DEFINITIONS of the Building And Personal Property Coverage Form. The Property Extender Program Endorsement carries two express modifications to §H DEFINITIONS of the Building And Personal Property Coverage Form, neither of which applies here. The Causes of Loss – Special Form §F. DEFINITIONS also does not define "occurrence."

To define "occurrence," defendant-appellant offers a definition included in a separate part of the policy, the Commercial General Liability Part's "Commercial General Liability Coverage Form." The form's §V[3] DEFINITIONS, 13., reads: "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

To support its definition of occurrence and accident, defendant-appellant offers non-binding authority by analogizing to this Court's holding in *Allstate Ins. Co.* v *McCarn*, unpublished per curiam opinion of the Court of Appeals, issued October 3, 2000 (Docket No. 213041), rev'd by *Allstate Ins. Co. v. McCarn*, 466 Mich 277, 284; 645 NW2d 20 (2002). In that case, the insurer sought a declaratory ruling, asking that it not be made to indemnify the insureds, who were defendants in a wrongful death suit. In *McCarn*, defendants' grandson pointed a gun he believed to be unloaded at his friend and pulled the trigger, killing his friend. This Court attempted in *McCarn* to apply our Supreme Court's reasoning in two similar cases, *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000) and *Frankenmuth Mutual Ins. Co. v Masters*, 460 Mich 105; 595 NW2d 832 (1999), and determined that the boy set into motion the sequence of events by intentionally aiming a gun at his friend's face and pulling the trigger.

> [W]e conclude that Robert's intentional actions created a direct risk of harm that precludes coverage. The shooting of the gun was caused by Robert's intentional act. Although Robert did not intend to fire a bullet into Kevin, he did intend to

[3] Defendant-appellant uses a different nomenclature in the two parts of the policy, which further distinguishes them. The Commercial General Liability Coverage Form uses Roman numerals (here V); whereas the Building And Personal Property Coverage Form uses English letters.

> aim the gun at Kevin's face, to pull back the hammer and to pull the trigger. In other words, Robert intended to set in motion a dangerous weapon, but with limited consequences. Although Robert was merely "playing" with the victim or attempting to frighten him, far greater harm resulted. It is irrelevant whether the harm that resulted, Kevin's death, was different from or exceeded the harm intended, scaring him. Robert reasonably should have expected the consequences of his actions because of the direct risk of harm created by pointing a gun at another human being and pulling the trigger. Accordingly, we agree with plaintiff that there can be no coverage because Robert's intentional actions created the resulting direct risk of harm. *McCarn*, *supra*, at 6-7. [Citations omitted.]

In this case, defendant-appellant argues that defendant's deliberate introduction of the anti-foaming agent into plaintiff's cleaner concentrate is similarly not at "accident" because defendant knew or should have known that the anti-foaming agent would contaminate and ruin plaintiff's property. To emphasize this point, defendant-appellant also cites and relies upon, as did this Court in *McCarn*, our Supreme Court's reasoning in *Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999):

> [A]n accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.

In *Masters*, a father and son started a fire in their clothing store with the intention of causing smoke damage to their inventory for the purpose of collecting casualty insurance. They lost control of the fire, which damaged several buildings. The court declared that the Masters' insurer was not obligated to indemnify them against claims brought by other parties who suffered loss from the fire because their intentional act was not an accident. Specifically, the court stated:

> [V]iewed from the standpoint of the Masters, the fire, which was the underlying event, was caused by the Masters' intentional act. Also, there is no question that, in perpetrating the intentional act, the Masters intended to do property damage. Thus, the Masters' act cannot be characterized as an "accident," and there was no "occurrence" for purposes of coverage under either policy. It is irrelevant whether the harm that resulted, damage to the clothing store and surrounding businesses, was different from or exceeded the harm intended, minor damage to the clothing inventory. *Id* at 116-117.

Subsequent to our Supreme Court's decision in *Masters*, our Supreme Court reversed this Court's holding in *McCarn*. In doing so, and in harmonizing its view with *Masters*, the court stated:

> [T]he *Masters* test is not objective. On the contrary, the inquiry is entirely subjective – did the insured *intentionally* create a direct risk of harm? In this case, there was no intentional creation of a direct risk of harm because of the undisputed evidence that Robert McCarn believed he was pulling the trigger of an unloaded gun. *Allstate Ins. Co. v. McCarn*, 466 Mich 277, 284; 645 NW2d 20 (2002) [Emphasis original.]

We find relevant here this distinction between the two cases: In *Masters*, the father and son intended to create some risk of harm, if only a little; therefore their acts were not accidental and their insurer was relieved of liability for the harm they caused. In *McCarn*, the boy did not intend to create any risk of harm, not even a little, because he subjectively believed the gun was not loaded; therefore, his act was accidental and subjected the insurer to liability.

In this case, the affidavit of defendant's plant supervisor, Thomas Stoutjesdyck, is instructive. Stoutjesdyck stated that:

> [O]n a number of occasions, your Affiant inquired of (defendant's president) Ronald Balk the potential impact of the Lubrizol with the cleaning product but [sic] Ronald Balk rejected any concerns due to the additional inclusion of the preservative. In discussions between your Affiant and Ronald Balk, Mr. Balk knew that the final product as constituted per the formula supplied by (plaintiff) with the inclusion of the Lubrizol could go "bad" *without the proper preservative to off set the fermenting process*. Ronald Balk was not concerned as to such side effects *based upon his opinion that the inclusion of the additional preservative would off set the potential fermentation* of the product resulting in the rotten smell and poor viscosity. [Emphasis added.]

In addition to the affidavit, we note that while defendant-appellant asserts Balk reasonably should have expected the consequences of adding the anti-foaming agent to the RHINO concentrate because of his knowledge of the chemicals and processes involved, defendant-appellant fails to assert that Balk or defendant intended to create any risk of harm, even if only a little, as in the case of *Masters*.

Therefore, based upon the affidavit and upon defendant-appellant's failure to assert defendant's intent to create a risk of harm, we find that Balk, who ultimately was in charge of making the decision for defendant to add the anti-foaming agent, subjectively believed there was no risk of harm to plaintiff's product, i.e., defendant did not intend to create any risk of harm by adding the anti-foaming agent and the preservative. Because defendant subjectively believed he was creating no risk of harm, his actions were an accident and, as a matter of law, those actions constitute an occurrence as contemplated by the parties to the policy.

C. Time Bar of Plaintiff's Garnishment Action

Defendant-appellant asserts on appeal, for the first time in this matter, the affirmative defense that plaintiff's garnishment action is time-barred under the terms of the insurance policy. We note that under MCR 2.111(F)(3)(b), defendant-appellant should have asserted this defense with its motion under MCR 2.116(C)(10) or in its first responsive pleading or it would be waived. Because this issue was not properly raised before the appeal and presented to the trial court, we decline to address it.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff