IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7936

Summary Calendar

DONNA MCFARLAND,

Plaintiff-Appellee,
Cross-Appellant,

v.

UTICA FIRE INSURANCE COMPANY
OF ONEIDA COUNTY, N.Y.,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-J91-0125(W)(C))

(January 6, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Utica Fire Insurance Company of Oneida County, New York (Utica), appeals the district court's grant of Donna McFarland's motion for summary judgment for contractual damage claims. Donna McFarland also appeals the district court's grant of Utica's

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

motion for partial summary judgment as to McFarland's punitive damage claims. We affirm the judgment of the district court.

I. BACKGROUND

A. Factual Background

Utica issued an insurance policy in the name of William N. Adcock to Adcock and his wife, Donna McFarland, for their residence and its contents in Jackson, Mississippi, for the time period June 28, 1990, to June 28, 1991. The policy was issued through Utica's agent in Jackson--Estes, Parker & Associates (Estes)--and provided maximum coverage of $31,000 for personal property.

Sometime prior to October 18, 1990, Adcock and McFarland became estranged, and Adcock moved out of the residence. On October 18, 1990, McFarland asked Estes to remove Adcock's name from the policy. However, Estes refused to do so, citing the need for Adcock's independent authorization or supporting documentation from McFarland, i.e., a divorce decree, a quitclaim deed, a warranty deed, or a letter from the mortgage company releasing Adcock of his obligations.

On October 21, 1990, Adcock "went berserk" and attacked the residence, causing damage to both the residence itself and to McFarland's personal property. After Adcock bragged to McFarland about what he had done, McFarland called the police. Adcock assaulted the two officers who had responded to McFarland's call,

and in order to subdue Adcock, the Jackson Police Department had to cordon off the neighborhood and call in its SWAT team.

After McFarland ascertained damages totalling $14,000, she filed a claim with Utica for her loss. On January 10, 1991, Utica denied McFarland's claim, explaining that the "intentional acts" exclusion provision of her insurance policy precluded her recovery.

B. Procedural History

McFarland filed suit in the circuit court of Hinds County, Mississippi, against Utica and its agent, Estes, on February 28, 1991. McFarland sought to recover actual and punitive damages from the defendants for Utica's alleged wrongful and bad faith denial of her claim under the insurance policy issued by Utica and for the alleged negligence of Estes in not attaching proper endorsements to the insurance policy in question.

Utica and Estes removed the case to the United States District Court for the Southern District of Mississippi on diversity grounds, alleging fraudulent joinder of co-defendant Estes, a Mississippi resident. McFarland then moved to remand. The district court determined that because there was no assertion that defendant Estes had engaged in conduct which constituted gross negligence, malice, or reckless disregard for McFarland's rights, under Mississippi law Estes was not liable to McFarland as an independent tortfeasor. The district court then dismissed McFarland's claim against Estes and denied McFarland's motion to remand on April 21, 1992.

On December 16, 1992, the district court dismissed Estes from the lawsuit, denied McFarland's motion to reconsider the court's earlier order denying her motion to remand, denied Utica's motion for summary judgment as to McFarland's claim regarding contractual damages, and granted Utica's motion for partial summary judgment as to McFarland's claim regarding punitive damages. McFarland then filed a motion for summary judgment for her contractual damage claim, which the district court granted on June 4, 1993.

However, concurrently with its June 4, 1993 order granting McFarland's motion for summary judgment, the district court issued a final judgment which erroneously stated that McFarland's complaint was dismissed with prejudice. On June 14, 1993, the district court issued a final summary judgment, which correctly granted judgment in favor of McFarland.

Utica filed a timely notice of appeal on June 15, 1993. On June 21, 1993, the district court issued an order by which the erroneous June, 4 1993 final judgment was vacated and the June 14, 1993 final summary judgment was substituted and deemed to have been entered nunc pro tunc on June 4, 1993. McFarland then timely filed her notice of appeal on June 22, 1993.

II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the criteria which the district court used in the first instance. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir.

1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). That is, we review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. Dawson, 4 F.3d at 1306. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

Although the preliminary question of whether an ambiguous provision exists in an insurance policy is a question of law which we review de novo, we review the district court's interpretation of such an ambiguous provision for clear error. See Carpenters Amended and Restated Health Benefit Fund v. Holleman Constr. Co., 751 F.2d 763, 766-67 (5th Cir. 1985).

III. CONTRACTUAL DAMAGES

Utica contends that the district court erred in granting McFarland's motion for summary judgment because the district court incorrectly determined that the "intentional acts" exclusion provision of the insurance policy in question was ambiguous. We disagree.

The issue with which the district court grappled was whether the "intentional acts" exclusion provision of McFarland's insurance policy precluded her from recovering on her claim made pursuant to Adcock's intentional destruction of property covered under the policy. This "intentional acts" exclusion provision,

located on page eight of the policy under the section entitled "Exclusions That Apply To Property Coverage," reads as follows:

> **Intentional Acts - We** do not pay for loss which results from an act committed by or at the direction of an insured and with the intent to cause a loss.

McFarland argues that the language of this provision does not negate Utica's duty to pay in her case. She contends that an innocent spouse should not be denied her insurance proceeds merely because of the wrongful act of a co-insured. To support her contention, she notes that other language in the policy creates severable interests between co-insureds so that the act of one co-insured which falls within the "intentional acts" exclusion does not deprive another co-insured of coverage under the policy. She specifically refers to section six of that portion of the policy entitled "Definitions," on page one of the policy, which reads:

> **Insured** means:
>
> a. **you**;
> b. **your** relative if residents of **your** household;
> c. persons under the age of 21 in **your** care or in the care of **your** resident relatives; and
> d. **your** legal representative if **you** die while insured by this policy. This person is an **insured** only with respect to insurance on covered property and liability arising out of the property. An **insured** at the time of **your** death remains an **insured** while residing on the **insured premises** . . . .
>
> Each of the above is a separate **insured**, but this does not increase **our limit**.

McFarland thus argues that she was entitled to recover under the policy because of the ambiguity inherent in the "intentional acts" exclusion provision, which did not clearly preclude a co-

insured from recovering for a loss intentionally caused by another insured.

Utica, on the other hand, asserts that the language of the "intentional act" exclusion provision is not ambiguous. Utica contends that "an insured" should be read to mean "any insured" and that therefore the policy makes all insureds' interests non-severable with respect to intentional losses. Furthermore, Utica denies that the "separate insured" language on page one of the policy constitutes a "severability clause" and claims that the only purpose served by this language is to prevent the stacking of liability coverages. Utica thus contends that McFarland is precluded from recovering under the policy for a loss caused by Adcock's "intentional acts."

Because the instant suit is in federal court on the basis of diversity jurisdiction, we are bound by the principles of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), to settle the dispute as would the Mississippi courts--by applying Mississippi substantive law. Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1364 (5th Cir. 1987). Further, because Mississippi has not analyzed an identical or substantially similar "intentional acts" exclusion provision which is the central issue of this dispute, this court is called upon to make an Erie[1] guess as to how Mississippi law would

[1] Pursuant to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), if the relevant state law is unsettled, a federal court is required to make an educated guess as to how the state courts would resolve the issue.

resolve this dispute. We thus begin by looking to Mississippi's rules of insurance contract construction.

Words, terms, phrases, and clauses in insurance contracts are generally to be given their plain and common everyday meanings so as to effect the intent of the parties. See Benton v. Canal Ins. Co., 130 So. 2d 840, 846 (Miss. 1961). However, if an ambiguity exists, the insurance contract should be construed most favorably to the insured and against the insurer. State Farm Mutual Auto Ins. Co. v. Scitzs, 394 So. 2d 1371, 1372 (Miss. 1981). A contractual provision is deemed ambiguous if the provision is susceptible of more than one interpretation, if the provision is in direct conflict with another provision, or if the terms of the provision are unclear or of doubtful meaning. See, e.g., Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378, 1383 (Miss. 1990) (two provisions conflict); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984) (terms of the provision are unclear and the provision is susceptible to multiple interpretations).

In determining whether the Mississippi courts would view the "intentional acts" exclusion provision of the insurance policy in question as ambiguous, we find enlightening the Mississippi Supreme Court's implicit holding in McGory v. Allstate Ins. Co., 527 So. 2d 632 (Miss. 1988), and in cases cited therein which the court used to reach that holding.

In McGory, the insureds were a married couple whose insured rental property was substantially damaged by fire. Id. at 633. Suspicious circumstances, including the undisputed fact that the

fire was of incendiary origin, led the insurer to suspect that the fire was attributable to the McGorys themselves. Id. at 633-34. The insurer then brought an action for a declaratory judgment, seeking a finding that it had no obligations under the insurance policy in question on the theory that the McGorys had deliberately set the fire. Id. at 634. A jury eventually returned a verdict for the insurer, and the McGorys appealed. Id.

The main issue on appeal in McGory was what burden of proof an insurer had to meet when asserting the defense of willful incendiarism. Id. at 634-38. However, the court also addressed the inadequacy of the trial court's instructions to the jury on the quantum of proof necessary to hold liable the wife, a co-insured under the policy in question, for an intentional act of her husband. Id. at 638-39. Before reviewing the specific instructions submitted to the jury, the court determined that "absent insurance policy clauses excluding coverage to both co-insureds because of the deliberate wrongful act of one co-insured (non-severability clauses), the innocent spouse or business partner insured can recover on the policy." Id.

