STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE CO,

Plaintiff-Appellee,

v

JAMES F. LeGROW,

Defendant-Appellant

and

JESSICA LEWIS, AMY SHEMANSKI, and BETHANY DENNIS,

Defendants.

UNPUBLISHED
July 1, 2003

No. 238923
Genesee Circuit Court
LC No. 01-070082-CK

HASTINGS MUTUAL INSURANCE CO.,

Plaintiff-Appellee,

V

JESSICA LEWIS,

Defendant-Appellant

and

JAMES F. LeGROW, AMY SHEMANSKI, and BETHANY DENNIS,

Defendants.

No. 238941
Genesee Circuit Court
LC No. 01-070082-CK

HASTINGS MUTUAL INSURANCE CO.,

Plaintiff-Appellee,

V

AMY SHEMANSKI,

Defendant-Appellant,

and

JAMES F. LeGROW, JESSICA LEWIS, and BETHANY DENNIS

Defendants.

No. 239023
Genesee Circuit Court
LC No. 01-070082-CK

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from an order granting plaintiff's motion for summary disposition on its complaint seeking declaratory relief. We affirm.

This case arises out of allegations that defendant LeGrow surreptitiously videotaped his sexual acts with the other defendants (the "women"). The women eventually learned that they had been videotaped and sued defendant LeGrow seeking damages for invasion of privacy, intentional infliction of emotional distress, and a violation of MCL 750.539d. Defendant LeGrow had a homeowners' policy through plaintiff. Although plaintiff agreed to defend defendant LeGrow, as possibly required by the insurance policy, plaintiff also informed defendant LeGrow by letter that its decision to defend him did not prevent it from later denying coverage under the policy. Ultimately, the women were each awarded $100,000 or more in damages. Plaintiff filed the instant matter seeking a declaratory judgment that it could deny coverage under the policy, and that, therefore, it was not liable under the policy to pay these damages. The trial court construed the policy in plaintiff's favor and granted it the requested declaratory relief.

On appeal, defendants contend that the trial court erred in rejecting their contention that the relevant policy provisions were ambiguous. The "coverage plus" protection amended the policy to include coverage for several personal injury "offenses" or torts. The provision specifically listed the following torts: "false arrest, detention, or imprisonment, or malicious prosecution;" "libel, slander, or defamation of character;" and "invasion of privacy, wrongful eviction, or wrongful entry." However, the coverage plus protection also excluded from coverage injuries "caused by a violation of a penal law or ordinance committed by or with the

knowledge or consent of an 'insured.'" Thus, defendants contended that the policy was ambiguous.

The trial court opined, without explanation, that the insurance policy was "unambiguous." We review de novo a trial court's conclusion that contract language is unambiguous. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

Generally, the principles of contract construction apply to the construction of insurance policies. *Nikkel, supra* at 566. If an insurance policy is unambiguous, courts simply enforce the contract as written. *Id.* An insurance policy is ambiguous "when its provisions are capable of conflicting interpretations." *Id.* Our Supreme Court added:

> A contract is said to be ambiguous when its words may reasonably be understood in different ways.
>
> If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.
>
> Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear. [*Id.*, quoting *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982).]

Ambiguous insurance policy provisions are construed against the drafter and in favor of the insured. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996). Provisions that exempt or exclude coverage are strictly construed against the insurer, as well. *Id.*

Here, the policy covered various "offenses," as long as they were not also a violation of a penal statute. To be sure, there is some overlap between the "offenses" covered and then excluded under the provisions. However, a fair reading of the policy provisions leads to but one possible result: no coverage for an invasion of privacy that also violates a penal statute. Accordingly, we reject defendants' contention that the policy provisions were ambiguous. *Nikkel, supra* at 566.

Defendant LeGrow also contends that the trial court erred in ruling that his acts violated MCL 750.539d. MCL 750.539d provides as follows:

> Any person who installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, or eavesdropping upon the sounds or events in such place, or uses any such unauthorized installation, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.

Defendant LeGrow specifically contends that his bedroom was not a "private place" because it was his bedroom and he was present during the videotaping. MCL 750.539a(1) defines a "private place" as "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access." Here, defendant's bedroom was not a place where a substantial group of the public had access. Further, the fact that he was present and engaging in sexual acts with the women only increases the degree to which his bedroom was a "private place." There is no question that the women reasonably expected to be free from intrusion or surveillance. Accordingly, we reject defendant LeGrow's contention of error.

Defendants Shemanski and Lewis also contend that defendant LeGrow's violation of MCL 750.539d should not have precluded coverage because it did not cause the invasion of privacy or the intentional infliction of emotional distress. Initially, we note that the coverage plus protection did not extend coverage to intentional infliction of emotional distress; accordingly, coverage for that claim was plainly precluded.

Further, the act that led to the invasion of privacy claims was defendant LeGrow's act of videotaping the women contrary to MCL 750.539d. Although defendant Lewis references the elements of a "public disclosure of embarrassing private facts" form of invasion of privacy, that cause of action is inapplicable because there is no evidence that defendant LeGrow disclosed private facts. Instead, defendant LeGrow invaded the women's rights to privacy by unreasonably obtaining private information in a manner that is more akin to an "intrusion upon seclusion" form of invasion of privacy. See *Doe v Mills*, 212 Mich App 73, 80, 88; 536 NW2d 824 (1995). The "intrusion upon seclusion" form of invasion of privacy requires: "1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man." *Id.* at 88. Here, defendant LeGrow's acts of videotaping the women without their knowledge constituted an unreasonably objectionable method of obtaining private subject matter about the women. Accordingly, contrary to these defendants' claims, their invasion of privacy claims derived from defendant LeGrow's violation of MCL 750.539d. Consequently, coverage for defendant LeGrow's actions was precluded by the exception for "violations of a penal statute."

Finally, defendants Shemanski and Lewis contend that the doctrine of laches should have barred plaintiff's attempt to avoid coverage under the policy. "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Gallagher v Keefe,* 232 Mich App 363, 369; 591 NW2d 297 (1998). "The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant." *Id.* at 369-370.

Here, these two defendants contend that laches should apply because defendant LeGrow's attorney made offers to settle the case implying that there was insurance coverage. In fact, the trial court indicated that it assumed that plaintiff was covering defendant LeGrow's conduct. Although plaintiff communicated to defendant LeGrow that it was reserving its right to withhold coverage, it apparently never communicated this position to the women. However, these two defendants do not cite any authority establishing that plaintiff was under any obligation to inform the women about its reservation of rights. Indeed, plaintiff was only contractually bound to defendant LeGrow. Moreover, because the women ultimately obtained a judgment

against defendant LeGrow, it is not clear that they were prejudiced. In the absence of prejudice, we are not persuaded that the equitable doctrine of laches is applicable. *Gallagher, supra* at 369-370.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray