

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU INSURANCE, a Michigan
Corporation,

UNPUBLISHED
November 8, 1996

Plaintiff-Appellee,

v

No. 187618
LC No. 94-486638-CZ

MEMO'S, INC., d/b/a KASHAT IMPORTED
FOODS and IMAD KASHAT,

Defendants-Appellees,

and

RANDY KASHAT, a minor, by his Conservator,
LAURA ESCHARTEA,

Defendant-Appellant.

Before: Markman, P.J., and Smolenski and G.S. Buth,* JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion for summary disposition. We reverse.

Plaintiff brought an action against defendant seeking declaratory judgment that it had no duty to defend or indemnify its insured, Memo's, Inc., in a tort action brought by defendant Randy Kashat against Memo's and defendant's father, Imad Kashat, for injuries defendant sustained when a firework exploded in his hand. Defendant then brought a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff had the duty to defend¹ and indemnify because the firework that injured him was obtained by his father from Memo's, his father's employer. Plaintiff responded with a motion in opposition and counter-motion for summary disposition claiming that there was no genuine

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

issue of material fact that defendant's injury was not covered under the policy between plaintiff and Memo's because, inter alia, the firework that injured defendant was not obtained from Memo's.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except as to damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Skene v Fileccia*, 213 Mich App 1, 2-3; 539 NW2d 531 (1995). An insurer may utilize a motion for summary disposition in a declaratory judgment action to determine whether it must indemnify and provide a defense for an insured in an underlying tort action. *Allstate Ins Co v Freeman*, 432 Mich 656, 662 (Riley, J.); 443 NW2d 734 reh den with addenda to opinion 433 Mich 1202 (1989); *State Farm Fire & Casualty Co v Basham*, 206 Mich App 240, 240-241; 520 NW2d 713 (1994). The duty of an insurance company to provide a defense in an underlying tort action depends upon the allegations in the complaint and extends to allegations which even arguably come within the policy coverage. *Freeman, supra; Basham, supra*. The duty to defend is broader than, and not necessarily conclusive of, an insurer's duty to indemnify. *Freeman, supra*. The court must resolve any doubt pertaining to the duty to defend in favor of the insured. *Id.* However, an insurer's duty to defend and indemnify does not depend solely upon the terminology used in a plaintiff's pleadings. *Id.; Basham, supra*. Rather, it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists. *Freeman, supra; Basham, supra*. So must the allegations be examined to determine the substance, as opposed to the mere form, of the complaint. *Freeman, supra*.

Both parties concede that plaintiff will ultimately have the duty to indemnify only if the firework that injured defendant was obtained from Memo's. However, defendant argues that the fact that he alleged in his complaint that the firework that injured him was obtained from Memo's was enough to preclude the grant of summary disposition in favor of plaintiff because the allegation on its face imposed a duty on plaintiff to defend and indemnify. He further avers that even going beyond the face of his allegations, he presented evidence which established that the firework that injured him came from Memo's.

In his complaint, defendant alleged that the firework that injured him was an illegal firework that was obtained by Imad Kashat from Memo's. Based on that allegation, plaintiff had a duty to defend Memo's as its insurer. *Freeman, supra*. However, because the duty to defend is broader than the duty to indemnify, whether plaintiff had a duty to indemnify depends on whether there was coverage under the insurance policy for defendant's injury. *Id.* Thus, contrary to defendant's assertion, the trial court was required to resolve whether there was coverage for defendant's injury under the policy by determining if there was a question of fact as to whether the firework that injured him came from Memo's.

However, the trial court improperly found that there was no genuine issue of material fact that the firework that injured plaintiff was not obtained by Imad Kashat from Memo's. Although Imad Kashat testified that he did not believe that the firework that exploded in his son's hand could have been one of the fireworks that he purchased from Memo's, the evidence presented indicated the contrary.

Imad admitted that he bought one or two boxes of fireworks from Memo's in July and that he did not use all the fireworks he bought and stored the remainder in the garage. He also testified that he thought the box that was sitting on top of the television, from where defendant apparently obtained the firework that caused his injury, was empty. However, the police did find fireworks in that box. Imad did not deny that the box containing fireworks on top of the television was one of the boxes he purchased from Memo's. Rather, Imad admitted that the police found festival ball fireworks in the box on top of the television, but denied that the festival ball could do the kind of damage that it did to his son. Officer O'Malley testified that based upon his interview with defendant about the firework that exploded in his hand, he believed that the firework that injured him was the same type as the fireworks in the box on top of the television. Officer Thomas Nelson testified that the box on top of the television was accessible to defendant, and he assumed that that is where defendant obtained the firework that injured him.

Imad Kashat stated that the firework that injured his son could not have been one of the fireworks he purchased from Memo's because the latter could not have produced the kind of injury that occurred to his son because they were Class C fireworks, which Memo's had a license to sell. However, Imad was prosecuted for and convicted of possession of Class C, illegal fireworks,² which indicates that the fireworks he obtained from Memo's were, in fact, illegal. Thus, Imad's belief that the fireworks he obtained from Memo's could not have caused severe injury was based on the incorrect belief that they were legal. Additionally, Imad admitted that he was not an expert in fireworks or explosives. Therefore, Imad's opinion appears only to be based on the refusal to believe that the fireworks he obtained to "have fun with the kids" could have caused severe damage to his son. Therefore, whether the firework that exploded in defendant's hand was one of the fireworks that Imad purchased from Memo's was a question of fact that should have been decided by a jury.

Defendant argues that Imad's testimony that the firework that exploded in his son's hand was not one of the fireworks he purchased from Memo's was inadmissible because it was not rationally based on his perception since Imad did not see the firework that exploded in defendant's hand. In response to a motion for summary disposition, the trial court must conclude whether there is a genuine issue of material fact based on evidence that would be admissible at trial. *Cox v Dearborn Heights*, 210 Mich App 389, 397-398; 534 NW2d 135 (1995). The admissibility of opinion testimony by a lay witness is governed by MRE 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Although he did not see the firework that exploded in his son's hand, Imad saw his son immediately after the explosion and observed the damage that had been done. Therefore, he properly expressed his opinion based on an inference that was rationally based on his perception. The fact that Imad stated that he was not an expert in the area of explosives does not make his testimony inadmissible because he

did not testify as an expert. Rather, his testimony would be admissible at trial and his credibility a determination for the trier of fact.³

Defendant also argues that the trial court's ruling was inconsistent. Although the court incorrectly stated that Imad was "a hundred percent certain that Memo's doesn't sell illegal fireworks," when Imad only stated that he was one hundred percent certain that the firework that injured defendant was not one of the fireworks obtained from Memo's, it cannot be said that the court's ruling was contradictory. The court never stated that it believed the firework was obtained from Memo's. It indicated that there were assertions to that fact, but the court clearly stated that it did not believe there was any evidence to contradict Imad's unequivocal testimony that the origin of the firework that injured defendant was not Memo's.

Finally, defendant contends that plaintiff argued, in opposition to defendant's motion for summary disposition, that there was a genuine issue of material fact whether the firework that injured defendant was obtained from Memo's. However, plaintiff argued in its counter-motion that it should be granted summary disposition because there was no evidence that the firework was obtained from Memo's, and in the alternative, that defendant should not be granted summary disposition because there was a genuine issue of material fact that the firework was obtained from Memo's. Because parties may present alternative arguments to the court, defendant's implication that plaintiff has conceded that summary disposition was improper because there was a genuine issue of material fact is without merit. MCR 2.111(A)(2)(b); see also *Vinencio v Ramirez*, 211 Mich App 501, 509; 536 NW2d 280 (1995).

Accordingly, the trial court improperly granted summary disposition in favor of plaintiff because there was a genuine issue of material fact as to whether the firework that injured defendant was obtained from Memo's.

Reversed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth

¹ On appeal, plaintiff concedes that it had a duty to defend, and the only issue we address is whether plaintiff had a duty to indemnify.

² Imad was convicted under MCL 750.243a; MSA 28.440(1).

³ Furthermore, although the trial court properly determined that Imad's affidavit cannot be used to contradict his deposition testimony, the court nevertheless improperly granted plaintiff's motion for summary disposition, because, as discussed above, even without the affidavit there was a genuine issue of material fact whether the firework was obtained from Memo's. *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991).