2016 IL App (5th) 150158-U

NO. 5-15-0158

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TIMOTHY ELLSWORTH and LISA ELLSWORTH, as Assignees and on Behalf of Aaron Misukonis,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellants,	)	
v.	)	No. 11-L-641
GRINNELL MUTUAL REINSURANCE COMPANY,	)	Honorable Dennis R. Ruth,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting summary judgment in favor of defendant is affirmed where the alleged damages to plaintiffs' home were not covered under the insurance policy. The court did not err in granting defendant's motion for leave to file a counterclaim for declaratory judgment.

¶ 2 Plaintiffs, Tim and Lisa Ellsworth, appeal from an entry of summary judgment in favor of defendant, Grinnell Mutual Reinsurance Company. Plaintiffs contend the trial court erred in granting defendant's motion for summary judgment and erred in granting defendant's motion for leave to file its counterclaim for declaratory judgment. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 17, 2007, plaintiffs entered into a contract with Aaron Misukonis to purchase a spec home located at 3313 Preston Drive in Granite City, Illinois. Misukonis had recently constructed the house, and the transaction closed on June 15, 2007. Prior to the transaction closing, Misukonis had purchased a commercial general liability policy (policy) from defendant, Grinnell Mutual Reinsurance Company, which covered the policy period of March 3, 2007, to March 3, 2008.

¶ 5 After a storm removed siding from plaintiffs' home in January 2008, plaintiffs noticed house-wrap had not been installed during the construction of their home. By February 2008, plaintiffs noticed other alleged defects related to the construction of their home. In a letter from their attorney dated February 28, 2008, plaintiffs informed Misukonis of the nature of the underlying claim, and on July 18, 2008, plaintiffs served Misukonis with a complaint which had been filed in the circuit court of Madison County.

¶ 6 Plaintiffs' complaint alleged Misukonis constructed and sold the residence to plaintiffs in a defective condition which impaired the intended use of the dwelling, namely habitation. Specifically, the complaint asserted:

> "(a) Defendant constructed the house without bridging within the floor joists. Bridging is required for proper support of the floor joists, and to prevent moving and twisting.
>
> (b) Defendant hired a foundation contractor, who constructed the foundation and resulting house unlevel, with many areas being 3/8 inch higher or lower [than] the

average wall height, causing the sill plate to settle between the indifferent highs and lows, resulting in a wavy floor area.

(c) Defendant constructed the house without installing house-wrap (referred to in the industry as Tybak or Topar), to protect against condensation in the exterior wall assembly."

¶ 7 Misukonis directed plaintiffs' complaint to defendant, which denied coverage and refused to defend Misukonis after determining its policy "incorporates exclusions for these types of cases in which plaintiff homeowners allege that the home did not meet their expectations." On March 14, 2011, Misukonis settled the lawsuit with plaintiffs for $225,000 and assigned his rights under the policy to plaintiffs.

¶ 8 On June 29, 2011, plaintiffs filed a complaint against defendant claiming defendant breached its duty to defend Misukonis. The complaint alleged that plaintiffs, as assignees of Misukonis, were entitled to a judgment against defendant in an amount in excess of $245,000 plus costs of suit, a figure arrived at by adding plaintiffs' settlement with Misukonis ($225,000) and plaintiffs' alleged damages suffered in defending the lawsuit ("in excess of $20,000.00").

¶ 9 Plaintiffs then filed a motion for summary determination of major issues on April 26, 2012, seeking a declaration that (1) defendant owed a duty to defend the lawsuit, (2) defendant breached its duty when it denied coverage and failed to either defend its insured or offer its insured a defense under a reservation of rights, and (3) defendant is estopped from asserting any defense based on noncoverage.

¶ 10 In support of their motion, plaintiffs offered the affidavit of Michael Averill, the author of the policy at issue. In the affidavit, Averill asserted that his qualifications included the following: he was the author of the policy language in question, he has an extensive background in the insurance industry, and he has personal knowledge of the matter. Based upon his knowledge of the policy and his review of the underlying complaint, Averill asserted defendant "misread the [policy], the intent to provide coverage for the complete operations of its insured contractor, and applied its own definitions and intent of coverage that is not embodied in the words of the contract." Averill further asserted that because the subcontractor's faulty construction and Misukonis's failure to install house-wrap were not intentional acts, those failures "can only be considered an 'accident' " within the policy's coverage. In sum, Averill asserted plaintiffs' application for coverage should be honored.

