STATE OF MICHIGAN

COURT OF APPEALS

WESTFIELD INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellant,

v

D & G DOLLAR ZONE,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

and

CHANNING M. MCAFEE,

Defendant-Appellee,

and

BURR & COMPANY,

Third-Party Defendant.

UNPUBLISHED
February 28, 2013

No. 306408
Genesee Circuit Court
LC No. 11-095742-CK

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

In this declaratory-judgment action, plaintiff appeals by right the circuit court's order denying its motion for summary disposition and granting partial summary disposition and declaratory relief in favor of defendants.[1] We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I

On or about October 13, 2009, defendant Channing McAfee (McAfee) purchased a pair of cosmetic, non-corrective contact lenses from a Flint-area dollar store owned and operated by

[1] In a subsequent order, the circuit court resolved the last pending claim and closed the case.

defendant D & G Dollar Zone (D & G). McAfee claims that after wearing the lenses, she developed a serious eye infection, a corneal ulcer, and other eye complications. McAfee alleges that as a result of her eye infection and other complications, she has suffered "permanent impairment of the vision in her right eye, including blurriness."

On January 5, 2011, McAfee filed suit against D & G in Genesee Circuit Case No. 11-095193-NP. McAfee set forth claims alleging products liability (Count I), negligence (Count II), and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. (Count III). McAfee claimed that she was in need of ongoing medical care and future eye surgery, and asserted that D & G had been at fault for selling the allegedly defective and unsafe contact lenses.

At the time McAfee purchased the allegedly defective lenses, plaintiff Westfield Insurance Company (plaintiff) insured D & G under a commercial insurance policy. Plaintiff agreed to defend D & G in the underlying lawsuit under a reservation of rights.

On April 4, 2011, plaintiff commenced the instant declaratory-judgment action in the Genesee Circuit Court, naming both D & G and McAfee as defendants. Plaintiff alleged that it had no duty to indemnify D & G against the claims asserted by McAfee in the underlying lawsuit because McAfee's injury had not resulted from an "occurrence" as defined by the insurance policy. Plaintiff also alleged that several exclusions in the insurance policy precluded coverage related to McAfee's claims. For instance, under the heading "Professional Services," the policy stated that "[t]his insurance does not apply to . . . '[b]odily injury', 'property damage' or 'personal and advertising injury' caused by the rendering or failure to render any professional service," including "[a]ny service, treatment, advice or instruction for the purpose of appearance" and "optical . . . services including the . . . distribution of ophthalmic lenses and similar products . . . ." In addition, under the heading "Expected or Intended Injury," the policy stated that "[t]his insurance does not apply to . . . '[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured."

On June 3, 2011, D & G filed its countercomplaint and third-party complaint. D & G asserted counterclaims of fraud and breach of contract against plaintiff. Further, D & G asserted claims of fraud, breach of contract, and negligence against third-party defendant Burr & Company (Burr).[2] Among other things, D & G alleged that "[a]t the time of the purchase of the policy, both Westfield and Burr represented that the insurance policy D & G intended to purchase from Westfield would cover products D & G sold, including, but not limited to, 'non-corrective contact lenses.'"

On July 13, 2011, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff argued that the three aforementioned exclusions in the insurance policy

[2] Third-party defendant Burr was D & G's insurance agent. The essence of D & G's third-party complaint was that Burr had failed to procure the correct type of insurance for D & G, specifically insurance that would cover defective contact lenses and other similar products sold in D & G's store. Burr is not a party to this appeal.

precluded any coverage related to McAfee's claims. In particular, plaintiff contended that coverage was barred by the "Professional Services" exclusion pertaining to "the . . . distribution of ophthalmic lenses and similar products . . . ." Plaintiff argued that "[b]ecause there is no coverage for the McAfee claims under the plain terms of the Westfield policy, the issue is one of law for the courts and should be decided by way of summary disposition."

Plaintiff also sought partial summary disposition with respect to D & G's countercomplaint. Plaintiff argued that D & G's counterclaim of fraud should be dismissed under MCR 2.116(C)(8). Plaintiff argued that D & G had failed to plead its fraud counterclaim with particularity as required by MCR 2.112(B)(1), that any allegedly fraudulent statements were related to the issue of future insurance coverage rather than to existing facts, that D & G had failed to provide evidence of reasonable reliance on any allegedly false statements, and that it had made no false statements in the first instance.

McAfee responded to plaintiff's motion for summary disposition. McAfee argued that her injuries had arisen out of an "occurrence" as defined by the insurance policy. She also contended that the "Professional Services" exclusions relied on by plaintiff were not applicable to bar coverage because D & G had merely sold a product in its dollar store. McAfee pointed out that no "professional" such as an optometrist had ever been involved in the sale of the contact lenses. Therefore, she argued, the sale was not a "professional service." McAfee further asserted that the insurance policy provided coverage for her MCPA claim because that claim was grounded in negligence. McAfee argued that the insurance policy unambiguously conferred on plaintiff a duty to defend and to indemnify. McAfee sought judgment in her favor under MCR 2.116(I)(2).

In reply, plaintiff again argued that the "Professional Services" exclusions pertaining to "ophthalmic lenses" and "personal appearance" foreclosed coverage related to all of McAfee's claims. Plaintiff contended that because the exclusion pertaining to ophthalmic lenses specifically mentioned the "distribution of ophthalmic lenses and similar products," it applied to retail sales.

D & G filed a brief concurring with McAfee's response. D & G argued that the "Professional Services" exclusions did not apply to the mere "sale of goods from a dollar store." Rather, D & G contended that the exclusions applied only to specific advice or services offered by licensed professionals. D & G argued that a "sale" was not a "professional service." D & G also asserted, albeit in conclusory fashion, that it had pled its fraud counterclaim with sufficient particularity and that McAfee's MCPA claim was covered by the insurance policy.

On August 29, 2011, after dispensing with oral argument, MCR 2.119(E)(3), the circuit court issued an opinion and order denying plaintiff's motion for summary disposition and granting partial summary disposition and declaratory relief in favor of defendants. The circuit court ruled that neither of the "Professional Services" exclusions relied on by plaintiff was applicable to bar coverage in this case. The circuit court also ruled that McAfee's injury constituted a "bodily injury" and was caused by an "occurrence" within the meaning of the

insurance policy, and that the insurance policy provided coverage relating to McAfee's MCPA claim.[3]

II

We review de novo the circuit court's grant or denial of summary disposition in a declaratory-judgment action *MEEMIC v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). We similarly review de novo the circuit court's grant of declaratory relief, *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993), as well as the proper interpretation of an insurance contract, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

III

As a preliminary matter, we note that McAfee's injury constituted a "bodily injury" and was caused by an "occurrence" within the meaning of the insurance policy. The policy defines "[b]odily injury" in relevant part as "bodily injury, sickness or disease sustained by a person . . . ." It was beyond factual dispute that McAfee's allegations of a serious eye infection, a corneal ulcer, and other eye complications, including "permanent impairment of the vision in her right eye," fell within this definition of "bodily injury."

The insurance policy states that insurance coverage will be provided for "bodily injury," but "only if . . . [t]he 'bodily injury' . . . is caused by an 'occurrence[.]'" The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although the policy does not define the term "accident," our Supreme Court has "repeatedly stated 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) (citation omitted); see also *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 144; 610 NW2d 272 (2000). Whether a specific event constitutes an "accident" within the meaning of an insurance policy "should be framed from the standpoint of the insured, not the injured party." *Frankenmuth*, 460 Mich at 114. Accordingly, in the instant case, whether McAfee's injury resulted from an "accident" must be evaluated from the standpoint of D & G. *Id*.

[3] In the order of August 29, 2011, the circuit court purported to grant summary disposition in favor of D & G concerning its breach-of-contract counterclaim. In addition, the circuit court ruled that D & G had pled a legally cognizable counterclaim of fraud and therefore denied plaintiff's request for dismissal of the fraud claim under MCR 2.116(C)(8). In a subsequent order of September 16, 2011, the circuit court vacated its earlier grant of summary disposition for D & G with respect to the breach-of-contract counterclaim, dismissing the counterclaim as moot. In the same order, the court dismissed D & G's fraud counterclaim with prejudice, but allowed for the possibility of refiling the fraud claim if the court's ruling concerning insurance coverage was reversed on appeal. The order of September 16, 2011, resolved the last pending claim and closed the case.

From the standpoint of D & G, which voluntarily offered the contact lenses for sale at its dollar store, McAfee's injury certainly resulted from "'an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things[.]'" *Id*. Indeed, it would be ridiculous to assert that D & G knew or intended that an injury would result from its sale of the contact lenses. Because McAfee's injury was the result of an "accident," we conclude that it was "caused by an 'occurrence'" within the meaning of the insurance policy.

IV

On appeal, plaintiff asserts that two exclusions[4] in the insurance policy preclude all coverage related to McAfee's claims. Specifically, plaintiff argues that coverage is foreclosed by the insurance policy's "Professional Services" exclusions pertaining to "ophthalmic lenses" and "personal appearance."[5] We cannot agree.

The applicability of both exclusions is limited to circumstances involving "the rendering or failure to render any professional service[.]" "Whether a professional service is being rendered depends on the nature of the act or omission, not the character or title of the person who acted or failed to act." *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 528; 679 NW2d 106 (2004); see also *American Fellowship Mut Ins Co v Insurance Co of North America*, 90 Mich App 633, 638; 282 NW2d 425 (1979).

The term "professional service" is not defined in the policy of insurance. However, the general rule is that a "professional service" is "one arising out of a vocation or occupation involving specialized knowledge or skills, and the skills are mental as opposed to manual." 46 CJS, Insurance, § 1378, p 264. In considering the term "professional service," this Court has previously observed:

> "[S]omething more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind." [*St Paul Fire & Marine Ins Co v Quintana*, 165 Mich App 719, 723; 419 NW2d 60 (1988), quoting *Marx v Hartford Acc & Indemnity Co*, 183 Neb 12, 13; 157 NW2d 870 (1968).]

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[4] Plaintiff argued below that the policy's "expected or intended injury" exclusion also precluded coverage in this case. However, plaintiff does not raise this argument on appeal. Accordingly, applicability of the "expected or intended injury" exclusion is not before this Court.

[5] The policy's "ophthalmic lenses" and "personal appearance" exclusions provide in pertinent part: "This insurance does not apply to . . . '[b]odily injury', 'property damage' or 'personal and advertising injury' caused by the rendering or failure to render any professional service," including "[a]ny service, treatment, advice or instruction for the purpose of appearance" and "optical . . . services including the . . . distribution of ophthalmic lenses and similar products . . . ."

In *Marx*, 183 Neb at 13, the Nebraska Supreme Court observed that the term "professional . . . services" connotes some degree of learning, proficiency, or intellectual skill, and does not encompass the "production or sale of commodities." Similarly, in *St Paul Fire & Marine Ins Co v Three D Sales, Inc*, 518 F Supp 305, 310 (D ND, 1981), the United States District Court for the District of North Dakota held that a farmer's act of selling his own farm products was not a "professional service" for purposes of an exclusion in the parties' insurance contract.[6]

After reviewing the language of the insurance policy, as well as the relevant authorities, we conclude that the term "professional service," as used in the instant exclusions, does not contemplate the mere sale of goods at a dollar store. When selling the contact lenses to McAfee, neither D & G nor any of its employees was required to exercise any specialized skill or knowledge. Instead, the retail sale of the contact lenses was a routine act flowing from mere employment or vocation. See *Quintana*, 165 Mich App at 723. Nor was D & G's sale of the contact lenses a "[p]rofessional service" of the type or nature described in MCL 450.222(c). We conclude that the retail sale of cosmetic, non-corrective contact lenses at D & G's dollar store did not involve "the rendering or failure to render any professional service" within the meaning of the insurance policy. Therefore, the circuit court correctly ruled that neither the "ophthalmic lenses" exclusion nor the "personal appearance" exclusion applied in this case.[7]

V

According to plaintiff, McAfee's claim that D & G violated the MCPA did not fall within the insurance policy's definition of "occurrence" because it was not based on allegations of an accident, but rather of intentional conduct. Thus, plaintiff argues, the circuit court erred by failing to grant summary disposition in its favor concerning the issue of insurance coverage for the MCPA claim. We agree.

Plaintiff correctly notes that McAfee's MCPA claim did not arise out of an "occurrence" within the meaning of the insurance policy. In the underlying lawsuit, McAfee alleged that D & G had violated the MCPA by (1) causing confusion and misunderstanding regarding the

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[6] Albeit not decisive to our interpretation of the instant policy language, the Michigan Legislature has defined "[p]rofessional service" as "a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Professional service includes, but is not limited to, services rendered by a certified or other public accountant, chiropractor, dentist, optometrist, veterinarian, osteopathic physician, physician, surgeon, podiatrist, chiropodist, physician's assistant, architect, professional engineer, land surveyor, or attorney-at-law." MCL 450.222(c).

[7] Our conclusion might be different if McAfee had purchased corrective or prescription contact lenses. It appears that, in such a case, the "Professional Services" exclusion pertaining to "ophthalmic lenses" likely would have applied. However, as explained earlier, McAfee purchased cosmetic, non-corrective lenses. Therefore, she did not require the professional services of an optometrist.

goods it offered for sale, (2) using deceptive representations concerning its merchandise, (3) representing that the goods it offered for sale were safe or of a particular standard and quality, (4) misleading or deceiving its customers by failing to reveal certain material facts concerning its merchandise, and (5) making material misrepresentations about the nature or quality of its merchandise. See MCL 445.903(1). Violation of the MCPA generally requires purposeful conduct or an intent to deceive. See *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 418; 415 NW2d 206 (1987); *In re Packaged Ice Antitrust Litigation*, 779 F Supp 2d 642, 666 (ED Mich, 2011). Therefore, despite defendants' assertions to the contrary, the substance of McAfee's MCPA claim did not sound in negligence and did not arise out of an "occurrence" or "accident." Because McAfee's claim that D & G had intentionally violated the MCPA was not based on accidental conduct, it was beyond dispute that the insurance policy provided no coverage for the claim. We reverse the circuit court's ruling to the contrary and remand for entry of judgment in favor of plaintiff regarding the issue of coverage for the MCPA claim.

VI

Lastly, plaintiff argues that D & G failed to plead its counterclaim of fraud with sufficient particularity as required by MCR 2.112(B)(1). We decline to address the merits of this issue. In its final order dated September 16, 2011, the circuit court dismissed D & G's fraud counterclaim with prejudice. It is true that the court allowed for the possibility of refiling the fraud claim in the event that its ruling on the issue of insurance coverage was reversed on appeal. It is also true that we are reversing that portion of the circuit court's ruling that declared the existence of insurance coverage for the MCPA claim. However, D & G's fraud claim has not been refiled at this time and it is not clear if it will ever be refiled. It is well settled that this Court will not consider hypothetical issues on appeal, reach the merits of issues that are not ripe for review, or issue advisory opinions. See *People v Hart*, 129 Mich App 669, 674; 341 NW2d 864 (1983); *Rozankovich v Kalamazoo Spring Corp (On Rehearing)*, 44 Mich App 426, 428; 205 NW2d 311 (1973).

VII

McAfee's injury constituted a "bodily injury" and was caused by an "occurrence" within the meaning of the insurance policy. Further, the circuit court correctly ruled that the insurance policy's "Professional Services" exclusions pertaining to "ophthalmic lenses" and "personal appearance" did not apply in this case. We affirm that portion of the circuit court's order that granted summary disposition and declaratory relief in favor of defendants with respect to the issue of insurance coverage for McAfee's products liability and negligence claims. Plaintiff has a duty to defend and indemnify D & G against the products liability and negligence claims.

However, the circuit court erred insofar as it determined that the insurance policy provided coverage for McAfee's MCPA claim. Because McAfee's MCPA allegations were not based on and did not arise out of an "occurrence" or "accident," there is no insurance coverage for the MCPA claim. We reverse that portion of the circuit court's order that granted summary disposition and declaratory relief in favor of defendants with respect to the issue of coverage for the MCPA claim, and remand for entry of judgment and declaratory relief in favor of plaintiff on this issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood