STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

FOUR SEASONS ROOFING &
SHEET METAL, LLC,
BILL BURKHARDT, and
DONALD LOCKRIDGE,
Plaintiffs,

vs. Case No. 17-3662-CB

WESTFIELD INSURANCE COMPANY,
Defendant.
_____/

OPINION AND ORDER

Westfield Insurance Company ("Defendant") filed a motion for reconsideration of this Court's July 27, 2018 *Opinion and Order* granting Plaintiffs'[1] motion for partial summary disposition. For the sake of judicial economy, the Court herein incorporates the factual background as more fully set forth in that *Opinion and Order*.

Essentially though, Defendant received notice of a claim under its policy. Defendant decided that the claim related to damage from asbestos contamination. Therefore, Defendant refused to indemnify or defend Plaintiffs for the loss. Approximately nine months later, Defendant learned that the claim also involved damage beyond the supposed asbestos contamination. Therefore, Defendant agreed to Defend Plaintiffs. Plaintiffs seek recovery of defenses costs incurred before Defendant recognized its duty to defend.

I. Standard of Review

Motions for reconsideration require the moving party to demonstrate a palpable

[1] "Plaintiffs" refers to Four Seasons Roofing & Sheet Metal, LLC, Bill Burkhardt and Donald Lockridge.

error by which the Court and the parties have been misled and show that a different disposition of the motion results from correction of the error. MCR 2.119(F)(3). A trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided. *Id*; *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). MCR 2.119(F)(3) allows courts to correct mistakes made when ruling on a motion in order to avoid subsequent correction on appeal at greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter of discretion. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

II. Law and Analysis

In its motion for reconsideration, Defendant argues that the Court erred in granting Plaintiffs' motion for partial summary disposition. According to Defendant, Plaintiffs' motion presented only a single issue—whether the allegations of the 2017 Complaint triggered a duty to defend. That is, did Defendant owe defense costs where the Complaint alleged accidental property damage caused by dust and debris rather than asbestos.

Defendant states that while the Cooks Claim Complaint did not explicitly refer to asbestos, its investigation confirmed the presence of asbestos in the debris. On that basis, Defendant determined that the loss fell within an asbestos exception in the insurance policy and therefore Defendant declined to indemnify Plaintiffs or to provide a defense. Defendant argues that the duty to defend does not arise until a covered claim is presented. Therefore, Defendant reasons, the duty to defend cannot be decided

without a decision of whether the policy covers the claims asserted in the complaint. That is, insurers are not obligated to defend non-covered claims.

According to Defendant, the Court's *Opinion and Order* does not address the presented issue—specifically, it did not decide whether the 2017 Complaint asserted a covered claim. Defendant believes that the Court must decide whether the complaint asserts a covered claim before it may determine whether there is a duty to defend. With coverage undecided, it is not possible to rule on the duty to defend and therefore Plaintiffs' motion was premature Defendant asserts. Defendant complains that the Court's *Opinion and Order* focused on the fact that Defendant eventually did decide to provide a defense for Plaintiffs starting in February 2018. Defendant believes that the Court "simply inferred" that the duty to defend existed from the beginning. Defendant contends that Plaintiffs never argued that the Court could determine the duty to defend "without reference to the complaint, based solely on the ground that a defense was later provided."

Defendant maintains that it did not subsequently assume Plaintiffs' defense based on allegations in the Complaint. Rather, it ultimately decided to assume the defense based on information in 2018 that the Cooks Claim may be seeking recovery for property damage covered by the policy." Therefore, when Defendant denied Plaintiffs' claims, "it had no notice of any claims for broken inventory or damaged audio or video systems or stains on the building. . ." Defendant then analogizes the above described scenario to an amended pleading. According to Defendant, it did not receive notice of such losses until early 2018 and therefore the duty to defend was not triggered

before that 2018 date. The duty to defend begins only when the insurer receives notice of a covered claim Defendant argues.

Defendant states that if the complaint fails to allege a covered claim, "no duty exists." Yet in its original response, Defendant argued that the duty to defend is not dictated by the allegations of a complaint. Defendant claimed, "Plaintiffs are wrong on the law. Allegations of a complaint do not control an insurer's duty to defend."

A recitation of some basic principles regarding the duty to defend is appropriate. First, it is well established that an insurer's duty to defend is broader than its duty to indemnify. *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74; 755 NW2d 563 (2008). When considering whether the insurer has a duty to defend the insured, it must be remembered that the duty to pay is severable from the duty to defend. *The one is not dependent on the other. Dochod v Cent Mut Ins Co*, 81 Mich App 63, 67; 264 NW2d 122 (1978) emphasis added.

