STATE OF MICHIGAN

14TH CIRCUIT COURT FOR THE COUNTY OF MUSKEGON
BUSINESS COURT DIVISION

AUTO-OWNERS INSURANCE COMPANY

Plaintiff,

File No. 13-48858-CK
Hon. Neil G. Mullally

CHANDRA L. NYHOF, a/k/a CHANDRA JAWOR, WILLIAM ANTHONY JONES, LYNN L. GLASER, GLENN W. GLASER, JJR., and BIT O'HEAVEN, INC., d/b/a GLASER'S GLENN LOG CABIN RESORT

Defendants.
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OPINION

This case is an action for declaratory relief in which the Plaintiff insurance company is seeking a declaratory judgment that the Plaintiff does not have a duty to defend or indemnify the Defendants Jones, Bit O'Heaven, Inc., and the Glasers in an underlying sexual assault tort case, *Chandra L. Nyhof v William Anthony Jones, et al.*, Muskegon County Circuit Court File 12-48720-NO. The Defendant Jones has been defaulted, and up to this point, the Plaintiff has been providing defense for the

Defendants Bit O'Heaven, Inc., and the Glasers under a reservation of rights. The Plaintiff in this case has filed a motion for summary disposition and the Defendants have filed responses, except for the defaulted Defendant Jones. The Court has heard oral arguments and considered the excellent briefs submitted by counsel. This Opinion sets forth the Court's decision as to the Plaintiff's motion for summary disposition.

At the outset the Court strongly emphasizes that the issue before this Court is whether the Plaintiff insurance company must defend and indemnify the Defendants Bit O'Heaven, Inc., and the Glasers against any of the claims of the Defendant Chandra Nyhof, who is the Plaintiff in the underlying tort case. In other words, this case is not to decide the question of whether Bit O'Heaven, Inc. and the Glasers are liable to Chandra Nyhof for the horrendous sexual assault she experienced. Rather, this case is to decide whether the Plaintiff insurance company must provide defense services and coverage to Bit O'Heaven and the Glasers as to any of the damage claims for which Bit O'Heaven and the Glasers may be held liable in the underlying case.

The Plaintiff's motion for summary disposition is based upon MCR 2.116(C)(10). That court rule allows the Court to grant a motion for summary disposition when "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment...as a matter of law."

The legal requirements under Michigan law concerning an insurer's duty to defend are set forth in *Fitch v State Farm Fire and Casualty Company*, 211 Mich App 468 (1995):

> Whether an insurance carrier has a duty to defend its insured in an underlying tort action depends upon the allegations in the complaint. *State Farm Fire & Casualty Co. v Basham*, 206 Mich App 240, 242, 520 NW 2d 713 (1994). The duty to defend and indemnify is not based solely on the terminology used in the pleadings in the underlying action. The court must focus also on

> the cause of the injury to determine whether coverage exists. *Id.*, p. 242, 520 NW 2d 713. Thus, it appears that our inquiry is twofold. Does the claimed injury fall within the meaning of the terms used in the policy? If so, is the cause of the injury covered under the policy? Id., p. 242, 520 NW 2d 713. 211 Mich App 486, 471.

In the underlying tort case, Chandra Nyhof's Complaint alleges that William Anthony Jones, the assailant of Chandra Nyhof, was an employee of Bit O'Heaven and under the authority and control of Bit O'Heaven's owners, the Glasers; that Bit O'Heaven and the Glasers had control of and access to the grounds surrounding the home she rented from them; that the Glasers knew of Jones' past criminal record and did not investigate his background with due care; that the Glasers knew that Jones had a sexual interest in Chandra Nyhof; that the Glasers knew or should have known that Jones represented a risk of harm to Chandra Nyhof; that the risk of harm was reasonably foreseeable; that the Glasers had a duty of due care to protect Chandra Nyhof by taking various actions related to Jones; that the Glasers violated the common law covenant of quiet enjoyment as to Chandra Nyhof, and also violated MCL 554.139(1)(a) as to fitness of the rental house for residential use; and that the above breaches of the Glasers' duties constituted an actual, foreseeable and proximate cause of the physical, emotional, and financial damages suffered by Sandra Nyhof.

Under Michigan law, insurance policies are contracts that are interpreted and construed in accordance with the rules of contract construction. *Hendersen v State Farm Fire and Cas. Co.*, 460 Mich 348 (1999). An insurance policy should be read as a whole to determine what the parties intended to agree upon, and should be construed to give effect to each word, clause, and phrase. *McKusick v Travelers Indemnity Co.*, 246 Mich App 329 (2001). Words contained in an insurance policy are to be given their commonly understood, ordinary, and plain meaning. *Allstate Ins. Co. v Tomsaszcwski,*

180 Mich App 616 (1989). If an insurance policy's terms are clear and unambiguous, the Court cannot rewrite the plain and unambiguous language to create coverage. *Allstate Ins. Co. v Freeman*, 432 Mich 656 (1989); *Fremont Mutual Ins. v Wieschowski*, 182 Mich App 121 (1989); *Edgar's Warehouse, Inc. v United States Fidelity and Guaranty Co.*, 375 Mich 598 (1965); *Eghotz v Cruch*, 365 Mich 527 (1962).

The Defendants Bit O'Heaven and the Glasers had two Auto Owner's insurance policies in effect at the time of the sexual assault of Chandra Nyhof.

The first insurance policy covering Bit O'Heaven, Inc. d/b/a/ Glaser's Glenn is an Auto-Owners Insurance Co. "Tailored Protection Policy," policy number 034676-1467210-10. That insurance policy covers the liability of the cabin rental business of the Defendant Bit O'Heaven, Inc. d/b/a/ Glaser's Glenn. The portions of the policy that are at issue in this litigation are the liability provisions for damages from personal injuries to individuals.

The second insurance policy names the Glasers individually as the insured party. It is called a "Dwelling Fire Policy Declaration," and is policy number 46-504-272-03. In addition to fire insurance protection, this policy provides coverage to the Glasers under a Landlord Liability provision for bodily injury damages.

The first policy's liability coverage allows insurance for bodily injury if the bodily injury is caused by an "occurrence." (Tailored Protection Policy, page 1, paragraph b.1) An occurrence is defined as an "accident, including continuous or repeated exposure to the same general harmful conditions." (Tailored Protection Policy, page 19, Section IV, paragraph 14) Because the injuries to Chandra Nyhof were not an accident, this policy does not provide coverage for those damages.

If even for the sake of argument the sexual assault upon Debra Nyhof were

considered an "accident," the Tailored Protection Policy also contains an exclusion that would preclude insurance coverage. Exclusion 2.a. provides that insurance coverage does not extend to "bodily injury...expected or intended from the standpoint of the insured." (Tailored Protection Policy, page 2, paragraph 2.a, emphasis supplied). Much of the gravamen of the Plaintiff's complaint is that the Defendants Bit O'Heaven and Glasers knew that the Defendant Jones had a past criminal record and foreseeably should have expected the intentional assault by Jones upon Chandra Nyhof. Obviously, that exclusion applies if the definition of "accident" were extended to the rape committed by Jones.

The second insurance policy, the Dwelling Fire Policy, contains the same definition of "occurrence" as an "accident" as cited above in the Tailored Protection Policy. (Dwelling Fire Policy, page 2, paragraph 9) Therefore, for the same reasons already discussed, the Dwelling Fire Policy does not provide coverage for damages from the intentional sexual assault in the underlying tort case. Likewise, the Dwelling Fire Policy contains an exclusion similar to the exclusion in the Tailored Protection Policy.

Based upon the insurance policies' clear and unambiguous terms, the conclusion is inescapable that the Plaintiff is not contractually obligated to defend or indemnify the Defendants in the underlying tort case because the cause of the personal injuries to Chandra Nyhoff was the intentional criminal rape committed by the Defendant Jones.

Whether Chandra Nyhof may eventually prevail against Bit O'Heaven or the Glasers on a negligence theory, breach of quiet enjoyment, etc., is not the issue in this case. The issue in this case is whether the Plaintiff has a duty to defend or indemnify when the cause of the personal injury was the intentional act of rape. Based upon the facts of the underlying case, the Court finds that the Plaintiff herein does not have the

contractual duty to defend or indemnify the Defendants as to the underlying tort case. No matter if the complaint couches the intentional act as a negligent act or an accident as to the insured, the Court must look at the actual cause of the bodily injury, which was an intentional act. *Fitch v State Farm Fire and Casualty, supra*. This decision is also supported by the numerous appellate decisions cited by the parties in their briefs, pleadings, and oral argument.

For the foregoing reasons, the Court grants the Plaintiff's motion for summary disposition. Plaintiff's counsel shall prepare and submit an order in compliance with this Opinion and Michigan Court Rules.

Dated: January 2, 2014

Neil G. Mullally P22857
14th Circuit Business Court Judge