MISSOURI SUPREME COURT
SC93502

KEN AND JANET ALLEN,
AND
FRANKLIN QUICK CASH
Plaintiff's/Respondents,

v.

CONTINENTAL WESTERN INSURANCE COMPANY,
Defendant/Appellant.

APPEAL FROM CIRCUIT COURT OF FRANKLIN COUNTY,
STATE OF MISSOURI
20TH JUDICIAL CIRCUIT
THE HONORABLE JOHN B. BERKEMEYER
(Cause No. 11AB-CC00029)

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Respondents make the following additions and corrections to Appellant's Statement of Facts:

Respondent Franklin Quick-Cash, LLC, a payday lender and automobile title lender first licensed in 2000, (LF 26, LF 149 pgh 5), purchased a Commercial General Liability policy of insurance from Appellant through agent/broker Ted Schroeder in 2004 (LF 24-25).

The claimant in the underlying action, Stephanie Whipple sued Respondents for conversion in two counts claiming she had been damaged as a result of a repossession of two cars. (LF 148-153). Appellant refused to defend. (LF 154-157). Ms. Whipple amended her petition adding two counts, (Counts II and IV), alleging that in repossessing her cars Respondents had been negligent. (LF 158-164). Ms. Whipple's counts for conversion (Counts I, and III) requested punitive damages and alleged Respondents' conduct was outrageous, willfull, wanton and malicious and done with actual malice (LF 160, pgh 11, and LF 162-163 pgh 25). Whipple's counts alleging negligence (Counts II and IV) omitted allegations of outrageous, willfull, wanton and malicious behavior and did not request punitive damages [LF 161, 163, (Count II did not restate pgh 11 from Count

I; Count IV did not restate pgh 25 from Count III)]. Appellant refused to defend Respondents against the amended petition. (LF 80 pgh 5, LF 188 pgh 5). Ms. Whipple's amended petition included allegations that at the time of the repossessions:

a. Respondents were in the business of making title loans. (LF 159 pgh 5 of claimant's petition).

b. Respondents intended to exercise control over the vehicles they repossessed. (LF 159 pgh 8.b., LF 162 pgh 22.b. See also LF 79-80 pgh 2 admitted at LF 187 pgh 2),

c. Whipple was lawfully entitled to immediate possession of the vehicles, (LF 159 pgh 8.e., LF 162 pgh 22.e. See also LF 79-80 pgh 2 admitted at LF 187 pgh 2),

d. Respondents' appropriation of her cars deprived Whipple of possession and control of them (LF 159 pgh 8.g. LF 162 pgh 22.e. See also LF 79-80 pgh 2 admitted at LF 187 pgh 2),

e. Respondents' conduct was negligent (LF 160 pgh 13 163 pgh 27), and

f. as a direct and proximate result Whipple was damaged, (LF 161, 163).

Without the benefit of a lawyer provided by their insurer, Respondents successfully moved to dismiss Whipple's petition, (see *Whipple v. Allen*, 324 SW3d 447 (MoApp ED 2010). The Eastern District affirmed the dismissal of the negligence claims, but reversed the dismissal of the conversion claims, *Whipple v. Allen, supra*.

In 2004 when the coverage was sought, Franklin Quick Cash was described as a payday loan company and as an automobile title loan company to the agent/broker who wrote the coverage through Appellant Continental Western. (LF 24 pgh 3). The cover sheet of the policy provided by Appellant for June 2, 2004 through June 2, 2005 and the cover sheet for the renewal for June 2, 2005 through June 2, 2006 described Franklin Quick Cash as an "office," (LF 101). When Continental Western renewed the policy for the policy year June 2, 2006 through June 2, 2007 and thereafter, the cover sheet of the policy described the business as "Bank-Credit Union." (LF 27-29). Respondent Ken Allen, who requested the insurance for Franklin Quick Cash, LLC, did not request the change of the business

description on the cover sheet or request a different type of co-coverage. (LF 24 pgh 5).

The agent/broker who wrote the coverage through Continental Western had actual knowledge of the nature of Respondents' business and on occasion gave Respondents specific advice regarding their title loan business. (LF 24 pgh 6). Repossession of secured collateral is a routine and standard business occurrence in the operation of title lender business. (LF 25 pgh 9).

Respondents sued Continental Western for the damages they incurred in defending against Whipple's suit. The Circuit Court of Gasconade County issued summary judgment for Respondents.

POINT RELIED ON

(In response to points 1,2,3,5 and 5 of Appellant's Substitute Brief)

The judgment of the trial court was correct in that Continental Western owed a duty to defend Respondents against the claims of Ms. Whipple, because, while Whipple's allegations of "negligence" were not complete enough to state a cause of action, they put the insurer and the Respondents on notice that a "negligence" claim was being attempted, and the allegations raised the potential for a claim in negligence being pursued through amendment or otherwise.

McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab. Ins. Co., 989 SW2d 168, 170 (Mo. banc 1999).

Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 83 (MoApp WD 2005).

Penn-Star Ins. Co. v. Griffey, 306 SW3d 591, 596 (MoApp WD 2010).

Columbia Casualty Co. v. Hiar Holding, L.L.C., SC93026 (Mo. banc Aug. 13, 2013).

ARGUMENT

The judgment of the trial court was correct in that Continental Western owed a duty to defend Respondents against the claims of Ms. Whipple, because, while Whipple's allegations of "negligence" were not complete enough to state a cause of action, they put the insurer and the Respondents on notice that a "negligence" claim was being attempted, and the allegations raised the potential for a claim in negligence being pursued through amendment or otherwise.

Standard of Review

Summary Judgment is appropriate where the moving party demonstrates that he is entitled to judgment as a matter of law and that no genuine dispute exists as to any material fact required to support the judgment, *ITT Commercial Finance Corp. v. Mi-America Marine Supply Corp.*, 854 SW2d 371, 378 (Mo banc 1993). The standard of review regarding summary judgment is essentially de novo, *Hayes v. Show Me Believers, Inc.,* 197 SW3d 706, 707 (Mo banc 2006). Summary Judgment may be sustained on any theory supported by the record, *In re Estate of Blodgett,* 95 SW3d 79, 81 (Mo banc 2003).

Narrative of Argument

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 dependent on the probable liability to pay based on the facts ascertained through trial. *McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 SW2d 168, 170 (Mo. banc 1999). An insurer's duty to defend a suit against its insured is determined by comparing the language of the insurance policy with the allegations asserted in the plaintiff's petition, *Stark Liquid. Co. v. Florists' Mut. Ins.*, 243 SW3d 385, 392 (MoApp ED 2007). The insurer has a duty to defend if the petition merely alleges facts that give rise to a claim potentially within the policy's coverage, *Id.* An insurer, however, may not merely rest upon the allegations contained within the petition. *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 83 (MoApp WD 2005). "Rather it must also consider the petition in light of facts it knew or could have reasonably ascertained." *Id.* "To extricate itself from a duty to defend the insured, the insurance company must prove that there is *no possibility* of coverage." *Id.* at 79 (emphasis in original; internal citations omitted). The duty to defend an insured, which is broader than the duty to indemnify, arises at the time the allegations or ascertainable facts

establishing potential or possibility of coverage become known to the insurer, usually at the outset, ***no matter how unlikely it is that the insurer will be found liable***, *Penn-Star Ins. Co. v. Griffey*, 306 SW3d 591, 596 (MoApp WD 2010), (emphasis added). The claimant's pleading is to be given its broadest intendment in relation to the insurance coverage available for the purpose of determining the insurer's duty to defend, *Id.*

In this case the duty arose when the underlying claimant attempted to add two counts for "negligent" acts. Whipple obviously was attempting to plead something other than conversion, which had been alleged in the initial petition. It is noteworthy that the two counts added in the claimant's amended pleading excluded the allegations of outrageous, willfull, wanton and malicious behavior found in the counts for conversion and did not request punitive damages.

Admittedly, the claimant's attempt at adding counts alleging negligent acts to its petition was inartful- - and ultimately was held to be ineffective in *Whipple v. Allen, supra.* But this attempt at amending to include counts alleging negligent acts put the insurer on notice of the potential or possibility of coverage for claims in that litigation. As the Appellant/insured litigated *Whipple v. Allen* in the trial court, there was little to prevent the claimant

from amending her pleading again, this time adding the necessary art and removing the conflicting assertions of "intent" from the counts alleging negligence, thereby bringing it within the terms of insurance coverage. And such an amendment could have been added in the eleventh hour as the case proceeded to trial or submission to a jury, all while the insurer sat on the sidelines.

With leave to amend liberally afforded under Rule 55.33 and the discretion of the trial courts, it is entirely conceivable, if not likely, that a claimant, who goes to the trouble to describe acts of the insured using the word "negligent," would amend her pleadings again at or prior to trial so as to state a claim for negligence. This is particularly true in the instant case where Whipple went to the trouble to amend her initial petition, which initially raised claims for conversion without using the term "negligent," to adding two counts using the term "negligent," deficient as they were. By such acts, one must infer that Whipple intended to do more than merely repeat her claims for conversion unnecessarily.

This is not to say that the mere possibility of an amendment to pleadings obligates an insurer to provide a defense. But where, as here, the claimant makes an attempt to plead negligence, and negligent acts are

covered by the insurance policy, the insurer is on notice that attempts are being made by the claimant to bring a claim for which there is a possibility of coverage. These attempts at amending are ascertainable facts which establish the potential or possibility of coverage.

"If the allegations and ascertainable facts establish any ***potential*** or ***possible*** coverage, then the insurer has a duty to defend. This is true even if the petition contains other claims that would not be covered," *Id.* at 597, citing *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 SW3d 64 (MoApp WD 2005), (emphasis added). Said another way, an insured is entitled to a defense against all claims that are ***potentially*** or ***possibly*** covered, not simply those that are artfully drafted.

Appellant's analysis focuses only upon those allegations that exclude coverage. It does not examine the allegations or ascertainable facts that could establish potential or possible coverage. In particular it does not examine whether Whipple sought damages for an injury Franklin Quick Cash did not intend. An insurer refusing coverage under an intentional injury exclusion must show that the insured either intended or expected the injury to occur, *Columbia Casualty Co. v. Hiar Holding, L.L.C.,* SC93026

(Mo. banc Aug. 13, 2013), p. 15, see also *Am. Fam. Mut. Ins. Co. v. Pachetti,* 808 SW2d 369, 371 (Mo banc 1991).

Inasmuch as Whipple was at least attempting to plead something other than conversion when she added two counts to her petition, it is conceivable she was attempting to allege that Franklin Quick Cash was negligent in its assessment of its legal rights as a secured creditor. Appellant argues that the underlying claimant's amended counts that used the word "negligent" were claims for, using the words of the insurance policy exclusion, " . . . property damage expected or intended from the standpoint of the insured." In doing so, Appellant fails to give the amended pleading its broadest interpretation so as to include:

a) a claim that respondent was mistakenly negligent in making a decision to repossess a car over which it had no security interest, or

b) a claim that respondent negligently repossessed security upon a mistaken belief the note or finance agreement secured thereby was in default when it was not.

In either of those interpretations the resulting wrongful loss of use of property would not have been intended, inasmuch as the insured would have

believed his repossession of the property to be rightful. A rightful repossession does not result in a knowingly wrongful deprivation of property. A secured creditor exercising his right to repossession upon default does not intend to violate the possessory right of the debtor. The act of default makes the possessory right of the debtor inferior to that of the secured creditor. If a secured creditor negligently errs in determining its possessory rights, his subsequent intentional act of repossession, made in reliance upon his prior error in judgment, does not equate with intent to violate a superior possessory right of the debtor. Without the element of knowledge or intent to damage, policy exclusions for knowing or intentional acts do not apply, even if the act is done recklessly, *Newell v. State Farm Fire and Cas.* 901 SW2d 133 (MoApp WD).

Insurer Knew or Should Have Known Its Insured Claimed a Possessory Right as a Secured Creditor

Appellant's argument fails to acknowledge that in amending her petition Whipple was at least attempting to plead something other than conversion to something that potentially or possibly would be covered by the policy. Moreover, Appellant was not entitled to merely rest upon the allegations contained in the amended petition when assessing its obligation to defend, *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 SW3d at 83.

Appellant was obligated to consider the amended petition in light of the fact that its insured was in the automobile title loan business and that repossession of vehicles pledged as security was a regular and customary part of that business, *Id.*

The insurer cannot ignore actual facts known to it or which could be known to it or which could be known from reasonable investigation, *Standard Artificial Limb, Inc. v. Allianz Ins. Co.*, 895 SW2d 205, 210 (Mo. App. E.D. 1995). "[A]ctual facts are those 'facts which were known, or should have been reasonably apparent *at the commencement of the suit and not the proof made therein or the final result reached.*'" *Zipkin v. Freeman*, 436 SW2d 753, 754 (Mo. banc 1968), (emphasis added) (quoting *Marshall's U.S. Auto Supply v. Maryland Cas. Co.*, 189 SW2d 529, 531(Mo. 1945)).

Even if one assumes, that in 2005 and 2006 Appellant was not aware that it was insuring a title loan company, Paragraph 5 of the petition provided the necessary enlightenment. And if examination of the petition alone was not enough for Appellant to conclude its insured was in the car

loan business, the most cursory interview with its insured in response to the claim would reveal it.[1]

Faced with the amended petition and the knowledge or presumed knowledge that the insured was in the car loan business and customarily repossessed cars pledged as security, the insurer's focus should not have been simply upon the claimant's loss of use of the vehicles. Rather, as argued earlier, the insurer's focus should have been upon whether or not the insured was negligent in its assessment of its rights as a secured creditor.

Policy-Specific Arguments

1. Occurrence/accident

Appellant's concentration upon policy-specific arguments, such as whether "property damage" was invoked by an "occurrence" ignores the

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[1] The fact that the cover sheets for the policy and renewal in effect for the first two years of the policy did not make a difference in the coverage available to Franklin Quick Cash, for once the cover sheets for the renewals started identifying it as a "Bank-Credit Union," the coverage remained substantially the same.

broader duties of determining whether the insured intended the injury, *Columbia Cas. Co. v. Hiar Holding, L.L.C., supra* and whether the underlying claim established any potential or possible coverage, *Penn-Star Ins. Co. v Griffey*, 306 SW3d at 597, citing *Truck Ins. Exch. v. Prairie Framing, LLC, supra.* Such myopia in Appellant's analysis does not meet the obligations imposed on insurers in *Truck Ins. Exch. v. Prairie Framing, LLC, supra* and *Penn-Star Ins. Co. v. Griffey, supra.*

The policy insures an "occurrence" which is defined as an "accident". But Appellant cannot rely on the term "accident" in its policy alone to exclude from coverage conduct planned in advance that is part of a process involving negligence by its insured, *D.R. Sherry Const. v. Amer. Fam. Mut. Ins.*, 316 SW3d 899 (Mo. banc 2010). The term "accident" as used in liability insurance policies, is not limited to a sudden, unexpected event; it may be the result of a process, *Id,* at 905. "The focus of the definition [of the term "accident"] is the insured's foresight or expectation of the injury or damages," *Id.* at 905, citing *Columbia Mut. Ins. Co. v. Epstein*, 239 SW3d 667, 672 (Mo App ED 2007).

2. Motivation

If Whipple was in default and respondent had the right to repossess, then Whipple suffered no injury to her legal right to possess the vehicles. Under those facts the question is not whether respondent took possession of Whipple's cars, but whether Whipple had a legal right to possession of the cars vis-à-vis the rights of her secured creditor or whether respondent was negligent in its assessment of its rights as creditor.

In this regard Appellant's reliance upon *Federated Mut. Ins. Co. v. Madden Oil Co., Inc.,* 734 SW2d 258 (Mo App 1987), and like cases involving possessory rights only, is misplaced. Negligence was not alleged in the pleading in *Madden*. The underlying claim was in replevin. Thus, the issue did not involve whether the Madden was injured as a result of a negligent determination of possessory rights.

In this instance, the motivation prompting the act of repossession is the crucial focal point, *Katz Drug Co. v. Commercial Std. Ins. Co.*, 647 SW2d 831, 837 (MoApp WD 1983). This is because a subsequent intentional act does not relieve an insurer from its duty to defend against potentially negligent acts causing harm, *Id.* (see discussion of motivation in *Brand v. Kansas City Gastroenterology & Hepatology*, LLC. WD755901

(Sept.17, 2013), " . . .[T]he motivation prompting allegedly negligent conduct is 'crucial' to the determination of whether that conduct is covered by an errors or omissions provision," *Id.* at p. 12.

3. Vehicles not in custody or control of insured when negligent act occurred

Appellant's further reliance upon the policy-specific exclusion for damage to "personal property in the care, custody or control of the insured" also misses its obligation to inquire whether the allegations and ascertainable facts present any potential or possible coverage. If the insured is alleged to have been negligent in its assessment of its possessory rights as a secured creditor, arguably that act of negligence would have occurred prior to acting upon that negligent assessment. Thus, the decision to repossess the claimant's cars would have been made prior to the time the act of taking "custody or control" of the cars occurred.

For this analysis the policy's definition of property damage is controlling.

Section V – Definitions . . .

17. "Property damage" means: . . .

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.

In a claim for negligence, the occurrence causing the loss of use was the negligent assessment of the insured's possessory rights as a secured creditor. The negligent assessment would occur prior to act of taking custody or control of the secured property. Thus, under the plain and ordinary meaning of the policy, the occurrence giving rise to a subsequent loss of use of the property would be covered.

To the extent another interpretation of the policy excludes coverage, an ambiguity results, for if a contract promises something at one point and takes it away at another, there is an ambiguity, *Seeck v. Geico Ins. Co.,* 212 SW3d 129, 132 (Mo banc 2007). But one does not have to assert the existence of an ambiguity to conclude that a secure creditor does not have custody or control of its security at the time when it is deciding whether or not to attach or repossess the security.

In situations where there are doubts or questions regarding an insurer's obligation to indemnify, the insurer has the option to provide a defense under a reservation of rights. At the very least the insurer can then

explore further the nature of the claim or claims against the insured with such instruments as a motion to make more definite and certain. Failure to do so leaves the insured unarmed to do battle against a petition that easily can be amended to state a claim for which insured is entitled to both a defense and indemnification. To leave open that possibility, when a claimant is making noises of raising a claim covered by the policy, fails to meet the insurer's obligation to prove that there is no possibility of coverage. Moreover, to leave it to the insureds to pay counsel to pursue the interpretations of the claimant's use of the word "negligence," deprives the insureds of their contractual right to a defense paid for by the insurer.

In the instant case it was the insureds who chose to challenge the effectiveness of the claimant's pleadings, effectively fighting the insurer's battle. Imposing the expense of that contest upon an insured, while the insurer unilaterally decided to remain on the sidelines, is inconsistent with the policy that is the insurer who must prove there is no possibility of coverage.

As this Court has held "To suggest that the insured must prove the insurer's obligation to pay before the insurer is required to provide a defense would make [the duty to defend] a hallow promise," *McCormick Baron*

Mgmt. Serv.,Inc. v. Am. Guar. & Liab. Ins. Co., 989 SW2d at 170. Likewise, to suggest that an insured must bear the dual burden of defending against a possible or potential claim and the burden of litigating whether he is entitled to a defense provided by his insurer, while the insurer awaits on the sidelines for the outcome, makes the duty to defend a hallow promise.

SUMMARY

Allegations and ascertainable facts established the potential or possibility of insurance coverage for Respondents when Whipple amended her petition. Appellant's refusal to provide a defense left the Respondents adrift, forcing them to incur the expense of challenging the claimant's pleadings. Appellant's refused to defend Respondents without first proving there was no possibility of insurance coverage against Whipple's claims. In effect that caused Respondents to incur the expense of fighting Appellant's battles over Whipple's pleadings. The trial court was correct in concluding as a matter of law that Appellant breached its duty to defend thereby causing damage to its insured.

CONCLUSION

For the forgoing reasons, the summary judgment of the trial court should be sustained.

CERTIFICATE OF COMPLIANCE

I hereby certify that, as required by Rule 84.06 ©, this brief complies with the word of line of limits of Rule 84.06 (b), and has a word count of 26, 391 words. The undersigned relies on the word count feature on his firm's word process system to arrive at that number. The original of this brief has been signed and maintained by the filer pursuant to Rule 55.03.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that he has served a true, accurate, and complete copies of the foregoing document was served through the electronic filing system upon **Bethany Culp and Christopher Garcia, 701 Market Street**, Suite 1300, St. Louis, Missouri, 63101-1843, Attorneys for Appellant, this 23rd day of September, 2013.

/s/Bradley H. Lockenvitz