In making this determination, the Mississippi Supreme Court relied on case law from other jurisdictions. Id. The court's reliance on Northwestern Nat'l Ins. Co. v. Nemetz, 400 N.W.2d 33 (Wis. Ct. App. 1986), is of particular import. In Nemetz, the court was presented with the issue of whether an exclusion clause in an insurance policy was ambiguous. Id. at 37-39. The policy

in question in Nemetz contained the following applicable provisions:

> DEFINITIONS.
> "You" and "your" mean the insured named in the Declarations and his or her spouse if living in the same household . . . .
> COVERAGE E--PERSONAL LIABILITY.
> We will pay all sums which an insured person becomes legally obligated to pay as damages because of bodily injury or property damage covered by this policy.
> CONDITIONS.
> . . . . .
> 2. Severability of Interest
> This insurance applies separately to each insured person against whom a claim or suit is brought, subject to our limits of liability for each occurrence.
> EXCLUSIONS.
> Under personal liability coverage . . . we do not cover . . . property damage . . .
> 5. Expected or intended by an insured person.

Id. at 37 n.2. After reviewing these provisions, the court concluded that the exclusion clause was ambiguous "because the severability clause creates the reasonable expectation that each insured's interests are separately covered, while the exclusion clause attempts to exclude coverage for both caused by the act of only one." Id. at 38. The court then construed the policy against the insurer, explaining that it could "not release an insurer from a risk that [might] have been excluded through more careful contract drafting." Id.

The Mississippi Supreme Court agreed with the decision in Nemetz in reaching its determination that absent a non-severability clause, an innocent insured spouse could recover under the insurance policy. McGory, 527 So. 2d at 638. Further, the language of the insurance policy at issue in Nemetz is strikingly similar to that of McFarland's policy in the instant

case. Accordingly, because the McGory court agreed with the reasoning of Nemetz and because the exclusion clause at issue in Nemetz was found to be ambiguous, we believe the Mississippi courts would conclude that the "intentional acts" exclusion provision of McFarland's policy is ambiguous. We thus determine that the district court did not err in deciding that an ambiguity existed in McFarland's insurance policy.

We further determine that the interpretation which the district court gave to the "intentional acts" exclusion provision of the policy, i.e., that "an insured" is used in the singular and does not refer to "any insured" and that thus the exclusion pertains only to the culpable party, is not clearly erroneous. Evidence the district court considered in interpreting the "intentional acts" exclusion--i.e., that although "an" may mean "any," "an" is seldom used to denote plurality--supports the district court's interpretation. Moreover, under Mississippi rules of insurance contract construction, the ambiguity in McFarland's policy necessitates the policy's being construed most favorably to McFarland and against Utica.

Accordingly, because Utica presented only a "non-ambiguity" defense to McFarland's ability to recover under the policy and because there is an absence of disputed material fact, the district court did not err in granting summary judgment for McFarland on her claim that she is entitled to recover contractual damages under the policy.

IV. PUNITIVE DAMAGES

McFarland contends that the district court erred in granting Utica's motion for partial summary judgment on the issue of punitive damages for Utica's alleged bad faith and tortious breach of contract. She argues that because McGory made it clear that an innocent co-insured spouse could recover his or her share of insurance proceeds, regardless of the other insured spouse's intentional acts, Utica had no arguable or legal basis for denying her claim. We disagree.

Again, because this suit is based on diversity jurisdiction, we apply Mississippi law to the issue of punitive damages and undertake to rule as would the Mississippi courts. Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 872 (5th Cir. 1991); Brooks, 832 F.2d at 1364. Under Mississippi law, punitive damages may be assessed against an insurer only if (1) the insurer denied a claim without an arguable or legitimate basis, either in law or fact, and (2) the insurer acted with malice or gross negligence or with reckless disregard for the insured's rights. Aetna Casualty & Sur. Co. v. Day, 487 So. 2d 830, 832 (Miss. 1986); State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 250-52 (Miss. 1985). Whether an insurer had an arguable reason to deny a claim is an issue of law. Dunn, 927 F.2d at 873; Banker's Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 269 (Miss. 1985), aff'd, 486 U.S. 71 (1988).

When Utica denied McFarland's claim, there was no Mississippi case which purported to interpret the thrust of the

"intentional acts" exclusion provision of McFarland's policy. Although McFarland contends otherwise, the Mississippi Supreme Court in McGory determined only that an innocent co-insured is entitled to recover for losses intentionally caused by another co-insured unless the policy contains a non-severability provision which excludes coverage for such losses to all insureds. McGory did not address whether an "intentional acts" exclusion provision worded in the manner of such a provision in McFarland's policy was sufficient to serve as a non-severability clause and thus to exclude an innocent co-insured, such as McFarland, from coverage. Hence, because Mississippi law was unsettled at the time Utica denied McFarland coverage under the policy, we cannot say that Utica's interpretation of the "intentional acts" exclusion provision as precluding recovery by an innocent co-insured was without an arguable or legitimate basis. Further, McFarland has offered no evidence of malice, gross negligence, or disregard of her rights by Utica in this case. The district court did not err, therefore, in granting Utica's motion for partial summary judgment on the issue of punitive damages for Utica's alleged bad faith and tortious breach of contract.

V. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.