STATE OF MICHIGAN

COURT OF APPEALS

BRIAN J. LUDLOW,

Plaintiff/Counterdefendant,

v

PATRICK R. HACKETT and THOMAS N. JAMES,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

GRANGER & ASSOCIATES, INC., and NORTHERN LAKES, INC., d/b/a COLDWELL BANKER NORTHERN LAKES and MARY REYNOLDS,

Defendants,

and

PETOSKEY TITLE AGENCY, INC., d/b/a PETOSKEY TITLE COMPANY and LAWYERS TITLE INSURANCE CORPORATION,

Third-Party Defendants-Appellees.

UNPUBLISHED
July 2, 2009

No. 283189
Emmet Circuit Court
LC No. 06-009356-CH

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

In this case involving the scope of a title insurance policy, third-party plaintiffs Patrick R. Hackett and Thomas N. James appeal as of right a circuit court order granting summary disposition to third-party defendants, Petoskey Title Company (Petoskey) and Lawyers Title Insurance Corporation (Lawyers Title). The circuit court determined as a matter of law under MCR 2.116(C)(8) and (10) that the Lawyers Title insurance policy did not extend coverage to

the public streets appearing in a recorded subdivision plat. We affirm, albeit pursuant to different logic.

I. Facts and Proceedings

The underlying property dispute centers on Block 16 in the plat of Mich-Eden, No. 1, a Carp Lake Township subdivision in Emmet County. Block 16 consists of eight lots bordered by Oak Street on the east and Fir Street on the west. Four lots in Block 16 have a southerly border comprised by Paradise Lake (formerly Carp Lake). An alley separates the four southerly lots from the four lots situated directly north, along US-31. The proprietor of the plat, certified in 1927, declared that the "streets and alleys are hereby dedicated to the use of the public."

Hackett and James entered the picture in 2003 when they purchased Block 16 from Allen Hendershot. In November 2003, Hendershot conveyed to Hackett and James by warranty deed,

> All of Block 16, Mich-Eden No. 1, according to the plat recorded in Liber 5 of plats, on page 1, Emmet County Records, and ½ of the vacated Oak Street and the alley that connects Oak Street and Fir Street, and ½ of the vacated Fir Street from said alley to the lakeshore.
>
> Subject to all easements, restrictions and reservations of record, if any.

Hackett and James obtained a title insurance commitment concerning Block 16 through Petoskey and Lawyers Title.

In September 2004, Hackett and James conveyed Block 16 by warranty deed to Brian Ludlow. The September 2004 deed from Hackett and James, like Hendershot's deed to them, similarly conveyed Block 16, "1/2 of the vacated Oak Street and the alley that connects Oak Street and Fir Street, AND ½ of the vacated Fir Street." In 2006, Ludlow filed the underlying suit against Hackett, James and others, complaining with respect to Hackett and James that they misrepresented the status of their property ownership and breached the promises contained in the 2004 warranty deed. Ludlow averred that Emmet County had rejected a proposal for a development that he desired to place on Block 16, because questions existed regarding the ownership condition of the "vacated" streets mentioned in his deed. Hackett and James eventually filed a third-party complaint against Petoskey and Lawyers Title, primarily alleging their breach of contract in refusing to pay the policy's coverage limit or offer a defense against Ludlow's action. Petoskey and Lawyers Title moved for summary disposition of Hackett's and James's third-party complaint, which the circuit court dismissed pursuant to MCR 2.116(C)(8) and (10).

We review de novo the circuit court's summary disposition ruling. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). Because the parties referred to, and the circuit court considered, matters beyond the pleadings, we must ascertain whether the court properly granted the motion for summary disposition under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). A motion under subrule (C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a (C)(10) motion, this Court considers the pleadings and any affidavits, depositions, and other documentary evidence submitted by the parties in the

light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists for trial, or whether the moving party was entitled to judgment as a matter of law. *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000).

Initially, we observe that we need not analyze the precise nature of Hackett's and James's ownership of the streets and alley adjacent to Block 16, or the extent of the other subdivision lot owners' easements or other interests in the streets and alley adjacent to Block 16, in light of Emmet County's 1982, 1992 and 1996 resolutions of road abandonment under MCL 224.18(3). We find dispositive of this appeal the language in the insurance policy issued by Lawyers Title. "The construction and interpretation of the language in an insurance contract is a question of law that this Court reviews de novo." *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007).

