Court of Appeals, State of Michigan

ORDER

Aladdin's Carpet Cleaning Inc v Farm Bureau General Ins Co

Docket No. 278605

LC No. 04-034864-CZ

Kathleen Jansen
Presiding Judge

Peter D. O'Connell

Donald S. Owens
Judges

On the Court's own motion, the Court orders that the February 12, 2009, opinion is hereby VACATED, and a new opinion is attached to this order. Farm Bureau General Insurance Company—and not State Farm as was erroneously indicated in the opinion of February 12, 2009—is the defendant-appellant in this action.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 26 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

ALADDIN'S CARPET CLEANING, INC., d/b/a ALADDIN'S RESTORATIVE DRYING, INC.,	UNPUBLISHED February 12, 2009
Plaintiff-Appellee,	
v	No. 278605 Lapeer Circuit Court
FARM BUREAU GENERAL INSURANCE COMPANY,	LC No. 04-034864-CZ
Defendant-Appellant,	
and	
RON HICKS,	
Defendant-Appellee.	

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

In this insurance dispute, defendant Farm Bureau General Insurance Company ("defendant" or "Farm Bureau") appeals by right the circuit court's order denying its motion for summary disposition and instead granting partial summary disposition in favor of plaintiff. Defendant also challenges the circuit court's award of damages for plaintiff. We affirm in part, vacate in part, and remand for a jury trial on the issue of damages consistent with this opinion.

I

Eugene Earns's home was damaged by water. Earns consequently contacted his homeowner's insurance company, which retained plaintiff Aladdin's Carpet Cleaning, Inc., d/b/a Aladdin's Restorative Drying, Inc., to enter Earns's home and remediate the water damage. According to Earns, however, plaintiff actually exacerbated the damage by negligently allowing potentially dangerous mold to spread throughout the house.

Thereafter, on May 24, 2004, Earns filed a complaint in the Genesee Circuit Court alleging that plaintiff had "failed to use proper methods to prevent cross-contamination of dangerous potentially toxic mold throughout the home and in fact caused cross-contamination."[1] Earns set forth three separate claims against plaintiff, including allegations of negligence, misrepresentation, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. With respect to the negligence claim, Earns alleged that plaintiff had "breached its duties to [Earns] by its actions and/or inactions, including but not limited to" (1) "[f]ailing to make prompt repairs," (2) "[f]ailing to take adequate precautions to prevent against admitted mold damage," (3) "[f]ailing to prevent contamination of the insured property by protecting it against air contamina[nt]s and mold spores," (4) "[f]ailing to use proper methods of remediation in order to prevent further damage," and (5) "[c]ausing further damage to [Earns]'s home."

Plaintiff seasonably contacted its general liability insurance carrier, defendant Farm Bureau, and asked defendant to defend it in the Earns litigation. Defendant denied plaintiff's request, concluding that it was not obligated to defend plaintiff under either plaintiff's "Guardian Policy" or plaintiff's "Commercial Umbrella Liability Policy."[2] The Earns litigation was eventually settled and the parties stipulated to dismiss Earns's claims with prejudice on September 8, 2005. However, plaintiff had already incurred substantial litigation costs at the time the stipulated order of dismissal was entered.

II

Believing that defendant had owed a duty to defend it in the underlying Earns litigation, plaintiff filed the present action in the Lapeer Circuit Court on August 31, 2004. Among other things, plaintiff alleged that defendant State Farm had breached the insurance contract—

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[1] Earns also named his homeowner's insurance company in the complaint. However, that company is not involved in this appeal.

[2] Plaintiff had two separate insurance policies with defendant State Farm: a "Guardian Policy" and a "Commercial Umbrella Liability Policy." The Guardian Policy in effect at the time of plaintiff's work at Earns's house provided that "[t]his insurance policy does not apply . . . to bodily injury, personal injury, or property damage which would not have occurred, in whole or in part, but for the actual, alleged, or threatened . . . contact with, exposure to, existence of, or presence of any fungi or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material, or product contributed concurrently or in any sequence to such injury or damage." It also provided that "[t]his insurance policy does not apply . . . to any loss, cost, or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, remediating, or disposing of, or in any way responding to, or assessing the effects of, fungi or bacteria . . . ." The Guardian Policy went on to define "[f]ungi" as "any type or form of fungus, including mold or mildew . . . ." In light of these specific fungus and mold exclusions, it appears that defendant State Farm correctly denied the request to defend plaintiff under the terms of the Guardian Policy. However, the Commercial Umbrella Liability Policy in effect at the time of plaintiff's work at Earns's house contained no similar fungus or mold exclusion. Therefore, the issue on appeal is whether defendant had a duty to defend plaintiff under the terms of the Commercial Umbrella Liability Policy.

specifically the Commercial Umbrella Liability Policy—by failing to defend plaintiff and pay its litigation costs in the underlying action. Plaintiff also claimed that defendant State Farm should be estopped from denying coverage because it had improperly induced plaintiff into believing that the insurance policy would cover mold-related losses.[3]

The circuit court denied defendant Farm Bureau's motion for summary disposition and instead granted partial summary disposition in favor of plaintiff. The court determined that defendant State Farm had owed plaintiff a duty to defend in the underlying Earns litigation. Specifically, the court found that the alleged mold contamination at Earns's house was an occurrence covered by the Commercial Umbrella Liability Policy, and further determined that coverage for the mold-related loss was not excluded by the policy. The court awarded plaintiff $22,354.41 in litigation costs and attorney fees, plus interest.[4]

III

Defendant State Farm argues that the circuit court erred by finding that it had a duty to defend plaintiff in the underlying Earns litigation and that as a consequence, the court also erred by granting partial summary disposition in favor of plaintiff. We disagree.

A

We review de novo a circuit court's decision to grant or deny summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We also review de novo questions of law, including the proper interpretation of an insurance contract, *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004), and issues concerning an insurer's duty to defend in an underlying action, *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004).

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[3] Plaintiff further sued defendant Ron Hicks, a State Farm insurance agent, alleging negligence and negligent misrepresentation. Plaintiff claimed that Hicks had failed to use reasonable care in advising plaintiff with respect to the nature of its insurance coverage and that Hicks had negligently represented that plaintiff's insurance would cover losses or expenses related to mold damage. The circuit court granted summary disposition in favor of Hicks, contingent upon an affirmance of its other rulings on appeal. Specifically, the circuit court ruled, "[T]he dismissal of Plaintiff['s] . . . claims against Defendant Ron Hicks is contingent upon this Court's Summary Disposition ruling that Farm Bureau was obligated to provide insurance coverage to Plaintiff Aladdin's on the Earns claim not being reversed on appeal. If that ruling is reversed or otherwise modified on appeal, [plaintiff]'s claims against Defendant Ron Hicks shall be reinstated. If this Court's summary disposition ruling against Defendant Farm Bureau is not reversed or otherwise modified on appeal, or no appeal is filed, then [plaintiff]'s claims against Defendant Ron Hicks shall be dismissed."

[4] It is true that defendant Ron Hicks is listed as a defendant-appellee on this Court's docket sheet and that he has filed a separate brief on appeal. However, because we affirm the circuit court's grant of summary disposition in favor of plaintiff with respect to the claims against defendant Farm Bureau, we need not consider the claims against defendant Ron Hicks in this opinion.

B

An insurer's duty to defend is separate and distinct from the insurer's duty to pay claims, *Aetna Cas & Sur Co v State Farm Mut Auto Ins Co*, 16 Mich App 658, 659; 168 NW2d 465 (1969), and is typically broader than its duty to indemnify, *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74; 755 NW2d 563 (2008). The duty to defend generally "exists so long as there is a genuine dispute over facts bearing on coverage under the policy or over the application of the policy's language to the facts." 44 Am Jur 2d, Insurance, § 1396, p 626. The insurer's duty to defend is measured by the allegations in the pleadings, and does not depend upon insurer's ultimate obligation to indemnify the insured. *Guerdon Industries, Inc v Fidelity & Cas Co of New York*, 371 Mich 12, 18; 123 NW2d 143 (1963).

The duty to defend "is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured *even arguably* come within the policy coverage." *Detroit Edison v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980) (emphasis in original). "The duty to defend cannot be limited by the precise language of the pleadings." *Id*. Instead, the insurer has the duty to look behind the pleadings and to determine whether coverage is possible. *Id*. "In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Id*.

