STATE OF MICHIGAN

COURT OF APPEALS

KEVIN T. BLASER, TAMARA A. BLASER, LAURIE SIMMONS JEWELL, ARTHUR R. LENAGHAN, ANDREW LENAGHAN, KAREN LENAGHAN, DONALD WILLIAMS, BARBARA WILLIAMS, JOHN MUSCARI and MILDRED MUSCARI, Trustees of the JOHN MUSCARI and MILDRED B. MUSCARI REVOCABLE TRUST dated March 8, 2002,

Plaintiffs,

v

DALE M. DEVRIES and PERNELLA M. FOWLER,

Defendants/Third Party Plaintiffs-Appellees,

and

RICHARD G. BRISTOL and SANDRA L. BRISTOL,

Third Party Defendants,

and

FIRST AMERICAN TITLE INSURANCE COMPANY,

Third Party Defendant-Appellant.

UNPUBLISHED
November 29, 2011

No. 297555
Kalkaska Circuit Court
LC No. 08-009831-CH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Third party defendant First American Title Insurance Company (American) appeals as of right from the trial court's March 22, 2010, order granting third party plaintiffs-appellees Dale Devries's and Pernella Fowler's (appellees) motion for reimbursement of attorney fees, but American is primarily challenging the trial court's denial of its motion for summary disposition,

which dictated the trial court's decision on the attorney fee issue. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS

Third party defendants Richard and Sandra Bristol created seven lots in Rapid River Township, five of which they sold to plaintiffs. The deeds to those five parcels contained four restrictions: (1) no manufactured housing, (2) no cellular towers, (3) no sale of mineral rights, and (4) all homes built must be a minimum of 1,200 feet on the first level. These four restrictions were not placed on the deeds to the two other lots.

One of the lots that did not contain the restrictions was sold to appellees. Appellees subsequently obtained a special use permit from the Kalkaska County Planning Commission, which permitted them to build a second dwelling on their lot. Thereafter, plaintiffs filed a complaint for declaratory relief, seeking to impose the four restrictions on appellees' lot under a reciprocal negative easement theory. Appellees then filed a third-party complaint against American, alleging that American breached a title insurance contract and asking that a declaratory judgment be issued requiring American to defend appellees in the underlying lawsuit.

American and appellees moved for summary disposition on the third party complaint pursuant to MCR 2.116(C)(10). American argued that there was no coverage under the title insurance policy, because it contained an "exception" for restrictions that did not appear in the chain of title and an "exclusion" for title risks that did not arise until after the policy was in effect. Appellees responded that the restrictive covenant at issue was specifically defined as a covered risk, that the exclusions American referenced were inapplicable, and that even if the exclusions were applicable, American had a broader, separate duty under the policy to defend appellees in the underlying lawsuit.

On April 24, 2009, the circuit court issued an opinion denying American's motion for summary disposition and granting in part appellees' motion for summary disposition. The court first found that the portion of the title insurance policy excluding "[r]estrictions upon the use of the premises not appearing in the chain of title" was ambiguous, because it was unclear whether the 1,200 square foot "building restriction" at issue was a restriction upon the *use* of the premises. Because of this ambiguity, the circuit court found that there was a genuine issue of material fact whether the exception applied, and therefore summary disposition was inappropriate. The circuit court also rejected American's argument that the restriction did not affect the property until after the policy date, finding that if the 1,200 foot building restriction applied to appellees, it must have been applicable at the time they purchased the lot, or it would not affect the property at all. Finally, the circuit court found that American had a duty to defend appellees in the principal case until the factual issues were decided and it was determined whether the exclusions apply.

American moved for reconsideration, and on June 1, 2009, the circuit court issued an opinion and order clarifying its prior opinion and order. The circuit court noted the disparity between its ruling that genuine issues of material fact existed, while at the same time granting appellees summary disposition regarding American's duty to defend. The trial court then

acknowledged that it had failed to apply the rule that in a contract for insurance ambiguities are to be construed in favor of coverage and against the drafter, which in this case was American. It observed that when the ambiguous language is construed against American, there is no longer a question of fact regarding it, and therefore its decision that the ambiguities created questions of fact was in error. After construing the ambiguities against American, the trial court concluded that "American is obligated to defend and indemnify, if necessary [appellees] from the underlying suit, and this court finds as a matter of law that the claims asserted against [appellees] are covered by the applicable insurance policy and not within any of the exclusions and/or exceptions with that policy."

As a result of this ruling, the trial court ordered American to pay appellees $28,997.84, which represented the amount of attorney fees appellees had paid through May 15, 2009, in defending the underlying lawsuit that sought to impose the reciprocal negative easement *and* in pursuing appellees' claim that American was required to defend them in the underlying lawsuit.[1] The trial court also subsequently ordered American to pay appellees an additional $8,385.75, which represented the amount of attorney fees appellees paid from May 15, 2009, to October 16, 2009. Of this amount, $6,166.19 was related to the defense of the underlying lawsuit and $2,219.56 was related to appellees' claim that American was required to defend them in the underlying lawsuit. American now appeals.

II. STANDARD OF REVIEW

On appeal, a trial court's decision whether to grant a motion for summary disposition is a question of law that is reviewed de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). The motion is properly granted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 552. A genuine issue of material fact is found to exist "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The interpretation of an insurance contract and whether an ambiguity exists in the contract are questions of law that are reviewed de novo on appeal. *Wilkie v Auto–Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

III. ANALYSIS

American asserts that its motion for summary disposition should have been granted because two exclusions in the insurance policy it issued to appellees precluded coverage. Neither party asserts that the insurance contract is ambiguous. Instead, the disagreement turns upon whether the exclusions are applicable to the specific facts of the underlying lawsuit.

In *Century Surety Co v Charron*, 230 Mich App 79, 82-83; 583 NW2d 486 (1998), this Court summarized the guidelines for interpreting insurance policies and exclusionary clauses:

[1] The trial court's order does not specify what percentage of the $28,998.84 was for each lawsuit.

> "An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992). When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained the policy. The court must give the language contained in the policy its plain and ordinary meaning so that technical and strained constructions are avoided. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). If an insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. *Cavalier Mfg Co v Employers Ins of Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). Where the language of an insurance policy is clear and unambiguous, it must be enforced as written. Courts must be careful not to read an ambiguity into a policy where none exists. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).
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> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume." *Churchman*, *supra* at 567; *Frankenmuth Mut Ins Co v Masters*, [225 Mich App 51, 62; 570 NW2d 134 (1997), rev'd on other grounds 460 Mich 105 (1999).]

The Subsequently Arising Exclusion

The insurance policy specifically excludes coverage for title risks "that first affect your title after the Policy Date." The parties' dispute regarding this exclusion concerns when a reciprocal negative easement affects the property. American argues that the easement will not affect the property until a court grants relief and imposes it, which is clearly after the policy date. Appellees argue that the easement first applied, if at all, when the property was still owned by the Bristols, which was before the policy date.

Our Supreme Court has explained the doctrine of reciprocal negative easements, as follows:

> There must have been a common owner of the related parcels of land, and in his various grants of the lots he must have included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated. Once the plan is effectively put into operation, the burden he has placed upon the land conveyed is by operation of law reciprocally placed upon the land retained. In this way those who have purchased in reliance upon this particular restriction will be assured that the plan will be *completely* achieved. [*Lanski v Montealegre*, 361 Mich 44, 47, 104 NW2d 772 (1960) (emphasis in original).]

In an earlier case, our Supreme Court explained the doctrine in more detail:

> If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land, subject to its affirmative or negative mandates. It originates for mutual benefit and exists with vigor sufficient to work its ends. **It must start with a common owner**. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. **They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner.** Such a scheme of restrictions must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan**. If a reciprocal negative easement attached to defendants' lot, it was fastened thereto while in the hands of the common owner** of it and neighboring lots by way of sale of other lots with restrictions beneficial at that time to it. [*Sanborn v McLean*, 233 Mich 227, 229-230; 206 NW 496 (1925) (emphasis added).]

On the basis of the foregoing authority, it is clear that a reciprocal negative easement first arises the moment a landowner sells part of his property with a restriction that is intended for the entire property. When this occurs, the restriction included on the property that the landowner sells also attaches to the property that the landowner retains, regardless of whether the landowner includes the restriction in a subsequent sale of the property retained.

Turning to the immediate case, assuming the original landowners, the Bristols, behaved in a manner sufficient to create a reciprocal negative easement, it affected appellees' property when the property was still owned by the Bristols. Thus, the exclusion for title risks that first affect title after the policy date is inapplicable, because the reciprocal negative easement first affected the property before the policy date when the Bristols still owned the property.

The Chain of Title Exception

The insurance policy at issue here specifically provides an exception from coverage for "[r]estrictions upon the use of the premises not appearing in the chain of title." The parties agree that the restrictions do not appear in the chain of title. The parties' argument concerns the definition of "use of the premises" and specifically, whether the reciprocal negative easement claimed by plaintiffs is a restriction on the "use of the premises" subject to the exception.

We conclude that the above exception is clear and the trial court erred when it failed to enforce it as written. Giving these words their plain and ordinary meaning, *Century Surety Co*,

230 Mich App at 82, a restriction forbidding the construction of a house with a first level of less than 1,200 square feet is a restriction on the use of the premises.[2] Appellees argue that this restriction is a "building" restriction and not a "use" restriction. However, we do not find appellees' attempt to distinguish a building restriction from a use restriction persuasive, because a limitation on what a property owner may build on the premises necessarily restricts how the property owner can "use" the premises. In Michigan, "building" restrictions can include "use" restrictions, and these terms are not rigidly defined by Michigan caselaw. See e.g., *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 342; 591 NW2d 216 (1999). In any event, while the restriction at issue here may indeed be a "building restriction," plaintiffs' argument that the restriction is not subject to the exception because it is technically not what one thinks of as a "use restriction" is unpersuasive. The policy exception is broader than plaintiffs seek to read it; it does not only except "use restrictions" but "restrictions upon the use of the premises." The 1,200 square feet restriction limits the way a property owner can use the premises, because the owner cannot use the premises to build a house with a first level of less than 1,200 square feet. Thus, this exception applies to the underlying lawsuit seeking to impose the reciprocal negative easement. The trial court erred in finding otherwise and should have granted American's motion for summary disposition on this basis.

Attorney fees related to the duty-to-defend lawsuit

The award of attorney fees to appellees related to the duty-to-defend lawsuit was premised on appellees prevailing in that suit. Because appellees are no longer the prevailing party, they are not entitled to an award of attorney fees arising out of the duty-to-defend lawsuit.

Attorney fees related to the underlying lawsuit

After the trial court determined that American had a contractual duty to defend appellees in the underlying lawsuit, it ordered American to reimburse appellees for the attorney fees they had already expended in defense of the underlying lawsuit.[3] In other words, American's obligation to reimburse appellees stemmed from the trial court's ruling that the claims asserted against appellees in the underlying lawsuit were covered by the insurance policy and not within any of the exceptions. Because the trial court's determination that the underlying lawsuit was covered by the insurance policy and not with any of the exceptions was in error, its subsequent award of attorney fees based on that erroneous determination was also in error.

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[2] "Premises" is defined as "[a] house or building, along with its grounds." Black's Law Dictionary (8th ed), p 1219.

[3] The attorney fees related to the underlying lawsuit are more accurately characterized as damages for American's breach of the insurance contract than an "award" of attorney fees. When American refused to defend appellees in the underlying lawsuit, appellees mitigated their contractual damages by hiring an attorney to defend them. This is different from a situation where the losing party is required to pay the winning party's attorney fees, as is typically the case when speaking of awarding attorney fees.

Although, insurance companies have a separate duty to defend that is broader than the duty to indemnify, *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 16; 521 NW2d 480 (1994), this principle is inapplicable here. This rule concerns whether the underlying complaint arguably falls under the insurance policy, not whether a legal question regarding coverage will arguably be decided in favor of the insured. The fact that the insured credibly argued that the claims come within the policy coverage is irrelevant.

> An insurer's duty to defend is expansive and arises when any part of the claim is potentially or arguably within the scope of the policy's coverage, even if the allegations of the suit are false, fraudulent, or groundless. An insurer will therefore ultimately be obligated to defend more cases than it will be required to indemnify, because even the possibility that the insurer will have to indemnify the insured triggers the duty to defend. However, the duty to defend does not extend to circumstances where there is no duty to indemnify as a matter of law; there is no duty to defend as a matter of law only if there is no possible factual or legal basis on which the insurer could be obligated to indemnify the insured.
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> When coverage under the duty to defend depends on an outstanding factual dispute, the disputes must be resolved in favor of coverage until the insurer conclusively establishes that there is no potential for coverage. Conversely, when coverage depends on an unresolved legal question, there is no duty to defend. [14 Couch, Insurance, 3d, § 200:11, pp 20-21 (footnotes omitted).]

Here, because, as discussed above, the exception clearly applies, there is no duty to indemnify as a matter of law. There is no possible factual or legal basis on which American could be obligated to indemnify the insured, and thus it had no duty to defend the insured. As such, we vacate the trial court's orders requiring American to reimburse appellees for the attorney fees appellees initially expended in defending the underlying lawsuit.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro