# STATE OF MICHIGAN

# COURT OF APPEALS

DKE, INC.,

Plaintiff-Appellee,

v

SECURA INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 16, 2008

No. 278032
Oakland Circuit Court
LC No. 2005-068745-CH

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

We granted leave to appeal to decide whether the trial court erred in holding that defendant's "dishonest and criminal acts" exclusion to the fire insurance policy held by plaintiff was void under MCL 500.2833. We hold that it did err, and therefore reverse the trial court's order and remand for further proceedings.

The issue noted above was raised in defendant's motion for partial summary disposition. Material facts relevant to this issue are as follows. Plaintiff owns a building that was damaged by an arson fire. Defendant claims that Patrick Winter, the son of plaintiff's sole owner, was plaintiff's authorized representative and/or the person to whom the property was entrusted. Defendant also suggests that Patrick was involved in the arson and thus denied coverage on the basis of the dishonesty/criminal acts provision of the policy, which provides as follows:

> f. Dishonesty
>
> Dishonest or criminal acts by you, anyone else with an interest in the property, or any of your or their partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:
>
> (1) acting alone or in collusion with others;
>
> (2) whether or not occurring during the hours of employment.

The trial court ruled that this exclusion is broader than the exclusion contained in § 2832 (which is partially incorporated in MCL 500.2833), and thus, defendant's policy failed to provide plaintiff with the "minimum" coverage required by law. On this basis, the court held that the dishonesty/criminal acts provision was void as a matter of law.

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 150; 715 NW2d 398 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this subrule, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

Before January 1, 1992, all fire insurance policies issued in Michigan were required to conform to the standard fire insurance policy language in MCL 500.2832. See *Williams v Auto Club Group Insurance Company (On Remand)*, 224 Mich App 313, 316; 569 NW2d 403 (1997). MCL 500.2832 provides, among other exclusions, that the insurer "shall not be liable for loss occurring" "while the hazard is increased by any means within the control or knowledge of the insured." MCL 500.2832. Although MCL 500.2832 was repealed in 1992, in its place the Legislature enacted MCL 500.2833, which requires, among other things, that all fire insurance policies "contain, at a minimum, the coverage provided in the standard fire insurance policy under former section 2832." MCL 500.2833(2); *Borman v State Farm & Casualty Co*, 446 Mich 482, 489; 521 NW2d 266 (1994). Although a provision may be added, it must be consistent with the mandates of § 2832; any provision of a fire insurance policy which is contrary to the provisions of § 2832 is void. MCL 500.2832, 500.2860. Pursuant to MCL 500.2833(1)(c), fire insurance policies are required to contain a provision stating, "that the policy may be void on the basis of misrepresentation, fraud, or concealment."

Plaintiff argues that because William Winter, the president and sole shareholder of plaintiff corporation, is innocent of any wrongdoing, defendant is barred by § 2832 from denying coverage because § 2832 provides coverage for innocent insureds. Plaintiff cites to cases holding that a fire insurance policy that purports to deny coverage to an innocent coinsured on the basis of the intentional acts of the other insured is void as being contrary to the standard fire insurance policy language as set forth in § 2832. See *Borman, supra* at 489 (despite the fact that the insurance policy prohibited coverage for intentional wrongful acts by "any insured," an innocent coinsured was entitled to coverage on the basis of § 2832 where her coinsured grandson set the fire that damaged the property); *Morgan v Cincinnati Ins Co*, 411 Mich 267, 277; 307 NW2d 53 (1981) (holding that the standard provision of a fire policy barring coverage for fraud by "the insured" has application only to the insured husband who started the fire and not to the innocent coinsured wife); *Williams, supra* at 317-318 (holding that § 2832 voids the exclusion provision that bars coverage for loss caused by intentional acts of "an insured person" with respect to an innocent coinsured wife where her coinsured husband committed the arson).

These cases are not dispositive, however, because they differ significantly from the instant case because each of those cases involved multiple *individual* insureds, one of who was innocent of wrongdoing, the other of who was not. Thus, *Borman*, *Morgan* and *Williams* were grounded upon the principle that it would be inequitable to bar an innocent insured from recovering fire insurance proceeds where the wrongdoing that occurred to cause the loss was perpetrated exclusively by the coinsured. In contrast, here, if Patrick exercised sufficient control over the corporation's affairs, any act of arson on his part would be imputed to the *corporation* (the sole insured), and thus, there would be no innocent insured like there was in the aforementioned cases, and defendant would be entitled to deny coverage. See *K&T Enterprises, Inc, v Zurich Ins Co*, 97 F3d 171, 179 (CA 6, 1996) (distinguishing *Morgan* on these same grounds).

