

STATE OF MICHIGAN
COURT OF APPEALS

SHERYAL A. GARRISON,

Plaintiff-Appellant,

v

LARRY CONKLIN, JR.,

Defendant,

and

AMERISURE COMPANIES,

Defendant-Appellee.

UNPUBLISHED
February 14, 2003

No. 234243
Genesee Circuit Court
LC No. 96-044278-NO

Before: White, P.J., and Kelly and R.S. Gribbs, * JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition in favor of garnishee defendant Amerisure Companies. We affirm.

On October 30, 1994, defendant Conklin constructed four crosses of wood, placed them on plaintiff's lawn, and set them on fire. Conklin later pleaded no contest to ethnic intimidation, MCL 750.147b, and plaintiff filed a civil action alleging that Conklin's actions caused her emotional damage. Defense counsel acknowledged at oral argument that defendant Amerisure was served but did not respond. Conklin did not respond to the complaint and a default was entered against him. Subsequently, plaintiff and Conklin entered into a consent judgment that required Conklin pay plaintiff \$250,000. Plaintiff sought to garnish Amerisure under a homeowner's insurance policy that was issued to Conklin's mother, and under which Conklin was an insured. Amerisure denied indebtedness, and claimed Conklin's actions were not covered under the policy. Amerisure moved for summary disposition of plaintiff's garnishment claim on those grounds, and the trial court granted Amerisure's motion.

On appeal, plaintiff argues that summary disposition was inappropriate because the trial court improperly determined that the homeowner's insurance policy precluded coverage for the incident giving rise to the consent judgment against Conklin. Also, plaintiff argues, if the policy

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

does not provide coverage for the incident giving rise to the judgment, then the policy provides illusory coverage. Finally, plaintiff argues that a question of fact exists as to the exclusion of liability coverage arising out of allegedly wilful violations of penal law.¹ Since the parties presented evidence outside of the pleadings, including deposition testimony and documentary evidence, it is appropriate to review the issue under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999). On appeal, a trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Interpretation of an insurance contract presents a question of law which is reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

On appeal, plaintiff first argues that summary disposition was inappropriate because the trial court failed to consider whether the incident giving rise to Conklin's consent judgment was a "personal injury" as defined by the policy. We disagree. To determine whether an event is covered by a liability insurance policy, a court first considers whether the event is within the scope of the policy coverage and, if so, whether the event is denied under a policy exclusion. *Fire Ins Exchange v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996). The scope of the coverage is determined by the terms of the insurance contract. *Id.*

The policy at issue provides for the following personal liability coverage:

If a claim is made or a suit is brought against an **INSURED** for damages because of **BODILY INJURY** or **PROPERTY DAMAGE** caused by an occurrence or personal injury to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the **INSURED** is legally liable; and
2. provide a defense at our expense by counsel of our choice even if the suit is groundless, false, or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the occurrence equal our liability limit.

PERSONAL INJURY means an injury arising from an event, during the policy period, caused by one or more of the following offenses:

1. false arrest, detention or imprisonment, or malicious prosecution.
2. Libel, slander or defamation of character; or
3. invasion of privacy, wrongful eviction or wrongful entry.

* * *

¹ Plaintiff raised additional arguments for the first time at oral argument. These arguments were not briefed and will not be addressed here. Failure to brief an issue abandons it on appeal. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

PERSONAL INJURY does not apply to injury:

(1) caused by a willful violation of a penal law or ordinance committed by or with the knowledge or consent of an **INSURED**.

Plaintiff alleged the following in her amended complaint:

On or about October 30, 1994 the Defendant [Conklin] not intending injury but contrary to the provisions of the public policy expressed by the Michigan Ethnic Intimidations laws, the common law and other Michigan Statutes did construct four crosses of wood, soaked them with a flammable liquid believed to be kerosene, entered onto the lawn area of the Plaintiff's home, placed the crosses in the yard and ignited the crosses under the cover of darkness.

Although Defendant's actions were upon information and belief intended only as a Halloween prank the events initiated by Defendant accidentally cause[d] injury and damage to Plaintiff when she observed the flames and damage on her premises.

The trial court found that the Conklin's acts "were intentional, designed to effect a certain result" and did not qualify for coverage under the Amerisure policy. Plaintiff argues that Conklin's actions, specifically an invasion of privacy and wrongful entry, caused "personal injury" and should be covered, whether or not they qualify as an "occurrence" under the policy.

As the trial court suggested at the motion hearing that, although Conklin pleaded no contest to ethnic intimidation, he admitted in response to the initial complaint that he helped build the crosses "to frighten and intimidate Plaintiff because of her race." Conklin denied, both in his answer to the complaint and in his deposition testimony, that he burned the crosses on plaintiff's property, although he was deemed to have admitting burning the crosses when he failed to reply to defendant's request to admit. In granting defendant's motion for summary disposition, the trial court stated,

The truth is Mr. Conklin is in prison for ethnic intimidation. The truth is that he has earlier in this case admitted doing the things that he was charged with even though he initially pled no contest and further admitting that these things were done with the intent to frighten and scare Mrs. Garrison. The fact that he now says he didn't do it I don't think is of any assistance because if he is telling the truth now, and he didn't do it, there would be no reason for coverage.

I find that the acts of the Defendant Conklin were intentional, designed to effect a certain result, that they did so, that those acts don't qualify as an occurrence under the Amerisure policy. I don't find that the section which describes the events to be ap—apo (indistinct) here, the claim is for violation of the ethnic intimidation law, and I am going to grant summary disposition in favor of Amerisure.

As the trial court concluded, neither Conklin's admission that his actions were intentional and intended to frighten and intimidate plaintiff because of her race, nor his claim that they never

happened, supports plaintiff's assertion that there should be coverage for a personal injury in this case. In addition, in light of Conklin's admissions, the trial court did not err in finding that there was no question of fact regarding whether Conklin intentionally violated the law.

Plaintiff also argues the coverage is illusory because the enumerated "personal injury" provision covers events caused by intentional torts, and a different provision excludes liability for wilful violations of penal laws, which may include intentional torts. We disagree. An insurance company is free to limit its liability as long as it does so clearly and unambiguously. *Allstate Ins Co v Fick*, 226 Mich App 197, 201-202; 572 NW2d 265 (1997). Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. *Raska v Farm Bureau Ins Co*, 412 Mich 355, 361-362; 314 NW2d 440 (1982).

The plain language of the policy exclusion dictates that if Conklin intended to violate a penal statute, Amerisure would not be required to provide coverage for the resulting personal injury, whether the harm was intended or not. *State Farm Fire & Casualty Co v Couvier*, 227 Mich App 271, 274-275; 575 NW2d 331 (1998). The exclusion language is clear and unambiguous. In addition, it is against Michigan public policy to provide benefits to those who commit crimes. As a matter of public policy, an insurance policy that excludes coverage for a person's criminal acts serves to *deter* crime, while a policy that provides benefits to those who commit crimes would *encourage* it. *Auto Club Group Insurance Company v Daniel*, ___ Mich App __; ___ NW2d __ (Docket No. 231706, issued September 13, 2002), slip op, p 3. The trial court did not err in granting summary disposition.

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs