STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN HOME ASSURANCE COMPANY, a New York corporation,

Plaintiff/ Counter-Defendant/ Appellee/ Cross-Appellant,

v

THE SELECTIVE GROUP, INC., a Michigan corporation, NKA F&H Holdings, Inc.,

Defendant/ Counter-Plaintiff/ Appellant/ Cross-Appellee,

and

MICHAEL P. HOROWITZ, a Michigan citizen, and CENTEX HOMES, a Nevada general partnership,

Defendants-Appellants/ Cross-Appellees.

UNPUBLISHED
June 20, 2006

No. 266774
Oakland Circuit Court
LC No. 2004-056997-CK

Before: Fitzgerald, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff, American Home Assurance Company ("American"), brought this declaratory judgment action seeking a determination whether it is obligated to indemnify The Selective Group, Inc. n/k/a F&H Holdings Inc. ("Selective"), Michael P. Horowitz, and Centex Homes ("Centex), collectively referred to as defendants, for the settlement of two copyright infringement actions, which involved defendants' misappropriation of architectural designs of condominiums. In finding for plaintiff, the trial court held that the definition of "advertisement" in plaintiff's policy is ambiguous as applied to certain public filings Selective submitted to the Canton Township Planning Commission, and the filings, therefore constitute "advertisement." The trial court, however, also held that there exists no causal nexus between the injuries suffered by the underlying plaintiffs in the copyright infringement actions and the township filings, thereby precluding coverage under plaintiff's policy. Further, the trial court held that no coverage exists for Selective's assumed contractual liability under an asset purchase agreement in which Selective sold all of its assets, including the misappropriated architectural designs to

Centex. Lastly, the trial court held that no "property damage" to "tangible" property occurred. Defendants now appeal as of right the trial court's order granting summary disposition to plaintiff, and plaintiff cross-appeals the trial court's determinations that the policies are ambiguous and that Selective's filings with the Canton Township Planning Commission constituted "advertisement" within the meaning of the policies. We affirm the trial court's grant of summary disposition in favor of plaintiff.

Defendants first argue that the trial court erred in failing to consider the underlying plaintiffs' claims of false designation of origin under the Lanham Act, 15 USC 1125(a), in determining that defendants failed to establish a causal nexus between Selective's township filings and the underlying plaintiffs' injuries. Plaintiff responds that, because Selective's township filings do not constitute "advertisement" within the meaning of the policies, the underlying plaintiffs did not suffer an "advertising injury," and, thus, their injury is not a covered loss. We agree with plaintiff that Selective's filings with the Canton Township Planning Commission do not constitute "advertisement" as that term is defined in the policies.

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo, considering the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Rose v Nat'l Auction Group,* 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The construction and interpretation of the language of an insurance contract also presents an issue of law that we review de novo. *Allstate Ins Co v Muszynski,* 253 Mich App 138, 140-141; 655 NW2d 260 (2002). "This Court interprets an insurance contract by reading it as a whole and according its terms their plain and ordinary meaning." *Farm Bureau Mutual Ins Co v Buckallew,* 246 Mich App 607, 611; 633 NW2d 473 (2001). The terms of an insurance policy are to be enforced as written when no ambiguity is present. *Id.* A contract is ambiguous when its words may be reasonably understood in different ways. *Raska v Farm Bureau Mutual Ins Co of Michigan,* 412 Mich 355, 362; 314 NW2d 440 (1982). If a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation, it may not be said to be ambiguous. *Id.* This Court will construe a policy containing ambiguous terms in favor of the insured and against the insurer. *Buckallew, supra* at 612. However, an insured bears the burden of proving coverage, while it is the insurer that must prove that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mut Ins,* 449 Mich 155, 161 n 6; 534 NW2d 502 (1995).

Here, Selective's policy with plaintiff provides two types of coverage. Coverage A provides excess coverage to the primary USFIC policy in accordance with the USFIC policy's term and conditions:

> A. We will pay on behalf of the **Insured** those sums in excess of the total applicable limits of **Scheduled Underlying Insurance** [USFIC policy] that the **Insured** becomes legally obligated to pay as damages provided the damages would be covered by the **Scheduled Underlying Insurance**, except for exhaustion of the total applicable limits of **Scheduled Underlying Insurance** by the payment of **Loss**.

The USFIC policy provides coverage for damages because of "'personal and advertising injury' caused by an offense arising out of your [the named insured's, i.e., Selective's] business . . . ." The USFIC policy defines "personal and advertising injury" to mean "injury, including consequential 'bodily injury', arising out of one or more of the following offenses":

*** * ***

d. Oral, written, televised, videotaped or electronic publication, including on the Internet, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral, written, televised, videotaped or electronic publication, including on the Internet, of material that violates a person's right of privacy;

f. The use of another's advertising in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

The USFIC policy defines "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."

