

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID and JANE PAYNE,

Plaintiffs-Appellants,

v

STATE FARM FIRE AND CASUALTY  
COMPANY,

Defendant-Appellee.

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UNPUBLISHED

September 17, 1996

No. 177448

LC No. 93-462429

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,\* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) in this action involving an insurer's duty to defend. We affirm.

Plaintiffs sold their home to Aaron and Cheryl Weberman in January, 1991. In January, 1992, in the underlying case, the Webermans sued plaintiffs because of flooding in the basement of the home. The complaint alleged breach of warranty, fraud, innocent misrepresentation, promissory estoppel, rescission, and violation of the Michigan Consumer Protection Act. At the time that plaintiffs sold their home to the Webermans, defendant covered plaintiffs under both a homeowners' policy and a personal liability umbrella policy. Although plaintiffs requested that defendant defend the case brought by the Webermans, defendant denied coverage under both policies.

After the trial court dismissed the Webermans' case in the underlying action, plaintiffs brought this action seeking indemnification for their costs in defending against the Webermans' suit. Both parties moved for summary disposition. The trial court denied plaintiffs' motion, but granted defendant's motion.

Plaintiffs argue that the complaint in the underlying case sufficiently pleaded a claim of innocent misrepresentation so as to avoid summary disposition. We disagree. A motion for summary disposition

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\* Circuit judge, sitting on the Court of Appeals by assignment.

under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 431-432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts. *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

An insurer's duty to defend extends to cases in which the allegations in the third-party complaint even arguably come within the policy coverage. *Arco Industries Corp v American Motorists Ins Co*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 187104, issued 3/1/96); *State Farm Fire & Casualty Co v Basham*, 206 Mich App 240, 242; 520 NW2d 713 (1994). However, the duty to defend is not based solely on the terminology used in the pleadings in the underlying action. *Fitch v State Farm Fire & Casualty Co*, 211 Mich App 468, 471; 536 NW2d 273 (1995); *Basham, supra*, p 242. Rather, a court focuses on the cause of the injury to determine whether coverage exists. *Basham, supra*, p 242. Allegations in the third-party complaint must be examined to determine the substance, as opposed to the mere form, of the complaint. *Fitch, supra*, p 471.

Under the homeowners' policy issued to plaintiffs by defendant, defendant was required to defend plaintiffs in third-party lawsuits for damages caused by an "occurrence." An "occurrence" was defined in the policy as "an accident, including exposure to conditions, which results in bodily injury or property damage." This definition excludes intentional acts. *Greenman v Michigan Mutual Ins Co*, 173 Mich App 88, 92; 433 NW2d 346 (1988). In addition, neither the homeowners' policy nor the personal liability umbrella policy applied to damage which was either expected or intended by the insureds. In order for this exclusion to take effect, both an intent to act and an intent to injure is required. *Id.*, p 93.

Here, it is true that count III of the Webermans' complaint was labeled "Innocent Misrepresentation." This count stated that plaintiffs made false material misrepresentations "as more specifically set forth above." However, the allegations that are "set forth above" stated that plaintiffs made intentional and false representations, and "knew that the home had severe leakage problems." Looking beyond the form and into the substance of the Webermans' complaint, *Fitch, supra*, p 471, there was no actual allegation of innocent misrepresentation. See *Fremont Mutual Ins Co v Wieschowski*, 182 Mich App 121, 123-124; 451 NW2d 523 (1989). Since the substance of the complaint in the underlying case alleged only intentional acts, there was no "occurrence" to trigger defendant's duty to defend. Although plaintiffs argue that the flooding of the basement of the house constituted an "accident" or an "occurrence" within the contemplation of the insurance contract, a court focuses on the cause of the injury to determine whether coverage exists. *Basham, supra*, p 242. Here, the complaint against plaintiffs was based not on the "accident" of flooding, but on the intentional statements allegedly made by plaintiffs to the Webermans.

In addition, if it is true as it was "set forth above" in the Webermans' complaint that defendants knew of the various problems with the house, and had an intent to defraud, an intent to act and injure

can be inferred as a matter of law. *Greenman, supra*, p 93. Accordingly, plaintiffs' claim was excluded by the "expected or intended" clause of both insurance contracts. *Wieschowski, supra*, pp 123-124. Thus, the trial court did not err in granting defendant's motion for summary disposition. *Marcelletti, supra*, p 658.

Affirmed.

/s/ Marilyn Kelly

/s/ Myron H. Wahls

/s/ M. Richard Knoblock