In reviewing an insurance policy dispute, an appellate court looks "to the language of the insurance policy and interpret[s] the terms therein in accordance with Michigan's well-established principles of contract construction." *Citizens Ins Co, supra* at 82, quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999).

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity. [*Citizens Ins Co, supra* at 82, quoting *Henderson, supra* at 354.]

"'While we construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured.'" *Citizens Insurance Co, supra* at 82, quoting *Henderson, supra* at 354.

In deciding whether an insured is entitled to insurance benefits, we employ a two-part analysis. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). "First, we determine if the policy provides coverage to the insured." *Id*. (internal quotation omitted). "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Id*. at 161. If the policy does provide coverage, "we then ascertain whether that coverage is negated by an exclusion. It is the insured's burden to establish that his claim falls within the terms of the policy." *Id*. at 172 (internal quotation omitted).

In November 2003, Lawyers Title issued Hackett and James a "Commitment for Title Insurance," and supplied Hackett and James the actual title insurance policy only after they filed their third-party complaint. However, the parties do not suggest that the "Commitment for Title Insurance" and the actual insurance policy contained any different material terms or conditions. The Lawyers Title policy commences,

> SUBJECT TO THE EXLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, LAWYERS TITLE . . . insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:
>
> 1. Title to the estate or interest described in Schedule A being vested other than as stated therein; . . .

The referenced Schedule A extends coverage to the following:

> 4. The land referred to in this policy is described as follows:
>
> Situated in the Township of Carp Lake, Emmet County, Michigan:
>
> All of Block 16, Mich-Eden No. 1, according to the Plat thereof as recorded in Liber 5 of Plats, Page 01, Emmet County Records.

The "Conditions and Stipulations" portion of the policy expressly defines "land" as follows:

> 1.(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. *The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways* or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy. [Emphasis added.]

We conclude that the clear and unambiguous terms of the Lawyers Title policy do not afford coverage to the streets and alleys abutting Block 16. Our reading of Schedule A, together with the plain language defining the "land" covered by the policy, "fairly leads to only one reasonable interpretation."[1] *Heniser*, *supra* at 161. The sole reasonable interpretation arising from our review of Schedule A and the definition of "land" is that the Lawyers Title policy insures Hackett's and James's title to the "land" comprising "[a]ll of Block 16," which does not encompass "*any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, [or] ways* . . . ." (Emphasis added). Consequently, irrespective whether the other Mich-Eden No. 1 lot owners possess private easement rights in the abandoned Oak Street and Fir Street, as Hackett and James urge, the Lawyers Title policy broadly and plainly removes from

[1] In moving for summary disposition, Petoskey and Lawyers Title invoked the policy definition of "land," but the circuit court did not rely on this definition. To the extent that this issue may technically qualify as unpreserved, we nonetheless may consider it for the first time on appeal because it involves a question of law. *In re Nestorovski Estate*, ___ Mich App ___; ___ NW2d ___ (Docket No. 271704, issued March 31, 2009), slip op at 3.

coverage "*any* rights, title, interest, estate or easement," private or public, "in abutting streets road, avenues, alleys, [and] lanes . . . ." (Emphasis added). Furthermore, the policy definition of "land" in the Lawyers Title policy does not contravene public policy. *Id.*

In summary, the circuit court reached the correct result in granting Petoskey and Lawyers Title summary disposition of the third-party complaint pursuant to MCR 2.116(C)(10), although for a different reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007) (observing that "we will not reverse if the right result is reached, albeit for the wrong reason").[2]

Affirmed.

/s/ William C. Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher

[2] Even assuming that the third-party complaint suggested that Petoskey and Lawyers Title negligently "examined the title" pertaining to Block 16, the circuit court found in light of admissions by Hackett and James that they did not request an abstract of title from Petoskey or Lawyers Title. Hackett and James do not reference negligence on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (noting that where a party fails to brief the merits of an allegation of error, he has abandoned it on appeal). Moreover, Michigan does not recognize tort actions against title insurers. See *Mickam v Joseph Louis Palace Trust*, 849 F Supp 516, 521 (ED Mich, 1993) (citing *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), in support of the proposition that "an abstracter who negligently performs a title search is liable to a foreseeable class of potentially injured persons," but observing that "no Michigan court has held that a title insurer or agent has a professional duty of care to those who employ them, outside of their contractual obligations").