¶ 11 Defendant was granted leave to file its counterclaim on February 15, 2013. That same date, the court ordered that discovery on damages and the reasonableness of the settlement be deferred until after a decision on any of the summary motions regarding coverage. Defendant's counter complaint and third party complaint for declaratory judgment asserted its policy afforded no coverage regarding the underlying complaint, and, therefore, defendant owed no duty to defend plaintiffs' lawsuit. Specifically, defendant asserted plaintiffs did not allege an "occurrence" or "property damage" within the meaning of the policy. Defendant further asserted that two of the policy's exclusions were effective to exclude coverage.

¶ 12 Plaintiffs filed a motion to dismiss defendant's counter complaint and third party complaint as substantially insufficient in law, which the trial court denied. Thereafter, plaintiffs filed a supplemental memorandum in support of summary determination of major issues, and defendant filed an additional memorandum in further opposition to plaintiffs' motion and in support of its motion for summary determination regarding the question of coverage. Defendant also filed a motion for summary determination of the major issue of the absence of a duty to defend, and plaintiffs filed a second supplement to their memorandum in support of their motion for summary determination.

¶ 13 The trial court heard oral argument on plaintiffs' and defendant's competing motions on April 10, 2015, and entered an order granting defendant's motion and denying plaintiffs' motion. The court's order indicated defendant owed no duty to defend the underlying lawsuit. Prior to entering its order, the court stated it was bound by existing precedents. The court noted this case involved nothing more than the interpretation of a contract, and case law is "clear that you don't look outside the contract."

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Plaintiffs raise two issues on appeal. First, plaintiffs allege the trial court erred in granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment by not recognizing defendant owed a duty to defend Misukonis, whom defendant insured and who assigned his rights under the policy to plaintiffs, or at least owed a duty to offer independent counsel to defend Misukonis while defendant

reserved its right to deny coverage. Second, plaintiffs allege the trial court erred in granting defendant's motion for leave to file its counterclaim for declaratory judgment.

¶ 17 Before we begin our analysis, we acknowledge defendant argues plaintiffs have waived consideration of their argument pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), which requires that an appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." After careful review of plaintiffs' brief, we find plaintiffs have satisfied this requirement. Accordingly, we address plaintiffs' contentions in turn.

¶ 18 I. Summary Judgment

¶ 19 A trial court's order granting summary judgment is subject to a *de novo* standard of review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Outboard Marine Corp.*, 154 Ill. 2d at 102, 607 N.E.2d at 1209. Summary judgment is a drastic measure which should only be granted if the movant's right to judgment is clear and free from doubt. *Outboard Marine Corp.*, 154 Ill. 2d at 102, 607 N.E.2d at 1209. Summary judgment should be denied when a reasonable person can draw divergent inferences from undisputed facts. *Outboard Marine Corp.*, 154 Ill. 2d at 102, 607 N.E.2d at 1209. In considering a motion for summary judgment, the court must construe the evidence strictly against the movant and liberally in favor of the nonmoving

party. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292, 757 N.E.2d 481, 491 (2001). A reviewing court may affirm the grant of summary judgment for any reason that appears in the record, regardless of whether that reason is relied upon by the trial court. *Geary v. Telular Corp.*, 341 Ill. App. 3d 694, 702, 793 N.E.2d 128, 135 (2003).

¶ 20 The construction of the provisions of an insurance policy is a question of law also subject to *de novo* review. *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 292, 757 N.E.2d at 491. The court's primary objective in construing the language of the policy is to ascertain and give effect to the intent of the parties to the contract. *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 292, 757 N.E.2d at 491. In order to ascertain the meaning of the policy's language and the parties' intent, the court must construe the policy as a whole and consider the type of insurance purchased, the nature of the risks involved, and the contract's overall purpose. *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 292, 757 N.E.2d at 491. If the words of a policy are free from doubt and unambiguous, "a court must afford them their plain, ordinary, and popular meaning." (Emphasis omitted.) *Outboard Marine Corp.*, 154 Ill. 2d at 108, 607 N.E.2d at 1212. However, if the words of a policy are susceptible to more than one reasonable interpretation, they are deemed ambiguous and will be construed in favor of the insured and against the insurer that drafted the policy. *Outboard Marine Corp.*, 154 Ill. 2d at 108, 607 N.E.2d at 1212. A court will not strain to find an ambiguity in a policy where none exists. *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 292, 757 N.E.2d at 491.

¶ 21 The insured bears the burden of establishing that a claim falls within the policy's terms. *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 749, 888 N.E.2d 633, 650 (2008). Once the insured satisfies this burden, the insurer bears the burden of proving the loss was limited or excluded by a contract provision. *Stoneridge Development Co.*, 382 Ill. App. 3d at 749, 888 N.E.2d at 650.

¶ 22 In the instant case, the insuring agreement of the policy provides in relevant part:

"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. ***

* * *

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) The 'bodily injury' or 'property damage' occurs during the policy period[.]"

¶ 23 The policy defines "occurrence" as "an accident," including continuous or repeated exposure to substantially the same general harmful conditions. It defines "property damage" as:

"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."

¶ 24 The policy does not apply to property damage to "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." The policy also excludes " '[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard,' " but the exclusion is inapplicable "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

¶ 25 In this case, the parties do not dispute that Misukonis hired a subcontractor who performed defective work during the construction of plaintiffs' home. Plaintiffs contend that because damage to a contractor's work product caused by the defective performance of a subcontractor is not excluded from coverage under the policy, they are entitled to coverage as assignees of the rights to the policy purchased by Misukonis from defendant. Plaintiffs further request that this court look beyond the policy itself to determine the intent of the policy. After careful review, we find plaintiffs' arguments are misplaced. Specifically, we conclude there was no "occurrence" or "property damage" within the meaning of the policy, two elements the policy requires in order to trigger coverage.

Further, we find plaintiffs' request that this court consider extrinsic evidence to help determine the policy's intent is contrary to well-established law in Illinois.

¶ 26 To determine whether defendant owed a duty to defend plaintiffs in the underlying lawsuit, we must first determine whether there was an "occurrence" within the policy period. *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 41, 831 N.E.2d 1, 6 (2005). Once an "occurrence" has been established, we must then determine whether there was "property damage" within the meaning of the policy. *Viking Construction Management, Inc.*, 358 Ill. App. 3d at 41, 831 N.E.2d at 6. If an "occurrence" and "property damage" have both been established, we must then consider whether any exclusion in the policy applies. *Viking Construction Management, Inc.*, 358 Ill. App. 3d at 41-42, 831 N.E.2d at 6.

¶ 27 As we previously indicated, the policy in this case defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." This court has defined accident as "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co. v. Tillerson*, 334 Ill. App. 3d 404, 409, 777 N.E.2d 986, 990 (2002) (quoting *State Farm Fire & Casualty Co. v. Watters*, 268 Ill. App. 3d 501, 506, 644 N.E.2d 492, 495-96 (1994)). The natural and ordinary consequences of an act do not constitute an accident. *Tillerson*, 334 Ill. App. 3d at 409, 777 N.E.2d at 990.

¶ 28 Here, we cannot say the alleged damages sustained by plaintiffs were the result of an accident. Plaintiffs' complaint alleged that Misukonis hired a subcontractor who defectively constructed the foundation which resulted in a "house unlevel" and "wavy floor area." The complaint further alleged that Misukonis constructed the home without bridging within the floor joists and without installing house-wrap.

¶ 29 After careful consideration, we find these allegations do not fall within the policy's meaning of an accident or occurrence, as they allege no unforeseen or undesigned, sudden, or unexpected event. *Tillerson*, 334 Ill. App. 3d at 409, 777 N.E.2d at 991. "Where the defect is no more than the natural and ordinary consequences of faulty workmanship, it is not caused by an accident." *Tillerson*, 334 Ill. App. 3d at 409, 777 N.E.2d at 991. Plaintiffs' alleged construction defects are the natural and ordinary consequences of Misukonis's construction techniques. While defective workmanship can be covered if it damaged something other than the project itself, plaintiffs' complaint alleges damage to their home, the project itself. *Stoneridge Development Co.*, 382 Ill. App. 3d at 753, 888 N.E.2d at 654. For these reasons, plaintiffs' allegations do not potentially fall within the policy's meaning of "occurrence." *Tillerson*, 334 Ill. App. 3d at 409, 777 N.E.2d at 991.

¶ 30 We further conclude that plaintiffs' allegations do not fall within the policy's meaning of "property damage." As we previously indicated, the policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," or "[l]oss of use of tangible property that is not physically injured."

¶ 31 Our supreme court has stated that "tangible property suffers a 'physical' injury when the property is altered in appearance, shape, color or in other material dimension." *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 301, 757 N.E.2d at 496. In contrast, "tangible property does not experience 'physical' injury if that property suffers intangible damage, such as diminution in value as a result from the failure of a component *** to function as promised." *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 301-02, 757 N.E.2d at 496. We further note that a comprehensive general liability policy, such as the policy at issue, is intended to protect the insured from liability for injury or damage to the persons or property of others; it is not intended to pay the costs associated with repairing or replacing the insured's defective work and products, which are purely economic losses. *Tillerson*, 334 Ill. App. 3d at 410, 777 N.E.2d at 991.

¶ 32 Here, plaintiffs "merely seek either the repair or the replacement of defective work or the diminishing value of the home." *Tillerson*, 334 Ill. App. 3d at 410, 777 N.E.2d at 991. Because plaintiffs seek a recovery for economic loss and not physical injury to tangible property, "[n]o property damage is alleged and coverage is not afforded." *Tillerson*, 334 Ill. App. 3d at 410, 777 N.E.2d at 991. For these reasons, the trial court properly concluded defendant did not have a duty to defend the underlying lawsuit and, therefore, properly granted summary judgment in defendant's favor.

¶ 33 Plaintiffs focus part of their argument on the exception in the policy which provides that damage to a contractor's work by a subcontractor does not negate coverage. While the policy contains such an exception, plaintiffs ignore the policy's requirement that the insuring agreement be satisfied in order to trigger coverage. "[W]here the

damage does not fall within the policy's coverage, there is no need to consider the applicability of any exclusions." *Stoneridge Developmental Co.*, 382 Ill. App. 3d at 756, 888 N.E.2d at 656. For the reasons stated above, we conclude the insuring agreement has not been satisfied. Thus, this exception lends no support to plaintiffs' position.

¶ 34 Plaintiffs further argue that the intent of the insurance clauses adopted by defendant and filed with the state, which they indicate were from a post-1986 Insurance Service Office's commercial general liability policy, suggests plaintiffs are entitled to coverage. In support of their argument, plaintiffs request that this court look outside the policy to determine its intent. Specifically, plaintiffs assert they are entitled to summary judgment if the drafting history of the insurance industry indicates the industry's intent to afford coverage. Plaintiffs contend the drafting history of the policy in this case indicates they should be afforded coverage and cite to *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997), in support of their proposition. Plaintiffs make further reference to the following in support of their argument: (1) the affidavit of Michael Averill, the author of the policy language in question; (2) deposition testimony of Robert Kinnaird, a retired employee of defendant; (3) and an article written by attorney Carl Salisbury. After careful review, we find plaintiffs' argument is misguided.

¶ 35 Plaintiffs' argument ignores the well-settled principle that it is unnecessary for this court to consider extrinsic evidence of a policy's purported meaning where the words of the policy are unambiguous. *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 301, 757 N.E.2d at 496. Here, we find no ambiguity in the policy as it pertains to an "occurrence" or "property damage." As discussed above, plaintiffs' allegations do not fall within the

policy's meaning of "occurrence" or "property damage." As our supreme court in *Eljer Manufacturing, Inc.* stated:

> "Because the words of the policy are unambiguous, it is unnecessary for this court to consider extrinsic evidence of the policy's purported meaning. Rather, we must afford the unambiguous policy terms their plain, ordinary and popular meaning." *Eljer Manufacturing, Inc.*, 197 Ill. 2d at 301, 757 N.E.2d at 496.

¶ 36 We further find that *Koloms* is distinguishable from the instant case. In *Koloms*, our supreme court concluded there was an ambiguity in new pollution exclusion language and found support for its decision in the drafting history of the exclusion. *Koloms*, 177 Ill. 2d at 489, 687 N.E.2d at 79. Conversely, we find no ambiguity in the policy at issue in this case. Therefore, it is unnecessary to consider the drafting history of the policy or any other extrinsic evidence, including the affidavit, deposition testimony, and article cited by plaintiffs. For these reasons, we reject plaintiffs' argument.

¶ 37 Plaintiffs next argue that defendant's failure to depose Michael Averill and defendant's failure to offer a counter affidavit or counter opinion witness lends support to their position that the trial court should have granted summary judgment in their favor. As plaintiffs indicate, "[w]here facts contained in the affidavit in support of a motion for summary judgment are not contradicted by a counteraffidavit, such facts are admitted and must be taken as true." We disagree.

¶ 38 Plaintiffs ignore the fact that Michael Averill's affidavit consisted of his opinion regarding his interpretation of the policy. An individual's interpretation of a policy does

not amount to fact, even if that individual is the author of the policy as is the case here. Defendant's failure to respond to Michael Averill's affidavit does not necessitate that Averill's opinion be taken as true. Accordingly, we reject plaintiffs' argument.

¶ 39 II. Declaratory Judgment

¶ 40 Plaintiffs also argue the trial court erred in granting defendant leave to file its declaratory judgment complaint after the underlying case concluded because an insurer must file its declaratory judgment complaint prior to the resolution of the underlying claim to be effective. In support of their argument, plaintiffs cite to a decision from the First District of this court:

> " '[T]hree options are available to a liability insurer requested to defend an insured against claims which the insurer believes exceed policy coverage. The insurer can (1) seek a declaratory judgment regarding its obligation before or pending trial of the underlying action; (2) defend the insured under a reservation of rights, or (3) refuse either to defend or to seek a declaratory judgment at the insurer's peril that it might later be found to have breached its duty to defend. Once an insurer violates its duty to defend, it is estopped to deny policy coverage in a subsequent lawsuit by the insured or the insurer's assignee.' " *Insurance Co. of Illinois v. Markogiannakis*, 188 Ill. App. 3d 643, 652, 544 N.E.2d 1082, 1087 (1989) (quoting *Maneikis v. St. Paul Insurance of Illinois*, 655 F.2d 818, 821 (7th Cir. 1981)).

¶ 41 Before we begin our analysis on the issue regarding declaratory judgment, we note that where the insurer fails to seek a declaratory judgment that there is no coverage or fails to defend the suit under a reservation of rights, the insurer " 'is estopped from later raising policy defenses to coverage and is liable for the award against the insured and the costs of the suit, because the duty to defend is broader than the duty to pay.' " *Stoneridge Development Co.*, 382 Ill. App. 3d at 741, 888 N.E.2d at 644 (quoting *Murphy v. Urso*, 88 Ill. 2d 444, 451, 430 N.E.2d 1079, 1082 (1981)).

¶ 42 In this case, the trial court granted defendant leave to file its declaratory judgment complaint on February 15, 2013, a date after plaintiffs requested and were denied coverage by defendant. Thus, it is undisputed defendant filed its declaratory judgment after it denied coverage. Plaintiffs contend defendant was required to file its declaratory judgment prior to the resolution of the underlying claim, which plaintiffs assert was prior to defendant's decision to refuse coverage. After careful review, we find plaintiffs' argument is misplaced.

¶ 43 Although the *Markogiannakis* court indicates that one of the options an insurer can take when it believes a claim exceeds coverage is to seek declaratory judgment pending trial of the underlying action, the "estoppel doctrine applies only where an insurer has breached its duty to defend." *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151, 708 N.E.2d 1122, 1135 (1999). Moreover, an insurer will be estopped from raising policy defenses to coverage only where the insurer fails to take any of the three steps discussed above and is later found to have wrongfully denied coverage. *Ehlco*, 186 Ill. 2d at 150-51, 708 N.E.2d at 1135.

¶ 44 Here, the trial court determined defendant owed no duty to defend plaintiffs' underlying lawsuit. As we discuss above, we agree with the trial court's determination. Thus, defendant did not wrongfully deny coverage. Accordingly, the estoppel doctrine is not applicable to this case even though defendant's declaratory judgment complaint was filed after defendant denied coverage. For these reasons, we reject plaintiffs' argument.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we hereby affirm the judgment of the circuit court of Madison County.

¶ 47 Affirmed.