Moreover, if the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense. *Polkow v Citizens Ins Co,* 438 Mich 174, 178, 180; 476 NW2d 382 (1991). The duty to defend may apply even where the claim is groundless or frivolous. *Am Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 451; 550 NW2d 475 (1996). Further, an insurer has a duty to defend, despite theories of liability asserted against an insured which are not covered under the policy if any theories of recovery fall within the policy. *Dochod v Central Mutual Ins Co,* 81 Mich App 63; 264 NW2d 122 (1978). Finally, cases of doubt as to whether or not the complaint alleges a covered claim must be resolved in the

insured's favor. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137–38; 610 NW2d 272 (2000).

Therefore, the duty to defend may be triggered despite the fact that Defendant disputes whether the policy covers the loss. The present case is at the summary disposition stage and the parties have argued about whether the loss falls within the asbestos exclusion. Both parties have recognized that the Court should not decide at this point whether the asbestos exclusion applies to Plaintiffs' claims because that is disputed question of fact. Consequently, the Court's *Opinion and Order* did not decide the asbestos exclusion question. Yet the Court could still decide the duty to defend question because that inquiry differs from the duty to indemnify.

Given that coverage is even arguable, on that basis alone the duty to defend is triggered. See *Polkow,* 438 Mich at 178. "Fairness requires that there be a duty to defend at least until there is sufficient factual development to determine" the source of the loss. *Id.* at 180. Until that time, the allegations must be seen as "arguably" within the policy. *Id.* Consequently, Defendant has a duty to defend until the coverage questions are settled. Defendant is incorrect in asserting that the duty to defend somehow rests on the duty to indemnify or may not be decided until the Court determines the liability questions.

Additionally, as Defendant has since recognized, some of the losses do fall within the policy and therefore Defendant has a duty to defend all of the claims. *Dochod,* 81 Mich App at 66. The only question then becomes when that duty arose. The duty to defend is triggered when a claim is made against the insured that even arguably comes within the policy's period and scope of coverage. *Am Bumper & Mfg*

Co v Hartford Fire Ins Co, 452 Mich 440, 458; 550 NW2d 475 (1996). For that reason, the Court considered the non-asbestos related damages in its *Opinion and Order*. While Defendant seeks to characterize the non-contaminant property damage as "new claims" for which it did not have notice until February 2018, the property damage arose from the same loss or occurrence averred in the Complaint.

The Court is satisfied that the Complaint sufficiently put Defendant on notice of the claims and therefore the duty to defend arose from the Complaint. As Defendant has argued, the insurer has the duty to look behind the allegations in a complaint to analyze whether coverage is possible. *Shepard Marine Construction Co v Maryland Casualty Co,* 73 Mich App 62; 250 NW2d 541 (1976). The duty to defend cannot be limited by the precise language of the pleadings. *Id.* Further, the duty to defend includes the duty to investigate and analyze whether the third party's claim against the insured should be covered. *Koski v Allstate Ins Co*, 456 Mich 439, 445 n5; 572 NW2d 636 (1998).

The *Cooks—The Lampshaders Co's* September 2017 Complaint averred that "Four Seasons allowed debris to enter the interior of the building, causing extensive damage to inventory and resulting in extensive clean-up costs and lost profits." ¶9. The Complaint stated that debris came in the attached warehouse; most of the inventory suffered damage from falling debris and caused damage to the structural integrity of the drop ceiling; the infiltration of the debris caused extensive damage. ¶ 31-43.

The *Cooks* Complaint contains allegations of property damage not related to the exposure of asbestos and sufficiently put Defendant on notice that it should investigate the nature of the damage caused by the falling debris. Therefore, the Complaint

triggered the duty to defend. Resolving any ambiguities in favor of the insured, Plaintiffs claims arguably came within the policy coverage and triggered the duty to defend. While Defendant maintains that it did not assume Plaintiffs' defense based on allegations in the Complaint, it should have done so.

For these reasons, the Court did not commit palpable error in its July 27, 2018 *Opinion and Order* in determining that Defendants had a duty to defend Plaintiffs from the beginning of the Cooks claims. Defendant's motion for reconsideration must be denied.

III. Conclusion

For the reasons stated above, the motion for reconsideration is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

Date: SEP 11 2018

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge