



In the Missouri Court of Appeals Eastern District

DIVISION THREE

KEN AND JANET ALLEN	)	No. ED99111
	)	
AND	)	
	)	
FRANKLIN QUICK CASH,	)	
	)	
Respondents,	)	Appeal from the Circuit Court
	)	of Franklin County
vs.	)	
	)	
CONTINENTAL WESTERN	)	Honorable John B. Berkemyer
INSURANCE COMPANY,	)	
	)	
Appellants.	)	FILED: April 30, 2013

Plaintiffs/Respondents, Ken and Janet Allen (the "Allens") and Franklin Quick Cash, L.L.C. (collectively, "Insureds"), sought damages for Defendant/Appellant's, Continental Western Insurance Company ("Continental Western"), refusal and failure to defend Insureds in an action arising out of the Allens' and Quick Cash's alleged wrongful repossession of an automobile from Stephanie Whipple. Both the Insureds and Continental Western filed motions for summary judgment, whereupon the trial court entered summary judgment in Insureds' favor. We reverse and remand.

I. BACKGROUND

Franklin Quick Cash ("FQC"), a Missouri limited liability company, is in the business of making title and payday loans. Ken Allen is the registered agent of FQC.

Continental Western, for all times relevant hereto, provided commercial general liability (CGL) insurance coverage to FQC and the Allens ("Insurance Policy").

In 2005, FQC and the Allens allegedly twice repossessed Stephanie Whipple's ("Whipple") 1998 Plymouth voyager ("Vehicle"). Thereafter, on August 19, 2005, in the Circuit Court of Franklin County, Whipple filed a petition ("Petition") against FQC and Ken Allen alleging two counts of conversion and seeking compensatory and punitive damages ("Underlying Action"). On October 24, 2006, after reviewing the claims presented by Whipple in the Underlying Action, Continental Western advised FQC and Ken Allen that counsel would not be retained to represent them in the Underlying Action because the damages sought by Whipple were not covered by the Insurance Policy ("First Refusal").

On August 1, 2008, Whipple filed her First Amended Petition ("Amended Petition") in the Underlying Action. In the Amended Petition, Whipple sought damages for conversion (Counts I and III) and negligence (Counts II and IV). Continental Western reaffirmed its First Refusal, and offered no legal assistance in defending the Underlying Action because the damages sought by Whipple in the Amended Petition, again, were not covered by the Insurance Policy.

This Court, on October 19, 2010, had the opportunity to determine the sufficiency of Whipple's claims in her Amended Petition after the trial court granted Ken Allen's motion to dismiss for failure to state a claim upon which relief may be granted. Whipple v. Allen, 324 S.W.3d 447, 448 (Mo. App. E.D. 2010). In Whipple v. Allen, this Court affirmed the trial court's dismissal of Whipple's negligence claims (Counts II and IV), but

reversed the dismissal of Whipple's conversion claims (Counts I and III). Id. at 451. The Underlying Action is currently still pending in the Circuit Court of Franklin County.

Subsequently, on January 26, 2011, FQC and the Allens commenced this lawsuit against Continental Western, seeking damages for Continental Western's failure to provide a defense for Insureds in the Underlying Action. After competing motions for summary judgment were filed, the trial court granted the Insureds' motion, finding that Continental Western owed a duty to Insureds to defend the Underlying Action and ordered damages in the amount of \$45,904.50.

This appeal now follows.

II. DISCUSSION

Continental Western raises five points on appeal. As indicated by each point, the determinative issue on appeal is whether the damages sought in the Underlying Action were covered by the Insurance Policy provided by Continental Western, requiring a duty to defend the Insureds.

Standard of Review

As are the circumstances in the case at bar, "[s]ummary judgment is frequently used in the context of insurance coverage questions, and the interpretation of an insurance policy is a question of law." Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo., 992 S.W.2d 308, 312 (Mo. App. E.D. 1999). Appellate review of summary judgment is *de novo*. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The criteria on appeal for testing the propriety of summary judgment are the same as the criteria applied by the trial court to test the propriety of summary judgment. Id. This Court reviews the record in the light most

favorable to the party against whom summary judgment is entered and accords the non-movant "the benefit of all reasonable inferences from the record." Id. Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. E. Mo. Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield, 386 S.W.3d 755, 759 (Mo. banc 2012); see also Rule 74.04(c)(6).

Where, as here, the trial court does not identify its reasons for sustaining a motion for summary judgment, the trial court is presumed to have based its decision on the grounds specified in the motion for summary judgment. Comp & Soft, Inc. v. AT&T Corp., 252 S.W.3d 189, 194 (Mo. App. E.D. 2008). However, "[i]f the trial court's judgment is sustainable on any ground as a matter of law, even one different than that posited in the motion for summary judgment, the judgment should be sustained." Tonkovich v. Crown Life Ins. Co., 165 S.W.3d 210, 215 (Mo. App. E.D. 2005).

Analysis

A. Duty to Defend

In Missouri, an insurer's duty to defend is broader than that of the duty to indemnify. Penn-Am. Ins. Co. v. The Bar, Inc., 201 S.W.3d 91, 96 (Mo. App. W.D. 2006); see also Lumber Mut. Ins. Co. v. Reload, Inc., 113 S.W.3d 250, 253 (Mo. App. E.D. 2003) ("An insurer may have a duty to defend claims falling within the policy even if it may not ultimately be obligated to indemnify the insured."). "The duty to defend arises whenever there is a *potential or possible liability* to pay based on the facts at the outset of the case and is not dependant on the probable liability to pay based on the facts ascertained through trial." McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab.

_____, 989 S.W.2d 168, 170 (Mo. banc 1999) (citations omitted) (emphasis added). In determining an insurer's duty to defend a suit against its insured, the court compares the language of the insurance policy with the allegations asserted in the plaintiff's petition. Stark Liquidation Co. v. Florists' Mut. Ins. Co., 243 S.W.3d 385, 392 (Mo. App. E.D. 2007). If the plaintiff's petition merely alleges facts giving rise to a claim potentially within the insured's policy coverage, the insurer has a duty to defend. Id.

However, beyond the facts alleged in the plaintiff's petition, those facts which are known or ascertainable also control an insurer's duty to defend. Trainwreck W. Inc. v. Burlington Ins. Co., 235 S.W.3d 33, 42 (Mo. App. E.D. 2007); see also Standard Artificial Limb, Inc. v. Allianz Ins. Co., 895 S.W.2d 205, 210 (Mo. App. E.D. 1995) ("The insurer cannot ignore safely actual facts known to it or which could be known to it or which could be known from reasonable investigation."). Therefore, an insurer's duty to defend its insured arises when the facts—either alleged in the plaintiff's petition or reasonably ascertainable—evidence a claim that is potentially covered. Cook's Fabrication & Welding, Inc. v. Mid-Continent Cas. Co., 364 S.W.3d 639, 646 (Mo. App. E.D. 2012). For an insurer to discharge its duty to defend its insured, the insurer "must prove that there is *no possibility* of coverage." Stark Liquidation Co., 243 S.W.3d at 392 (quoting Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 79 (Mo. App. W.D. 2005)) (emphasis in original).

As is required, this Court begins with the allegations asserted in the Underlying Action and compares those allegations to the plain language of the Insurance Policy to determine if there is potential or possible liability, requiring Continental Western to provide a defense for Insureds. We note that neither party contends ambiguity exists

within the Insurance Policy, nor does this Court find ambiguity. Accordingly, we need not resort to the rules of construction, but, rather, this Court interprets and enforces the policy as written. Krombach v. Mayflower Ins. Co., Ltd., 827 S.W.2d 208, 210 (Mo. banc 1992).

i. Whipple's Allegations in the Underlying Action

In her Amended Petition,¹ Whipple alleged two counts of conversion and two counts of negligence in connection with FQC and the Allens twice repossessing her vehicle in 2005.² Besides the different dates of alleged conversion, Counts I and III are identical:

8. On or about March 8, 2005 in Franklin County, Missouri, defendants took from plaintiff possession of plaintiff's motor vehicle, a 1998 Plymouth Voyager, at which time:
 - a. defendants were not authorized to assume ownership or possession of the said vehicle;
 - b. defendants intended to exercise control over the said vehicle;
 - c. defendants did so to the exclusion of plaintiff's rights in the said vehicle;
 - d. plaintiff was the owner of the said vehicle;
 - e. plaintiff was lawfully entitled to immediate possession of the said vehicle;
 - f. defendants appropriated the said vehicle to the use of defendants;

¹ Usually, we must determine when an insurer's duty to defend arose (i.e., at the filing of the Petition or the filing of the Amended Petition). However, this case does not call for such analysis because we find Continental Western had no duty to defend under the Amended Petition (which restated the same conversion allegations as asserted in the Petition). Thus, for ease of analysis, we disregard the Petition and concentrate solely on the Amended Petition.

² We note that, while Whipple v. Allen, *supra*, disposed of Whipple's negligence allegations (Counts II and IV), this Court is not concerned with the facts adduced during trial. Columbia Mut. Ins. Co. v. Epstein, 239 S.W.3d 667, 670 (Mo. App. E.D. 2007). Rather, "[t]he obligation of defendant to defend a suit filed against plaintiff is to be determined from the cause of action pleaded, **at the time the action is commenced**, not from what an investigation or a trial of the case may show the true facts to be." Trainwreck W. Inc., 235 S.W.3d at 39 (quoting Inter-State Oil Co. v. Equity Mut. Ins. Co., 183 S.W.2d 328, 332 (Mo. App. 1944)) (emphasis in original). As such, we determine whether Continental Western's duty to defend Insureds arose by looking at whether the Amended Petition pled facts or claims giving rise to potential or possible liability covered by the Insurance Policy. McCormack Baron Mgmt. Serv., Inc., 989 S.W.2d at 170.

- g. defendants thereby deprived plaintiff of possession and control of the said vehicle.
- 9. Since the time of defendants' said March 8, 2005 appropriation of the vehicle, plaintiff has demanded that defendants surrender the vehicle to plaintiff, but defendants have refused to do so.
- 10. As a direct and proximate result of the foregoing conduct, acts and omissions of defendants, plaintiff has been damaged.
- 11. Defendants' aforesaid conduct was outrageous, intentional, willful, wanton, malicious and done with actual malice and in disregard of the rights of plaintiff, entitling plaintiff to an award of punitive damages.

Similarly, besides the different dates of alleged negligence, Counts II and IV are identical:

- 12. Plaintiff restates, realleges and incorporates by reference each and every allegation contained in paragraphs 1-9 hereof, as if here fully set out.
- 13. Defendants aforesaid conduct was negligent.
- 14. As a direct and proximate result of the aforesaid conduct, acts and omissions of defendants, plaintiff has been damaged.

ii. Relevant Portions of the Insurance Policy

In pertinent part, the insurance policy provided to Insureds by Continental

Western reads:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply

- b. This insurance 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";

2. Exclusions

This insurance does not apply to:

- a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

SECTION V – DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

17. "Property damage" means:

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

B. The Amended Petition's allegations do not constitute "property damage"

As indicated by the plain and unambiguous language of the insurance policy, in order to fall within the insuring agreement, the following requirements must be met: (1) there must be a suit seeking to recover damages for "bodily injury" or "property damage"; and (2) the "bodily injury" or "property damage" must be the result of an "occurrence." Here, Insureds contend that damages were sought for "property damage."

i. Conversion (Counts I & III)

First, the issue at bar is whether the tort of conversion constitutes an "occurrence" giving rise to "property damage." The Insurance Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

While the Insurance Policy does not define "accident," Missouri courts have defined its common meaning as:

An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event. Hence, often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a mishap resulting in injury to a person or damage to a thing; a casualty; as, to die by an accident.

West v. Jacobs, 790 S.W.2d 475, 477 (Mo. App. W.D. 1990) (overruled on other grounds). An "accident" need not be a sudden event, but, rather, may be the result of a process. White v. Smith, 440 S.W.2d 497, 510 (Mo. App. 1969). "The focus of the definition is the insured's foresight or expectation of the injury or damages." Columbia Mut. Ins. Co., 239 S.W.3d at 672.

The alleged conversion of Whipple's car was an intentional act not falling within the meaning ascribed to the term "occurrence" or "accident." Indeed, conversion requires "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it[.]" Lacks v. R. Rowland & Co., Inc., 718 S.W.2d 513, 520-21 (Mo. App. E.D. 1986). Clearly, the intentional tort of conversion is at odds with the definition of "accident" which requires that the act not be deliberate. Even when giving Insureds all reasonable inferences, we are unable to find a single factual allegation evidencing that Insureds' act of repossession of Whipple's Vehicle was anything but intentional. In fact, the Amended Petition itself states as much when it

claims that Insureds' conversion of Whipple's Vehicle was "intentional, willful, [and] wanton." Khulusi v. Sw. Bell Yellow Pages, Inc., 916 S.W.2d 227, 230 (Mo. App. W.D. 1995) ("Willful and wanton conduct means an intentional act.").

Like the two other courts that have interpreted similar insurance policies under similar facts, we find the tort of conversion does not fall within the coverage of the Insurance Policy. See Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.3d 1116 (7th Cir. 1998); Landers Auto Group No. One, Inc. v. Cont'l W. Ins. Co., 621 F.3d 810 (8th Cir. 2010). For instance, in Massachusetts Bay Insurance Co., the insurer sought a declaratory judgment that it maintained no duty to defend its insured in the underlying action against the insured for alleged wrongful repossession. Mass. Bay Ins. Co., 136 F.3d at 1118. In interpreting almost identical insurance clauses, the Seventh Circuit held that the insureds' conversion of the car in the underlying action was "an intentional act not falling within the meaning ascribed to the term 'accident,'" and thus, the insurer had no duty to defend. Id. at 1124-25.