"In determining whether there is a duty to defend, courts are guided by established principles of contract construction." *Citizens Ins Co*, 279 Mich App at 74. "If the language of [a] contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

Plaintiff's Commercial Umbrella Liability Policy, which was in effect at the time of plaintiff's work at Earns's house, provided in relevant part:

> A. COVERAGE:
>
> The Company agrees to pay on behalf of the insured all sums in excess of the retained limit which the insured shall become legally obligated to pay, or agrees to pay, with the consent of the Company, as damages and expenses, subject to the limits which this policy applies, because of:
>
> (1) Personal Liability or
>
> (2) Advertising Liability,
>
> arising out of an occurrence happening during the policy period stated in the Declarations, anywhere in the world.
>
> B. DEFENSE, SETTLEMENT, AND SUPPLEMENTARY PAYMENTS:
>
> (1) When Underlying Insurance Does Not Apply to an Occurrence:
>
> With respect to any occurrence not covered by the underlying insurance listed in the Schedule of Underlying Insurance Policies attached to and forming a

> part of the Declarations, or any other underlying insurance collectible by the Insured (but covered by this policy, except for the amount of retained limit specified in the Declarations), the Company will, in addition to the amount of the ultimate net loss payable:
>
> (a) defend any suit against the Insured seeking damages on account of personal injury, property damage, or advertising liability, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient;
>
> (b) pay all expenses incurred by the Company, all costs taxed against the Insured in any suit defended by the Company, and all interest on the entire amount of any judgment in that suit which accrues after entry of the judgment and before the Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the Company's liability on that occurrence;
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> * * *
>
> (e) pay any prejudgment interest awarded against the Insured on that part of the judgment which is paid by the Company;
>
> and the amounts so incurred, except ultimate net loss, are not subject to the Insured's retained limit as stated in the Declarations and are payable by the Company in addition to the applicable limits of liability of this policy.

As an initial matter, we note that § B(1) of the Commercial Umbrella Liability Policy clearly provided that "[w]ith respect to any occurrence not covered by the underlying insurance listed in the Schedule of Underlying Insurance Policies attached to and forming a part of the Declarations . . . [Farm Bureau] will, in addition to the amount of the ultimate net loss payable . . . defend any suit against the Insured seeking damages on account of personal injury, property damage, or advertising liability, even if any of the allegations of the suit are groundless, false, or fraudulent . . . ." Plaintiff's Guardian Policy, which was listed as an "underlying insurance policy" in the Schedule of Underlying Insurance Policies attached to the Commercial Umbrella Liability Policy, contained a clear exclusion for damage caused by or resulting from "any type or form of fungus, including mold or mildew . . . ." Thus, despite the fact that the mold damage alleged by Earns would not have been covered by the underlying Guardian Policy, defendant State Farm was still obligated to defend plaintiff against Earns's complaint under § B(1) of the Commercial Umbrella Liability Policy so long as the alleged mold damage constituted an "occurrence" and was not otherwise excluded by the policy.

We must, therefore, determine whether Earns's complaint sufficiently set forth allegations of an "occurrence" within the meaning of plaintiff's Commercial Umbrella Liability Policy. We conclude, as did the circuit court, that Earns's allegations of negligence against plaintiff sufficiently satisfied the definition of an "occurrence."

As noted previously, Earns alleged that plaintiff had "failed to use proper methods to prevent cross-contamination of dangerous potentially toxic mold throughout the home and in fact

caused cross-contamination." He specifically claimed that plaintiff had failed "to take adequate precautions to prevent against admitted mold damage," had failed "to prevent contamination of the insured property by protecting it against air contamina[nt]s and mold spores," had failed "to use proper methods of remediation in order to prevent further damage," and had thereby caused "further damage to [Earns]'s home." At no time did Earns claim that any of these alleged actions or inactions by plaintiff were intentional or purposeful. Nor did Earns claim that any of the mold damage allegedly caused by plaintiff should have been expected or was readily foreseeable. Instead, Earns merely claimed that plaintiff had failed to take adequate precautions to prevent the alleged mold contamination.

Plaintiff's Commercial Umbrella Liability Policy defined an "occurrence" as:

> [A]n accident, including continuous or repeated exposure to conditions, which results in personal injury, property damage, or advertising liability and which is neither expected nor intended from the standpoint of the insured.
>
> With respect to personal injury and property damage, all such exposure to substantially the same general conditions existing at or emanating from one location or source shall be deemed one occurrence.

The word "accident" was not defined by the policy. However, the Michigan courts have recognized that "'an 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.'" *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999) (citations omitted); see also *Allstate Ins Co v JJM*, 254 Mich App 418, 422; 657 NW2d 181 (2002). "[T]he definition of accident should be framed from the standpoint of the insured, not the injured party." *Frankenmuth Mut Ins Co*, 460 Mich at 114. Accordingly, in the present case, whether there was an accident must be evaluated from the standpoint of plaintiff. *Id*. "Any doubt as to the extent of coverage is to be resolved in the insured's favor." *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 506; 362 NW2d 767 (1984); see also *Detroit Edison*, 102 Mich App at 142.

Earns set forth claims of negligence, violation of the MCPA, and misrepresentation against plaintiff. Defendant Farm Bureau argues that the claims of misrepresentation and violation of the MCPA would not fall within the insurance policy's definition of "occurrence" because they were not allegations of accidents, but rather of intentional acts. Defendant is correct that neither the MCPA claim nor the misrepresentation claim described an "occurrence" within the meaning of the policy. However, "[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, *if there are any theories of recovery that fall within the policy*." *Detroit Edison*, 102 Mich App at 142 (emphasis added). Thus, even though Earns's misrepresentation and MCPA claims did not allege "occurrence[s]" within the meaning of the insurance policy, the proper inquiry is whether the remaining negligence claim alleged an "occurrence."

The circuit court determined that Earns's negligence claim did allege an "occurrence" within the meaning of the policy:

> In the case at bar, Eugene Earns[’s] complaint states a negligence claim against [plaintiff]. A negligence claim alleges conduct that was neither expected nor intended, which in the opinion of this Court constitutes an “accident” within the Umbrella Policy’s “Occurrence” provision.

For the reasons set forth below, we agree with the circuit court’s determination that Earns’s negligence claim alleged an unintentional and unexpected accident, and therefore an “occurrence” within the meaning of the Commercial Umbrella Liability Policy.

We first conclude that the factual contentions underlying Earns’s claim of negligence—e.g., that plaintiff had failed to take adequate precautions and had failed to use proper methods of remediation—arguably alleged an “accident” within the meaning of the Commercial Umbrella Liability Policy. Viewing the alleged damage to Earns’s home “from the standpoint of the insured,” *Frankenmuth Mut Ins Co*, 460 Mich at 114, the alleged mold contamination was *at least arguably* “‘an undesigned contingency, a casualty, a happening by chance, [or] something out of the usual course of things,’” *id.* (citations omitted). After all, plaintiff was in the business of restorative drying and had experience with the remediation of water damage. It is illogical to conclude that a company such as plaintiff would design or otherwise purposefully cause mold contamination in the course of its water-damage remediation activities.

Moreover, Earns’s allegations of negligence tend by their very nature to describe an “accident” within the meaning of the policy. “‘The word “accident” is common in most liability policies and should not be construed in this type of case as not including claims involving negligence . . . .’” *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 144; 610 NW2d 272 (2000), quoting *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151, 153 (CA 6, 1962). As our Supreme Court has observed, “the negligence of [an] insured in acting as [it] did is not enough to prevent an incident from being an accident if the consequence of the action . . . should not have reasonably been expected by the insured.” *Allstate Ins Co v McCarn*, 466 Mich 277, 287; 645 NW2d 20 (2002). Earns’s allegations of negligence at least arguably described an “accident” within the meaning of plaintiff’s insurance policy.

We also conclude that the alleged mold contamination was at least arguably “‘unusual, fortuitous, not anticipated, and not naturally to be expected.’” *Frankenmuth Mut Ins Co*, 460 Mich at 114 (citations omitted). In order to qualify as an “occurrence” under plaintiff’s Commercial Umbrella Liability Policy, an accident must be “neither expected nor intended from the standpoint of the insured.” Defendant Farm Bureau argues that plaintiff should have expected or foreseen the mold contamination because it used improper methods when working at Earns’s home. Among other things, defendant contends that plaintiff should have known that its use of dehumidifiers or other air-circulating equipment in Earns’s basement would cause mold proliferation, transfer, or cross-contamination. However, defendant has presented no admissible evidence to support this contention. Defendant’s argument that plaintiff should have expected or foreseen the mold damage is based on self-serving and unsupported assumptions, as well as the fact that several of plaintiff’s employees had been trained in mold remediation. This, however, is simply insufficient to establish that the alleged mold damage in Earns’s home should have been expected, anticipated, or foreseen by the insured. At most, defendant has shown that there was a factual dispute concerning whether the mold damage was “neither expected nor intended from the standpoint of the insured” within the meaning of the policy. But, as noted above, the duty to defend “exists so long as there is a genuine dispute over facts bearing on coverage under the

policy or over the application of the policy's language to the facts." 44 Am Jur 2d, Insurance, § 1396, p 626.

In short, we are compelled to conclude that Earns's negligence claim *at least arguably* alleged an "occurrence" within the meaning of the policy. *Detroit Edison*, 102 Mich App at 142. The pleadings did not establish that the mold damage was anything other than an undesigned accident that was neither expected nor intended by the insured. See *Radenbaugh*, 240 Mich App at 149; see also *American Bumper & Mfg Co*, 261 Mich App at 376. Nor was there any other admissible evidence to suggest that the alleged mold damage should have been anticipated or foreseen by plaintiff. We therefore conclude that unless there was a specific exclusion for mold-related damage, defendant had a duty to defend plaintiff in the underlying Earns litigation. See *Detroit Edison*, 102 Mich App at 142.

C

It is true that "the duty to defend is not an unlimited one" and that "[t]he insurer is not required to defend against claims for damage expressly excluded from policy coverage." *Meridian Mut Ins Co v Hunt*, 168 Mich App 672, 677; 425 NW2d 111 (1988); see also *American Bumper & Mfg Co*, 261 Mich App at 375. It is therefore necessary to determine whether there was any provision in the Commercial Umbrella Liability Policy that expressly excluded coverage for the alleged mold-related damage. We conclude that there was not.

Exclusion § S(1) of the Commercial Umbrella Liability Policy provided in relevant part that the policy of insurance did not apply:

> to personal injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> * * *
>
> (h) at or from any premises, site or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of, pollutants[.]

The Commercial Umbrella Liability Policy defined "pollutants" as:

> any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed[.]

Defendant asserts that because mold is a solid "irritant" or "contaminant," and because plaintiff was working to clean up or otherwise respond to the mold in Earns's home, Exclusion § S(1)(h) of the Commercial Umbrella Liability Policy unambiguously excluded coverage in this case. However, defendant applies an incorrect legal analysis in this regard. Defendant apparently wishes to litigate for once and for all the question whether mold constitutes a

"pollutant" within the meaning of the Commercial Umbrella Liability Policy. But this is not the question presented here. The question presented in this duty-to-defend case is much more limited; the circuit court's obligation was merely to determine whether the alleged mold contamination could *arguably* have been covered by the insurance policy. *Detroit Edison*, 102 Mich App at 142. We find that the circuit court correctly answered this question in the affirmative.

To determine whether the alleged mold contamination could *arguably* have been covered by the insurance policy, it is unnecessary to decide definitively whether the mold in Earns's home constituted a "pollutant" within the meaning of Exclusion § S(1)(h). Indeed, we express no opinion concerning whether the mold alleged in this case was or was not a "pollutant" within the meaning of the policy. We do, however, conclude that there was "a genuine dispute over . . . the application of [Exclusion § S(1)(h)] to the facts," 44 Am Jur 2d, Insurance, § 1396, p 626, and that the mold contamination alleged by Earns was *arguably* covered by the policy, *Detroit Edison*, 102 Mich App at 142. Resolving any doubt in favor of the insured as we must, *id.*, we conclude that because the mold damage alleged by Earns was not clearly excluded by Exclusion § S(1)(h), and was *at least arguably* covered under the policy, defendant State Farm had a duty to defend plaintiff in the underlying Earns litigation.

IV

Lastly, defendant State Farm argues that because it owed plaintiff no duty to defend, the circuit court erred by awarding plaintiff damages in the amount of $22,354.41, which represented plaintiff's litigation costs and attorney fees in the underlying Earns litigation. We disagree with defendant's contention that plaintiff was not entitled to damages, but nonetheless conclude that the circuit court erred by failing to hold a trial on the amount of damages in this case.