In *United Gratiot Furniture Mart, Inc v Michigan Basic Property Ins Assoc*, 159 Mich App 94; 406 NW2d 239 (1987), this Court confronted the issue of when an insurance company is permitted to deny payment to a corporation for a fire loss when evidence demonstrates that a shareholder set the fire. Noting that the decision turned on the degree of control which the arsonist exerted over the affairs of the corporation, this Court held that "an insurance carrier may assert arson as a defense against a corporation's claim of fire loss if it is factually demonstrated that the individual who set or procured the setting of the fire exercised complete dominion and control over the affairs of the corporation." *United Gratiot, supra* at 101. Although the decision did not discuss any particular policy exclusions, presumably, a standard fire insurance policy was in effect. Therefore, *United Gratiot* implies that the minimum requirements of the standard fire insurance policy did not include coverage for an arson committed by a person who had the requisite amount of dominion and control over the affairs of the corporation.[1] Accordingly, policy language specifically excluding such coverage would not provide less coverage than the minimum requirements of the standard fire insurance policy.

We are persuaded that defendant's policy could validly exclude "criminal acts," i.e., arson, of an authorized representative or any person to whom the property was entrusted, so long as defendant establishes that the representative or person to whom the property was entrusted had complete dominion and control over the affairs of the corporation.[2] MCL 500.2833(1)(c).

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[1] Although the arsonist in *United Gratiot* was a shareholder, the holding of the case was not dependent upon ownership of the corporation, but upon control of the corporate affairs. Therefore, we believe that the fact that in the instant case the alleged arsonist is not a shareholder does not alter the analysis. Such a conclusion is consistent with the principle that a corporation can be bound by the misdeeds of its agents. See *MCA Financial Corp v Grant Thornton, LLP*, 263 Mich App 152, 163; 687 NW2d 850 (2004).

[2] Exactly how much control is required is not completely clear, as *K & T Enterprises, Inc*, *supra* at 179, held that it was unnecessary to read *United Gratiot* so broadly as requiring the arsonist to have exclusive control over the corporation before an insurer could deny coverage. *K & T* declined to draw a bright line rule concerning the amount of control sufficient to deny coverage, indicating only that sufficient control was proven in the specific factual scenario before it (involving an arsonist who was the president and a sole officer of the corporation, as well as a 50 percent shareholder, was married to the other 50 percent shareholder, and conducted the day-to-

(continued…)

Accordingly, because the dishonesty/criminal acts provision can be interpreted consistent with the mandates of MCL 500.2833 and former MCL 500.2832, the trial court erred in ruling that the provision was void as a matter of law.[3]

Finally, we note that in its motion for partial summary disposition, defendant presented evidence that Patrick had a very involved managerial role in plaintiff's day-to-day operations with little or no oversight. Although the trial court's opinion and order suggests that it was persuaded that Patrick was an authorized representative and/or an individual to whom the property was entrusted, the court did not make a definitive ruling on the issue. Rather, it appears that the court determined that its finding concerning the validity of the dishonesty/criminal acts provision rendered moot all issues relating to the provision. Given that the trial court was poised to make such a ruling on the issue of whether Patrick was an authorized representative or an individual to whom the property was entrusted, and should do so in the first instance, we remand to allow the trial court to rule on the issue, which will include a determination of whether Patrick had complete dominion and control over the affairs of the corporation under *United Gratiot*.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

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(…continued)

day operations of the corporation jointly with his wife). *Id*. Although federal case law is not binding precedent, it can be considered persuasive authority. *Sharp v City of Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001).

[3] Defendant bases its denial of coverage on the portion of the exclusion relating to authorized representatives and persons to whom the property is entrusted. Although there is another portion of the exclusion referring to "anyone else with an interest in the property, or any of your or their partners, employees, directors, trustees," that portion is not at issue here, and thus, we do not address whether that portion of the provision could be interpreted consistently with the standard fire insurance policy of § 2832.