Coverage B of Selective's policy with plaintiff provides coverage for bodily injury, property damage, personal injury, or advertising injury claims in excess of the USFIC policy:

A. We will pay on behalf of the **Insured** those sums in excess of the **Self-Insured Retention** that the **Insured** becomes legally obligated to pay as damages by reason of liability imposed by law or assumed by the **Insured** under an **Insured Contract** because of **Bodily Injury**, **Property Damage**, **Personal Injury**, or **Advertising Injury** not covered by **Scheduled Underlying Insurance**, provided that:

1. the **Bodily Injury** or **Property Damage** is cause by an **Occurrence** happening anywhere, and the **Bodily Injury** or **Property Damage** occurs during the **Policy Period**.

2. the **Personal Injury** or **Advertising Injury** is caused by an **Occurrence** happening anywhere, and the **Occurrence** takes place during the **Policy Period**.

Plaintiff's policy defines "advertising injury" under Coverage B as "injury, other than Bodily Injury or Personal Injury, arising solely out of your [Selective's] Advertisement . . . ." Plaintiff's policy defines "advertisement" under Coverage B as "a paid broadcast, publication or telecast to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."

The alleged advertisements at issue here are the filings that Selective submitted to the Canton Township Planning Commission, which falsely represented the source of the architectural designs contained within them. To trigger Coverage B, the advertising injury must arise out of Selective's advertisement. As the township filings are clearly not "a *paid* broadcast, publication or telecast," they do not meet the definition of "advertisement" under Coverage B, and there is no coverage. The trial court, however, held that the definition of "advertisement" in the USFIC policy, and thus under plaintiff's Coverage A, is ambiguous when applied to Selective's filings with the township, and therefore must be construed in favor of coverage.

To trigger Coverage A, the underlying plaintiffs' advertising injury must arise out of one of the enumerated offenses. Assuming, without deciding, that Selective's township filings constitute a "publication" within the meaning of the USFIC policy, there is no allegation that they slandered, libeled, or disparaged another's products, goods, or services, or that the filings invaded anyone's right of privacy; therefore, offenses (d) and (e) in the USFIC policy's definition of "personal and advertising injury" do not apply. With regard to offenses (f) and (g), coverage for injuries arising out of these offenses applies only if they occurred in Selective's "advertisement." Examining the definition of "advertisement" under Coverage A, "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters," we find that this definition is not ambiguous when applied to Selective's township filings. Although the filings may arguably constitute a "notice" as that term is commonly understood,[1] there is no evidence that the filings were "broadcast or published to the general public or specific market segments" or that they were made "for the purpose of attracting customers or supporters."

Although defendants argue that the township filings were submitted to "gain approval and support from the local government authorities and the community of prospective purchasers at large," it is clear from the record that defendants were required to submit these filings in order to obtain the township's approval that their plans met the zoning requirements. On their face, the filings are not directed toward the public at large or to prospective purchasers. Furthermore, defendants produced no evidence that members of the general public or prospective purchasers were ever actually provided with these township filings.

Defendants also argue that the underlying plaintiffs' claims under the Lanham Act, 15 USC 1125(a),[2] and supporting factual allegations in the underlying complaints establish, as a

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[1] "Notice" is defined as: "1. information, warning or announcement of something impending; notification: *to give notice of one's intentions*. 2. a written or printed statement conveying such information or warning: *to post a notice*." Random House Webster's College Dictionary, p 895.

[2] This section provides, in relevant part:

> (a) Civil action
>
> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device,

(continued…)

matter of law, that the underlying plaintiffs' damages arose out of an "advertising injury." This argument is without merit. First, it is based on defendants' erroneous assumption that claims under § 1125 must involve trademark or trade dress violation, which necessarily implicate advertising activity. The United States Supreme Court, however, made clear that "[w]hile much of the Lanham Act addresses the registration, use, and infringement of trademarks and related marks, § 43(a), 15 USC § 1125(a) is one of the few provisions that goes beyond trademark protection." *Dastar Corp v Twentieth Century Fox Film Corp*, 539 US 23, 28-29; 123 S Ct 2041; 156 L Ed 2d 18 (2003). Second, defendants produced no evidence that any public filings were attached to any pleading or used as a basis for liability in the underlying plaintiffs' cases in federal court. Third, even if the underlying plaintiffs did allege that their damages stemmed from an advertising injury that arose out Selective's filings with the township, "the duty to indemnify [is] not determined solely on the basis of the terminology used in a plaintiff's pleadings. Instead, a court must focus on the cause of the injury to ascertain whether coverage exists. It is the substance rather than the form of the allegations in the complaint which must be scrutinized." *US Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 493-494; 506 NW2d 527 (1993) (citation omitted).