As Insureds' repossession of the automobile was an intentional and affirmative act calculated to deprive Whipple of the use and possession of the Vehicle, it cannot be construed as an "occurrence" or "accident" under the terms of the policy. Accordingly, Continental Western has no duty to defend Insureds in the Underlying Action based upon Counts I and III for conversion.

ii. Negligence (Counts II & IV)

Disregarding the holding of Whipple v. Allen,³ *supra*, and focusing on the facts and claims alleged in Whipple's Amended Petition in Counts II and IV (negligence) and

³ In dismissing Counts II and IV (negligence) in Whipple's Amended Petition, Whipple v. Allen held:

those facts reasonably ascertainable by Continental Western, there is no evidence that Whipple's claims of negligence are covered by the Insurance Policy.

First, Whipple ostensibly attempts to plead that the intentional tort of conversion was also negligence (i.e., Amended Petition paragraphs 12 & 13, supra: "Plaintiff restates, realleges and incorporates by reference each and every allegation contained in paragraphs 1-9 hereof, as if here fully set out. Defendants aforesaid conduct was negligent."). "It is an axiom that theories based upon alleged 'negligent' and 'intentional' conduct are contradictory and mutually exclusive," and "[a] pleading that contains inconsistent theories within the same count is subject to dismissal." Gallatin v. W.E.B. Rest. Corp., 764 S.W.2d 104, 105 (Mo. App. W.D. 1988).

Second, we find the factual allegations of Count II and IV (negligence), including those allegations incorporated by references, premised upon intentional conduct (i.e., Amended Petition paragraph 8b, supra: "defendants intended to exercise control over the said vehicle"). See Ervin v. Coleman, 454 S.W.2d 289, 291 (Mo. App. 1970) ("defendant may have committed to cause plaintiffs harm was either (1) the tort of negligence or (2) the tort of willful, wanton or malicious misconduct, but it could not have been both at one and the same time, because the ultimate proof of negligence disproves willfulness and vice versa.") (internal citations omitted) (overruled on other grounds). Counts II and IV are devoid of any mention or implication of conduct sounding in negligence. See e.g., Brown v. Bailey, 210 S.W.3d 397, 404 (Mo. App. E.D. 2006) ("In order for a plaintiff to make a submissible negligence claim, he must prove the following: (1) the existence of a

negligence and conversion are fundamentally different causes of action, which require a plaintiff to plead different facts in order to sufficiently state a claim. Whipple fails to plead any facts that establish a duty or a breach of duty on the part of Allen. Whipple's failure to plead these essential elements renders Counts II and IV of the Petition deficient. Id. at 451.

duty to be performed by the defendant; (2) a breach of that duty; and (3) a resulting injury caused by the breach."). A review of Whipple's allegations reveals not a hint of negligent conduct alleged. See Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Emp., 43 S.W.3d 293, 302 (Mo. banc 2001) ("Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts. . . . Some explanation in one's pleading beyond vague assertions of harm is required."). The specific allegations contradict any possibility that the Insureds' conduct was negligent.

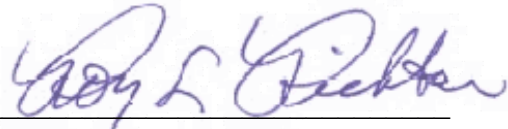
However, assuming, *arguendo*, Whipple's allegations of negligence create potential or possible coverage, we find, nevertheless, that the Insurance Policy excludes coverage. The Insuring Agreement does not apply to "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured."

Insureds consciously acted to repossess Whipple's Vehicle with both the intention and expectation that Whipple would not be able to use it. Truck Ins. Exch. v. Pickering, 642 S.W.2d 113, 116 (Mo. App. W.D. 1982) ("When an intentional act results in injuries which are the natural and probable consequence of the act, the injuries as well as the act are intentional."); See e.g., Mass. Bay Ins. Co., 136 F.3d at 1125-26; Landers Auto Group No. One, Inc., 621 F.3d at 815; Red Ball Leasing Inc. v. Hartford Acc. and Indem. Co., 915 F.2d 306, 311 (7th Cir. 1990) ("A volitional act does not become an accident simply because the insured's negligence prompted the act. Injury that is caused directly by negligence must be distinguished from injury that is caused by deliberate and contemplated act initiated at least in part by the actor's negligence at some earlier point.").

Therefore, Whipple's alleged counts of negligence were not potentially or possibly covered by the Insurance Policy. Continental Western's duty to defend was not triggered by Counts II and IV.

III. CONCLUSION

Based on the foregoing, the judgment is reversed and remanded to the trial court with instructions to enter summary judgment in favor of Continental Western.



Roy L. Richter, Judge

Robert G. Dowd, Jr., P.J., concurs
Angela T. Quigless, J., concurs