As we have determined, defendant owed plaintiff a contractual duty to defend in the underlying Earns litigation. But defendant breached this contractual obligation. Consequently, plaintiff was entitled to damages just as any other successful party would be in a breach-of-contract action. *Stockdale v Jamison*, 416 Mich 217, 224; 330 NW2d 389 (1982), overruled in part on other grounds *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525 (1989) (observing that when an insurer has a duty to defend and fails to fulfill that duty, "then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach"). It is well settled that "the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980); see also *Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854).

Plaintiff requested damages in the amount of $27,225.41, which represented its litigation costs and attorney fees in the underlying Earns litigation. The circuit court viewed this as a mere request for attorney fees and ultimately awarded plaintiff $22,354.41 without holding a trial on the issue of damages. But plaintiff's request was not merely a motion for attorney fees. This was a breach-of-contract action, and plaintiff's request was a request for contract damages. It is true that in a successful duty-to-defend action, the damages due to the insured will generally include attorney fees and other litigation costs incurred by the insured in the underlying litigation. See *Cooley v Mid-Century Ins Co*, 52 Mich App 612, 615-616; 218 NW2d 103 (1974); see also *Fireman's Fund Ins Cos v Ex-Cell-O Corp*, 790 F Supp 1318, 1325 (ED Mich,

1992). Indeed, "[a]n insurer who wrongfully refuses to defend an action against the insured, on the ground that the action was not within the coverage of the policy, is liable for reasonable attorney fees incurred by the insured in the defense of the action . . . ." *Cooley*, 52 Mich App at 615-616. The breaching insurer is liable to pay other costs and litigation expenses necessarily incurred by the insured in defending the underlying action as well. *Id*. at 616.[5]

But the fact that the damages due in duty-to-defend actions include attorney fees and litigation costs does not alter their essential character as contract damages. In general, unless the amount of damages is liquidated or otherwise certain, damages may not be assessed following the grant of summary disposition without the benefit of trial "because, in that event, determination of damages in itself raises a fact issue that can only be disposed of by the court or a jury, after hearing evidence." 7 Michigan Pleading & Practice, Summary Disposition, § 43:19, p 42; see also *Hecker Products Corp v Transamerican Freight Lines*, 296 Mich 381, 386; 296 NW 297 (1941), and *Cohen v Peerless Soda Fountain Service Co*, 257 Mich 679, 682; 241 NW 810 (1932). In the present case, the damages due to plaintiff as a result of defendant's breach of the duty to defend were not liquidated or otherwise spelled out with any degree of specificity by the parties' contract. Plaintiff presented billing statements and other evidence to support its claim for damages, but defendant disputed the amount of damages sought by plaintiff. Despite this, the circuit court summarily awarded damages in the amount of $22,354.41 without holding a trial to resolve the parties' competing arguments.

Although $22,354.41 may ultimately prove to have been an appropriate amount of damages in this case, the court was required to hold a trial on the issue of damages before entering an award of damages for plaintiff. Plaintiff demanded a jury in this case, and defendant was entitled to rely on this demand. *Marshall Lasser, PC v George*, 252 Mich App 104, 106; 651 NW2d 158 (2002). Plaintiff's jury demand was for all facts and issues involved for which trial by jury was permitted, and necessarily included the issues of liability and damages. *Id*. Once the right to trial by jury is secured, a plaintiff must obtain the defendant's consent to waive or withdraw the right to have a jury hear and decide the issue of damages. *Id*. As defendant State Farm made clear before the circuit court, it never consented to a waiver or withdrawal of this jury-trial right. See *id*. at 108-109. Accordingly, we must vacate the award of damages for plaintiff in the amount of $22,354.41, and remand for a jury trial on the issue of damages consistent with this opinion.

Affirmed in part, vacated in part, and remanded for a jury trial on the issue of damages consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens

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[5] We note that while plaintiff is entitled to damages consisting of its costs, expenses, and fees incurred in defending the underlying Earns litigation, it is not entitled to attorney fees incurred in the present suit against defendant State Farm. See *Shepard Marine Const Co v Maryland Cas Co*, 73 Mich App 62, 65-66; 250 NW2d 541 (1977).