The underlying plaintiffs asserted claims of false designation of origin in violation of § 1125, as well as copyright infringement and violation of common law. Among the factual allegations in the underlying complaints was that defendants "pursue the development, rental and advertising of their housing units in commerce, and their actions affect interstate commerce." The underlying complaints, however, contained no allegations that defendants ever advertised the underlying plaintiffs' architectural designs or that the underlying plaintiffs were injured by defendants' advertising. With regard to the Lanham Act claims, the underlying plaintiffs alleged:

> 34. Defendants deliberately copied Plaintiff's Plans; and, if not enjoined, Plaintiffs justly fear that Defendants will disseminate information to the public with the intention of misleading the public as to the source or designers of Defendants' housing units.

(…continued)

> or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

35. Defendants misrepresentations have caused, or will likely cause, confusion as to the origins or sponsorship of the homes marketed by Defendants.

36. Defendants' false and misleading actions violate 15 USC § 1125.

The underlying plaintiffs' complaints merely alleged the likelihood of harm from *future* advertising if defendants were not enjoined, not that Selective actually injured them through its advertising.

Moreover, these allegations do not set forth a cause of action for trademark or trade dress infringement, but rather for "reverse passing off." "Passing off (or palming off, as it is sometimes called) occurs when a producer misrepresents his own goods or services as someone else's. 'Reverse passing off,' as its name implies, is the opposite: The producer misrepresents someone else's goods or services as his own." *Dastar Corp, supra* at 28 n 1 (citations omitted). Or, in other words, "'reverse passing off' occurs when 'A' sells 'B's' product under A's name.'" *Dahlen v Michigan Licensed Beverage Assoc,* 132 F Supp 2d 574, 588 n 12 (ED Mich, 2001) (citations omitted).

Reverse passing off is precisely what the underlying plaintiffs alleged when they claimed that defendants were selling homes that used the underlying plaintiffs' architectural designs as though they were their own. Not only does this claim not necessarily implicate advertising activity, but also it is not one of the covered infringement offenses under Coverage A, which extends only to infringements of copyright, trade dress, or slogan. Thus, the township filings trigger neither Coverage A nor Coverage B, and it is unnecessary to analyze, as the trial court did, whether a causal nexus exists between Selective's "advertisement" and the underlying plaintiffs' injury.[3]

Defendants next argue that, through Coverage A, the USFIC policy provides coverage for the liability Selective assumed under the indemnity provisions of the asset purchase agreement between Selective and Centex, which defendants claim is an "insured contract" to which no exclusions apply. We disagree.

Defendants' argument is based on the exceptions, or "give back" provisions, to the USFIC policy's exclusions. The USFIC policy's coverage for "bodily injury" and "property damage" does not apply to:

> "Bodily injury" or "property damage" for with the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or

[3] This Court will not reverse a trial court's order if the trial court reached the correct result, albeit for the wrong reasons. *Taylor v Laban,* 241 Mich App 449, 458; 616 NW2d 229 (2000).

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.

The USFIC policy also excludes coverage for damages resulting from "personal or advertising injury":

(5) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

It is undisputed that neither "bodily injury" nor "personal injury," as defined by the USFIC policy, is at issue. Defendants claim that the underlying plaintiffs suffered "property damage" and "advertising injury," which arose, in the absence of any indemnity agreement, from Selective's own conduct in misusing the architectural designs. Thus, defendants argue that they are entitled to indemnity on this basis. Additionally, defendants claim that they are entitled to indemnity for the liability Selective assumed under the asset purchase agreement, which defendants maintain is an "insured contract."

According to the plain language of the USFIC policy's exclusions, the "give back" provision for an "insured contract" is only implicated where "bodily injury" or "property damage" is claimed. Defendants do not claim bodily injury occurred and, as discussed below, the underlying plaintiffs did not claim they suffered "property damage" within the meaning of the policy. Thus, the "insured contract" give back provision is inapplicable. Additionally, as we have already stated, the underlying plaintiffs did not claim an "advertising injury" within the meaning of the policy because Selective's filings with the township do not constitute "advertisement." Therefore, the give back provision pertaining to "advertising injury" does not apply either. Therefore, the trial court did not err in finding that defendants are not entitled to indemnity for Selective's assumed contractual liability.

Lastly, defendants argue that their misappropriation of the underlying plaintiffs' architectural plans constitutes "property damage" within the meaning of Coverage A because it caused the underlying plaintiffs to suffer a "loss of use of tangible property that is not physically injured."

The USFIC policy, and thus Coverage A of plaintiff's policy, applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" occurs during the policy period.

The policy defines "property damage" as:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the physical injury that caused it.

Although the trial court ruled that the underlying plaintiffs' claim of copyright infringement did not involve an invasion of a tangible property right, this analysis was unnecessary because defendants have not presented any evidence to show, or even made an argument, that their misappropriation was accidental. In order for "property damage" to be covered by either the USFIC policy or plaintiff's policy, it must be cause by an "occurrence." With respect to "property damage," both policies define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Because, as an insured, Selective bears the burden of proving coverage, *Heniser, supra* at 161 n 6, and defendants failed to present any evidence that the underlying plaintiffs' alleged "property damage" was caused by an "occurrence," defendants are not entitled to indemnity from plaintiff.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Christopher M. Murray