

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

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FIRST MOUNTAIN MORTGAGE  
CORPORATION,

UNPUBLISHED  
October 9, 2008

Plaintiff-Appellee,

v

No. 276929  
Washtenaw Circuit Court  
LC No. 04-001170-CK

CITIZENS INSURANCE COMPANY,

Defendant-Appellant.

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Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant Citizens Insurance Company appeals as of right from a judgment awarding plaintiff First Mountain Mortgage Company damages of \$147,407.50, representing attorney fees and costs of \$47,407.50 that First Mountain incurred in defending a separate action filed by Richard and Orpah Paylor, and reimbursement of \$100,000 as the compensable portion of a \$480,000 judgment that the Paylors obtained against First Mountain in their separate action. We reverse and vacate the trial court's judgment.

In June 2003, the Paylors filed an action against First Mountain and two of its employees, Brian Winborn and Eric Stanley, to recover damages for Winborn's and Stanley's allegedly tortious dealings with the Paylors in connection with a mortgage for the purchase of a house. The Paylors alleged in their complaint that before closing on the mortgage, they wrote various checks to Winborn, totaling \$63,968.50, but ultimately received no credit for the amount paid. They sought to recover the \$63,968.50 and other damages from First Mountain, Stanley, and Winborn, alleging claims for fraudulent misrepresentations, breach of the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, conversion, negligence, breach of contract, unjust enrichment, and intentional infliction of emotional distress.

While the Paylors' action was pending, First Mountain filed the instant action against its insurer, Citizens Insurance, seeking a declaration that Citizens Insurance had a duty to defend and indemnify it in the Paylors' action, based on the coverage afforded for employee dishonesty in a "businessowners special property coverage form" policy (hereafter "property policy"). First Mountain also sought money damages for Citizens Insurance's alleged breach of its policy and bad-faith failure to defend. First Mountain later moved for partial summary disposition on its request for declaratory relief. The trial court granted the motion in April 2005, and thereafter

entered an order declaring that Citizens Insurance had a duty to defend and indemnify First Mountain with respect to the Paylors' claims in their separate action.

In November 2006, following a bench trial in the Paylors' action, the court entered a final judgment awarding the Paylors noneconomic damages of \$480,000 against First Mountain, based on First Mountain's negligent supervision and training of Winborn and Stanley. First Mountain thereafter moved for entry of a money judgment against Citizens Insurance in this case, seeking recovery for the full amount of the Paylors' judgment and its costs and attorney fees incurred in defending the Paylors' action. The trial court granted the motion, finding that its earlier declaratory ruling was the law of the case, but limited the amount of recovery for the Paylors' judgment to the property policy limit of \$100,000 for employee dishonesty.

On appeal, Citizens Insurance challenges the trial court's decision to award First Mountain \$100,000 as the compensable portion of the Paylors' \$480,000 judgment for noneconomic damages against First Mountain. Citizens Insurance argues that even if the employee dishonesty provision in its property policy provided coverage for a loss sustained by the Paylors related to their misappropriated checks, there was no coverage for the noneconomic losses that were the basis for the Paylors' judgment.

We note that the trial court did not specifically rule on First Mountain's entitlement to coverage for noneconomic losses under the employee dishonesty provision when it granted declaratory relief, or when it later entered the money judgment. Instead, in response to First Mountain's motion for entry of a money judgment, it determined that its prior declaratory ruling was the law of the case. The trial court erred to the extent that it declined to consider this issue based on the law of the case doctrine. That doctrine does not apply to prior trial court decisions. *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 560; 692 NW2d 58 (2004). Rather, a trial court retains authority to revisit and correct a mistake in a prior order while proceedings are pending. MCR 2.604(A); *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007).

Although Citizens Insurance does not specifically address the trial court's reliance on the law of the case doctrine, the consequence of the trial court's misapplication of that doctrine was that First Mountain was entitled to recover noneconomic damages under the employee dishonesty provision of the property policy. This Court may overlook a deficiency in preservation when an issue of law has been raised. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Additionally, this Court is empowered to consider any issue that, in its opinion, justice requires be considered and resolved. *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994); see also *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004). Accordingly, we shall consider Citizens Insurance's argument.

A trial court is permitted to award money damages following a declaratory judgment. MCR 2.605(F); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90; 535 NW2d 529 (1995). But because the substance of the issues presented here involve legal questions that are within the scope of the declaratory relief that was granted in this case, and such relief was granted in the context of a motion for summary disposition in which the trial court relied on evidence outside the pleadings, we shall consider this issue under MCR 2.116(C)(10). See *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998); *Farm Bureau Ins Co v Abalos*, 277

Mich App 41, 43; 742 NW2d 624 (2007). Our review is de novo. *Id.* Summary disposition is appropriate under MCR 2.116(C)(10) only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 44. If it appears that the nonmoving party is entitled to judgment, judgment may be rendered to the nonmoving party. MCR 2.116(I)(2).

This matter involves the proper construction of the property insurance policy. Thus, summary disposition is appropriate only if there is no ambiguity in the policy. *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). A contract is ambiguous if two provisions irreconcilably conflict or a term is equally susceptible to more than one meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). A contract will be read as a whole and in accordance with its plain and ordinary meaning, but a court will ultimately strive to enforce the parties' intent. *Cole v Auto Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

Here, the employee dishonesty provision in the property policy obligates Citizens Insurance to indemnify First Mountain for "direct loss or damage to Business Personal Property and 'money' and 'securities' resulting from dishonest acts . . . ." Although the definitional provision in the property policy defines "money" and "securities," it does not provide a definition of "business personal property." Rather, the record indicates that First Mountain sought to bring the checks written by the Paylors to Winborn within the employee dishonesty provision by applying the following description of covered business personal property in ¶ A(1)(b) of the property policy:

Business Personal Property located in or on the buildings at the described premises or in the open (or in a vehicle) within 1000 feet of the described premises, including:

\* \* \*

(2) Property of others that is in your care, custody or control, plus the cost of labor, materials or services furnished or arranged by you on personal property of others . . . .

Assuming for purposes of analysis that the Paylors' checks fall within this description, we agree with Citizens Insurance's argument that there is no coverage available to First Mountain for the Paylors' noneconomic losses. Employee dishonesty policies insure against the risk of property loss through employee dishonesty and, while the policies may cover the loss of third-party property possessed by an insured, they are not liability policies and do not protect employers against tortious acts that their employees commit against third parties. *Lynch Properties v Potomac Ins Co*, 140 F3d 622, 629 (CA 5, 1998). Paragraph (E)(5)(a) of the policy sets forth Citizens Insurance's payment options for loss or damage that it was obligated to pay:

At our option, we will either:

- (1) Pay the value of lost or damaged property;
- (2) Pay the cost of repairing or replacing the lost or damaged property;

- (3) Take all or an part of the property at an agreed or appraised value; or
- (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to d.(1)(e) below.

Reading the property policy as a whole, it is clear that Citizens Insurance did not agree to pay for a third party's noneconomic losses related to the loss of or damage to property. The evidence presented by Citizens Insurance in opposition to First Mountain's motion for entry of judgment established that the Paylors were awarded noneconomic damages of \$480,000 based on a finding that First Mountain was negligent in failing to properly train or oversee Winborn's and Stanley's work. The noneconomic damages were the sole basis of the \$100,000 portion of the money judgment awarded to First Mountain in this case. Because Citizens Insurance had no obligation to pay noneconomic damages under the employee dishonesty provision in its property policy, we vacate this portion of the money judgment.

Next, we decline to consider Citizens Insurance's argument that there also was no coverage for the \$63,986.50 in misappropriated checks that was part of the basis for the Paylors' claims against First Mortgage in their separate action. Although a declaratory judgment generally has the same force and effect as a final judgment, MCR 2.605(E), the purpose of declaratory relief is to guide a plaintiff's future conduct in order preserve legal rights. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 126; 693 NW2d 374 (2005). Because the instant case ultimately proceeded to a money judgment for the amount owed by Citizens Insurance to First Mountain under the property policy, and there was no award based on the misappropriated checks, any error by the trial court in its earlier declaratory ruling relative to Citizens Insurance's obligation to indemnify First Mountain for the misappropriated checks was harmless.<sup>1</sup> MCR 2.613(A).

Turning to Citizens Insurance's challenge to the trial court's award of \$47,047.50 for attorney fees and costs incurred by First Mountain in defending the Paylors' various claims in their separate action, we agree with Citizens Insurance that the trial court erred by declaring that it owed First Mountain a duty to defend under the property insurance policy, employee dishonesty provision. "The rights and duties of parties to a contract are derived from the terms of the agreement." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). A duty to defend arises solely from the language in an insurance policy. *Stockdale v Jamison*, 416 Mich 217, 224; 330 NW2d 389 (1982); *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 117; 617 NW2d 725 (2000). Because the property policy on which First Mountain relied to establish coverage does not contain a duty to defend, its claim that it was owed such a duty fails as a matter of law.

We have considered First Mountain's argument that the award of \$47,047.50 can be affirmed on other grounds. Although an appellee can argue alternative grounds for affirmance without filing a cross appeal, *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d

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<sup>1</sup> We note that restitution for the misappropriated funds was eventually and separately made by the tortfeasor employees to the Paylors.

774 (1994), to properly preserve an issue for appeal, it must be presented to the trial court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). There is no indication in the record that First Mountain presented its proposed alternative grounds for affirmance to the trial court.

We decline to consider First Mountain's argument that a duty to defend can be derived from Citizens Insurance's alleged reckless and careless disregard of policy provisions because this claim is not sufficiently briefed, with citation to supporting authority. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Additionally, we are not persuaded that a letter written by Citizens Insurance to First Mountain in July 2008 affords any basis for finding a duty to defend. The letter indicates that Citizens Insurance considered, and denied, that there was a duty to defend under various provisions in a business owner's liability coverage form, not with respect to the employee dishonesty coverage in the property policy that is at issue in this appeal.

Finally, we are not persuaded that the property policy's employee dishonesty provision itself establishes a right to indemnity for attorney fees and costs that were incurred in defending the various tort, contract, and statutory claims in the Paylors' separate action. The provision imposes a duty on Citizens Insurance to pay for "direct loss or damage to Business Personal Property . . . ." As previously indicated, employee dishonesty policies are not liability policies. *Lynch Properties, supra* at 629. There is no language in the property policy that shows an agreement by Citizens Insurance to indemnify First Mountain for defense costs of any nature. Cf. *Busch v Holmes*, 256 Mich App 4, 9-10; 662 NW2d 64 (2003) (although insurance policy did not contain a duty-to-defend clause, defense costs were recoverable to the limited extent that they fell within an express indemnity provision for defense costs).

For these reasons, the trial court erred in awarding a money judgment of \$147,407.50 in favor of First Mountain. Accordingly, we vacate the money judgment and remand for entry of an order of summary disposition in favor of Citizens Insurance consistent with this opinion. MCR 2.116(I)(2).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald