IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

ROBERT DAVIS & JUNE DAVIS
Plaintiffs *

v.

* No. C2003-86729

STATE AUTO PROPERTY & CASUALTY INSURANCE CO., et al.
Defendants *

OPINION AS TO DECLARATORY JUDGMENT

This matter was tried before the undersigned, with a jury, between October 25 and November 1, 2004. Robert and June Davis (redesignated upon the Davis' motion[1] as "plaintiffs") were represented by C. Edward Hartman, III, Esq.; State Auto Property & Casualty Insurance Co., Inc. (redesignated as "defendant"- hereafter, "State Auto") was represented by Herbert R. O'Conor, Esq. and Mary C. Baldwin, Esq.

Upon State Auto's motion in limine and, later, its motion for judgment, the Court orally ruled as a matter of law that Plaintiffs' allegations did not suffice to state a cause of action for count 3 - unjust enrichment and count 4 - bad faith claims settlement practices. The Court permitted counts 1 & 2 - intentional misrepresentation and negligent misrepresentation to go to the jury, reserving count 5 - declaratory judgment as a matter for the Court in light of the jury's verdict.

The jury returned a verdict of $524,727 compensatory damages for negligent misrepresentation and intentional misrepresentation, plus $500,000 punitive damages. This Opinion now explicates the Court's attached determinations as to the declaratory judgment, in accordance with the jury's verdict.

The following discussion of facts, dismissed counts and counts submitted to the jury is provided as context for the declaratory judgment ruling:

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[1] This action began when State Auto filed a Complaint for Declaratory Judgment, naming as defendants both its insured Mona Builders, Inc. and Mona's construction customers Robert and June Davis. Mona also separately had sued State Auto. In the present action, the Davises counterclaimed and, eventually, filed the Second Amended Counterclaim upon which the case was tried.

Before trial, however, settlements were reached between State Auto and Mona, as well as between the Davises and Mona. State Auto voluntarily dismissed its declaratory judgment action herein. The Davises filed a motion asking the court to redesignate themselves to be referred to simply as "plaintiffs," rather than as "defendants and counter plaintiffs," and to redesignate State Auto as "defendant," rather than as "plaintiff and counter defendant." To simplify references for the jury, the undersigned granted this motion shortly before the jury trial began.

1. Facts

On May 24, 2000, Robert C. Davis, Jr. and June C. Davis ("Davis" or "Plaintiffs") - both of whom happened to be practicing attorneys - entered into a contract with Mona Builders & Developers, Inc. ("Mona") to build their "dream home" at 21 Perder Lane, Edgewater, in Anne Arundel County, Maryland ("the home"). *Exhibit 1.* Davis agreed to pay $935,000 for the construction of the home. Being familiar through his law practice with insurance matters, Davis provided in the contract that Mona was required

> ...to purchase and maintain such insurance as will protect from claims under workman's compensation acts and other employee benefit acts, **from claims for damages because of bodily injury**, including death, **and from claims for damages to property which may arise out of or result from** MONA BUILDERS & DEVELOPERS, INC. operations under this Contract". *Exhibit 1.* (Capitalization in original; emphasis added.)

Davis testified that this contractual provision effectively required that Mona maintain a commercial general liability ("CGL") insurance policy for the project and that Mona agreed to this requirement.

Davis had arranged a construction loan from Sandy Spring National Bank ("bank") to finance the construction of the home. *Robert C. Davis, Jr. and June C. Davis Second Amended Counterclaim ¶2 and testimony.* The bank also required proof that Mona had obtained and was maintaining insurance for the construction of the home, according to Davis testimony. However, this was not Davis only reason for putting the requirement into the contract with Mona: Davis testified that, in addition to the construction loan, he used his "life savings" of personal funds to pay Mona for construction of the home. If Mona had not submitted the two certificates, Davis therefore would have not completed the construction loan from the bank and would not have proceeded with the contract for Mona to build the house.

In performance of the insurance requirement of the contract with Davis, Mona went to the office of E. L. Sanders Agency, Inc., an agent[2] for State Auto, and arranged for the issuance of two certificates of liability insurance ("the certificates"), confirming the existence and, later, the renewal of the CGL insurance policy. Larry Sanders, as president of the agency, testified that he was authorized by State Auto to do this.[3] The first certificate dated June 19, 2000 specifically reported coverage for "construction of residence for Robert C. Davis, Jr. and June Davis located lot 30, 21 Perder Ct". The second certificate dated September 9, 2000 similarly reported coverage for "construction of residence for Robert C. Davis Jr. and June Davis, located lot 30, Perder Ct".

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[2] Larry Sanders, as president of the company, testified that his business is an "independent insurance agent", so that he actually represents many different insurers. In 1986, he compared insurance available from different insurers and discussed these with Mona, which selected State Auto.

[3] Sanders' apparent authority to speak for State Auto was confirmed by State Auto's issuance of the policies themselves, which recognize Sanders as agent.

While the certificates were addressed to the lender as "certificate holder" and disclaim any contractual liability to the "certificate holder," Sanders acknowledged that they include specific references to Plaintiffs by name, address and type of construction; these details were inserted on the certificates at Mona's explicit request. Sanders testified that he "probably" sent copies of both certificates to State Auto as a regular business practice.

Eventually, disputes arose between Davis and Mona as to the quality of subcontractor's work, both before and after Davis took possession of the home. Davis considered the quality of work on the home so poor that he withheld the final payment due under the contract. Defects included misplacement of structural components posing a danger the home could collapse, premature sealing of the rain-drenched structure leading to mold, and improper installation of chandeliers causing one to spontaneously drop giving rise to other damage, etc..

Mona filed suit seeking a mechanic's lien on the property in *Mona Builders & Developers, Inc. v. June and Robert Davis*, Anne Arundel County Circuit Court, civil case no. C-01-75461. Mona also made a claim on the CGL policy, seeking payment of the Davis claim. But, State Auto declined to cover the alleged damages. Eventually, State Auto filed the present case, seeking declaratory judgment as to the coverage issues and naming both Mona and Davis as defendants. Davis counterclaimed herein against both Mona and State Auto.

After many months of litigation and on the eve of trial on May 1, 2003, the action between Davis and Mona was settled. The settlement provided that Mona would pay Davis $1.5 million for the purchase of all land with buildings and improvements located at 21 Perder Lane, South River Colony, Edgewater, Anne Arundel County, Maryland. Davis released Mona, but not State Auto, in consideration for this payment. State Auto paid Mona $150,000 towards its expenses in settling with Davis and, in return, received a release from Mona.[4]

Thus, the only remaining claim to be litigated was that of Davis against State Auto. As discussed above, Davis' Second Amended Counterclaim was called for trial by jury and, now, is before the Court for declaratory judgment. Additional facts may be included in the opinion, below, as needed.

2. Dismissed counts

As to the dismissed count 3 - unjust enrichment, Plaintiffs here sought reimbursement of insurance premiums paid not by them, but by their contractor Mona Builders ("Mona"). There was no dispute of material facts that the insurance policy involved was not limited in its scope to Plaintiffs' home construction and, in fact, that it originally was arranged by Mona months prior to signing the construction contract with Plaintiffs. See exhibits 2 and E. Maryland case law defines unjust enrichment as:

[4] Upon Mona's motion, settlement, and State Auto's later consent, the Court ordered State Auto's original complaint to be dismissed. All claims against Mona, Nick Mona, and Dominic Mona were dismissed, judgment was entered in their favor against State Auto, and Mona's counterclaim was dismissed. *Court Order of June 1, 2004, Judge Rodney C. Warren.*

1. A benefit conferred upon the defendant by the plaintiff;
2. An appreciation or knowledge by the defendant of the benefit; and
3. The acceptance for retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Everhart v. Miles, 47 Md. App. 131, 136 (1981) (citing Williston on Contracts, §1479); *see also* County Com'rs of Caroline County v. J. Roland Dashiell & Sons, Inc., 358 Md. 83, 95 n.7 (2000).

Because the original "benefit" (the insurance policy premium) actually was *not* paid by Plaintiffs or even solely on their behalf, this Court found the unjust enrichment claim to be insufficient as a matter of law and, upon motion for judgment, dismissed it.

As to count 4 - bad faith claims practices, the Court also found that this claim lacks support in Maryland law. The Court of Appeals in Jones v. Hyatt Insurance Agency, 356 Md. 639 (1999) generally noted that there is no tort duty owed to third-party claimants, under Maryland law, stating:

> "Contrary to the [plaintiffs'] position...any status which they might have as third party beneficiaries under the contract [between the insurance agency and its customer to obtain insurance] is not by itself sufficient to create a duty in tort owed by [the agency to the plaintiffs]. [Citation omitted.] ... 'The mere negligent breach of a contract, absent a duty or obligation imposed by law is not enough to sustain an action sounding in tort'...Instead, the only action against the insurer is for breach of contract."

Hyatt, at 654-656. The contract-related actions which could be initiated by an injured third-party claimant, such as Plaintiffs herein, are limited[5] to: 1) declaratory judgment actions as to policy coverage disputes and, 2) after receiving a judgment against the insured, actions "in place" of the insured for collection. Id., at 646-648.

Specifically, as to bad faith claims by third parties, this legal proposition authoritatively has been rejected by Maryland's appellate courts. For example, in Mesmer v. MAIF, 353 Md. 241 (1999), the Court of Appeals stated:

> "...[W]hen a liability insurer erroneously takes the position that it has no contractual obligation with respect to a particular claim, and refuses to undertake any defense against the claim, it is liable only for breach of contract. The tort action based upon a liability insurer's bad faith failure to settle a claim within policy limits can arise only if the insurer undertakes to provide a defense against the claim.... [In that event, in] Maryland, the legal basis for the action [by the insured] to recover amount of an excess judgment is the

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[5] Theoretically, a liability insurance policy could contain a provision allowing direct actions by an injured third-party claimant directly against the insurance company; but there is no such rare "explicit [contractual] authorization to that effect" in the present case. Cf., Bean v. Allstate Ins. Co., 285 Md. 572, at 577 (1979).

independent tort duty arising from the potential conflict of interest when the insurer undertakes to defend against the claim...."

Mesmer, at 263-264. Compare, King v. GEICO, 843 F. Supp. 56 (D.Md. 1994) discussing Maryland case law and stating,

"[If the third-party claimant] were permitted to maintain [her suit against the insurer], she would be setting the stage for a direct action by virtually any tort plaintiff against the defendant's insurer for failure to settle a claim. This, the law of Maryland, or of any other state, will not tolerate, for reasons so obvious as to need no belaboring here. [Citations omitted.]"

Mesmer, at 57.

3. Intentional & negligent misrepresentation counts

However, the Court permitted this action to go the jury on the two remaining tort counts - count 1- intentional misrepresentation and count 2 - negligent misrepresentation - on the basis that this case might represent the exception circumstances contemplated in *dicta* of various Maryland appellate cases.

In Jones, the Court of Appeals stated:

"Under certain circumstances, a third-party beneficiary of a contract between principal and agent, who is identified when the contract is entered into[6], may bring a tort action against the agent who has made the representations to the beneficiary or otherwise assumed a duty owed to the beneficiary. Flaherty v. Wineberg, 303 Md. 116, 135-137 (1985) (agent allegedly made negligent misrepresentations directly to plaintiff, who was the identified third-party beneficiary of the agency contract and who was allegedly not [at the time of the contract] in an adversarial position to the principal, and the agent intended[7] that the plaintiff would act upon the representation. The opinion in Flaherty v.

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[6] While Plaintiffs were not identified when Mona's first insurance contract was entered into, they were identified prior to the renewal and issuance of the second policy. This second policy remained in effect at the time of the construction problems which led to the litigation herein. Cf., exhibits 2, 3, E, F and testimony herein.

[7] The jury herein explicitly found as a fact "that State Auto intended that Plaintiffs would act in reliance upon the information in the certificate of insurance." Verdict Sheet, item 1. As requested by both parties, the Court had instructed the jury as to the possible legal relations between an insurance company and its agents.

The instructions included the advice that "[a]n insurance company is considered to know all facts that are known or should have been known by its...agents...if they had acted with reasonable diligence and in a reasonable manner to follow up information which it or they

> Weinberg, however, clearly leads to the conclusion that the [Jones third-party claimants] would not be entitled to bring a direct tort action against [the insurance agent therein]."

Jones, supra, at 659, n. 11.

The Flaherty opinion involved a mortgage borrower's claim against the mortgage lender's settlement attorney for alleged negligent misrepresentation of facts. Discussing the key element as to "duty of care," the Flaherty court stated, "Although the Flahertys may find it difficult to support their claim that a direct purpose of the relationship between First Federal and Weinberg was to benefit the Flahertys, they nevertheless have alleged this...fact and such allegation is enough to survive the demurrer." [8]

Jones, in factual contrast to Flaherty, could not allege such a direct purpose or any direct contact with the insurer as the Joneses were complete strangers to the parties to the insurance contract prior to their automobile accident. The Joneses, thus, were *potential* third-party contract beneficiaries, rather than *identified* third-party contract beneficiaries. Cf., Jones, at 658-659, suggesting that "identified third-party beneficiaries" have a greater claim on the "intimate nexus" needed to procure tort liability.

Subsequent to Jones, the Maryland Court of Appeals again considered the tort liability to third-party plaintiffs in Walpert, Smullian & Blumenthal, PA v. Katz, 361 Md. 645 (2000). Reviewing Jones, the Court then summarized its holding on the issue as follows:

> "All that is required is that the trier of fact could find that the evidence suffices to apprise the defendant of ...the purpose for which its work is to be used, who is intended at the time of the engagement to use it for that purpose, see Jones v. Hyatt Ins. Agency, 356 Md. 639, 658-659...(1999) and some connection with that party that is the equivalent of privity, such as knowledge of that party's reliance."

Walpert, at 693.

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possessed." They also included the instruction that "an insurance *broker* ... does not act for and cannot bind the insurance company. ...[I]n a transaction, a person may be an insurance broker for some purposes and an insurance agent for other purposes." Counsel argued the parties' respective positions on this issue.

[8] In a footnote, the Flaherty court implied that documents, not before the trial court on demurrer, might suffice to defeat that claim of "direct purpose": a letter referred to Weinberg as "one of ***our*** settlement attorneys" and another statement noted the legal services "were performed on behalf of [First Federal] and **not on behalf of the Borrowers**." Emphasis added; Flaherty, 303 Md. 116, 139 (1985).

In the present case, somewhat similar documentary disclaimers were placed before the jury (exhibits 2 & 3) that the certificate of insurance, addressed to plaintiffs' lender, itself did not constitute a contract. The attorneys argued the significance of these disclaimers, but the jury nonetheless ultimately found a duty of care owed by the insurer to plaintiffs, as discussed below.

Walpert involved a claim of negligent misrepresentation in an accountant's report to his client; however, the accountant there directly communicated and delivered a copy of the report to the third-party plaintiffs. Id., at 694. In a concurring opinion[9], Judge Wilner opined that the Restatement (2nd) of Torts rule might as well have been adopted formally by the appellate court, providing professional liability only to the "client... and to those third parties to whom the accountant either intends to supply the information or actually knows the client intends to supply it." Id., at 694-695.

In the present case, Plaintiffs successfully argued to the jury that State Auto actually knew Mona intended to supply the allegedly misleading information to Plaintiffs.

4. Declaratory judgment

Consistent with the jury's verdict, this Court now proceeds to provide declaratory relief as requested by Plaintiffs and as allowed by Maryland Code, Courts and Judicial Proceedings Article, § 3-401, et seq., construing the insurance policy[10] ("the policy") herein. The relief Plaintiffs expressly have requested in this count is a declaration that:

> "State Auto...has a duty to compensate Davis as a third-party beneficiary under the policies insurance [it] issued to Mona Builders. Davis requests such other and further relief as the Court deems necessary and proper, including but not limited to, reimbursement of attorney's fees responding to the Complaint for Declaratory Judgment that State Auto [filed] and then voluntarily dismissed.

Initially, the Court notes that State Auto argued at the conclusion of the trial: a) that the declaratory relief should be considered moot in light of its prior settlement with the insured and of the jury's resolution of plaintiffs' claims herein; b) that the construction defects herein were not an "accident" or "occurrence" as insured under the CGL policy; and c) that no actions by State Auto caused any bodily injury to Plaintiffs."

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[9] This Court finds that Judge Wilner's concurring opinion practically constitutes an accurate paraphrasing of the majority's holding; the distinction simply focused on the authorities to which the holding was appended.

[10] Preliminarily, the Court notes that the complete text of the first insurance policy, effective between 1999 and 2000, is contained in exhibit E. A folder containing parts of the second policy, effective between 2000 and 2001, was acknowledged to be incomplete by all parties; no complete copy of this latter policy ever was submitted in evidence. However, State Auto's counsel did not disagree with the Court's suggestion, during trial, that absent evidence to the contrary, it might be inferred that the renewed contract contained essentially the same terms.

A. Mootness

On the question of mootness, this Court shares the concern of State Auto that, ordinarily, a plaintiff is expected to bring all related claims to court at once and, absent sufficient explanation, possibly may be estopped from later litigation of the related matters.[11]

However, one possible justification may be delayed discovery of latent injury. E.g., Harig v. Johns-Manville Products Corp., 284 Md. 70 (1984). Plaintiffs' counsel, at trial, proffered that bodily injuries suffered by Ms. Davis and the Davis children, as allergic reactions to toxic mold, constitute such latent injuries.

Recognizing the legislative policy that the Maryland Uniform Declaratory Judgment Act is to be "liberally construed and administered," this Court proceeds to consider the matter on the basis that the claim arguably may not be moot. Maryland Code, Courts and Judicial Proceedings Art., § 3-402.

B. CGL provisions as to "occurrence" and "accident"

At the heart of the declaratory judgment action is the question of whether the policy's definition of "occurrence" should cover Plaintiff's claims. During the course of the trial, this Court determined that, as a matter of law, the policy terms on this question were ambiguous. The key excerpts from the policy follow:

> "1.a. **We will pay those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies...**
> b. This insurance applies to "bodily injury" and "property damage" only if:
> (1) **The "bodily injury" or "property damage" is caused by an "occurrence**" that takes place in the "coverage territory"; and
> (2) The "bodily injury" or "property damage" occurs during the policy period.

[11] Plaintiffs, in fact, at the present trial proffered a personal injury claim as to June Davis' allergic reactions to toxic mold caused by faulty construction of Mona's subcontractors. State Auto objected to this claim going forward, suggesting that it was not properly pled.

This Court agreed and sustained the objection to the claim's presentation to the jury: the only references to bodily injury claims appear somewhat obtusely in the Second Amended Complaint's count - 5 as to declaratory judgment. Paragraph 59 simply alleges that the construction defects "exposed the Davis family to toxic mold," but does not explicitly allege that the exposure injured them. Paragraphs 61 and 66 allege that there is coverage for "bodily injury," but again fail to allege such injury. Various paragraphs allege unspecified "damage" incurred, but the Court found this insufficient.

Even if Ms. Davis were estopped and barred by limitations in her bodily injury claim, the Davises, as parents, might not be estopped or barred from presenting their children's claims for bodily injury. Maryland Code, Courts and Jud. Proc. Art., § 5-201.

2. Exclusions
This insurance does not apply to:
l. Damage to your work
"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard"
This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

"**Occurrence** means an **accident**, including continuous or repeated exposure to substantially the same general harmful conditions." *CGL, page 12, sec. IV.*

"**Your product** means [a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by: [y]ou; [o]thers trading under your name; or [a] person or organization whose business or assets you have acquired; and [c]ontainers, materials, parts or equipment furnished in connection with such goods or products. 'Your product' includes [w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product'; and [t]he providing of or failure to provide warnings or instructions." *CGL page 13, sec. IV, para. 20*

"**This insurance does not apply to property damage to [t]hat particular part of real property on which you or any contractors or subcontractors** working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." *CGL page 4, sec. I, para. J*

"This insurance does not apply to: '[p]roperty damage to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard'. **This exclusion does not apply if the damaged work** or the work out of which the damage arises **was performed on your behalf by a subcontractor**." *CGL page 4, sec. 1, para. l.*

Emphasis added.

Based on the above provisions as to "the insured," this Court finds that Plaintiffs were contractually third-party beneficiaries of the CGL insurance contract. Initially, they were within the class of unidentified *potential* third-party beneficiaries; subsequently, when State Auto's agent prepared the certificates of insurance specifying Plaintiffs and their residential construction project, they became *identified* potential third-party beneficiaries.

Also, based on the above policy provisions, this Court instructed the jury as follows:

"An insurance policy is to be interpreted with the words and terms given their customary and usual meanings. When terms are ambiguous, you must consider the other evidence and testimony in this case concerning the intention of the parties. If the terms are still ambiguous, the language in the policy must be interpreted against the insurance company."

"In the present case, the original insurance policy (exhibit E - 7/15/99 - 7/15/00) provided coverage for property damage arising from an 'occurrence', which is defined as 'an accident including continuous or repeated exposure to substantially the same harmful conditions.'" *CGL, page12, para. 13*

However, an ambiguity is created as to the exclusion of subcontractor's work because subsequent policy provisions states that the property damage exclusion does not apply "if the damaged work or the work out of which the damage arises was performed on your [the insured's - Mona Builders'] behalf by a subcontractor." *CGL, page 4, para. l.*

Accordingly, the jury was instructed to decide whether there was sufficient evidence to persuade it that there was coverage of "property damage" under the policy during the period in question.

The jury had heard evidence, *inter alios*, that one of State Auto's senior claims examiners (Bruce Fisher) testified at his deposition that there could have been coverage for "resulting damage" from subcontractors' work and that a "toxic mold" claim would have been covered at that time by the CGL policy.[12] Fisher called the interpretation of these CGL terms ***"a murky area"*** and recounted how he had consulted by email with his own supervisor (regional administrator William Masterson) about them. Fisher also stated that "99% of the time, [State Auto would deny all] coverage of claims involving general contractors building homes." Indeed, based on the instructions of his regional supervisor, Fisher promptly did deny the Mona/Davis claim without conducting any substantial investigation of the claim.

This evidence exceeds that considered in Maryland precedents in which plaintiffs complained of bad faith or negligent denials of coverage. In the present case, Plaintiffs offered evidence that the insurer simultaneously arranged: 1) to maintain a standard CGL policy with terms which deliberately were ambiguous, so as 2) to be able on this basis to deny 99% of all residential construction claims, but 3) to permit insurance agents, such as Sanders, to repeatedly issue certificates of insurance, representing to third-parties that there would be CGL coverage for residential construction projects. Together, these conflicting interpretations of the CGL policy for different purposes may be understood as constituting intentional - or at least negligent - misrepresentation to the third-party beneficiaries (as well as potentially insureds and lenders), who receive and rely upon the certifications as to insurance.

Considering all the evidence and the Court's instructions, the jury's verdict on construction of the insurance policy was that "State Auto's commercial general liability coverage for Mona...included 'property damage' which resulted from any negligent acts of Mona's subcontractors."[13] The jury also found that State Auto had "misrepresented a material fact as to

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[12] Fisher explained that, after this litigation, State Auto and other insurers have modified the standard terms of their CGL policies to exclude all claims for mold-related injuries.

[13] There was undisputed testimony at trial that neither Mona nor its subcontractors intentionally produced inadequate or faulty work. Similarly, neither Mona nor its subcontractors intended to cause Davis subsequent damage as a result of the work performed during the construction of the home. Thus, the Davis' damages properly fell within the policy's

the commercial general liability coverage." The latter finding of misrepresentation, as argued by Plaintiffs' counsel, effectively was based on State Auto's certification that there was coverage for residential construction, despite a company policy to construe the ambiguous policy provisions so that, "99% of the time," such coverage would be denied.

Consistent with the jury's verdict, the Court in the separate order attached will declare that the ambiguous provisions of the CGL policy herein properly must be interpreted to provide coverage for the Plaintiffs' property damages and any bodily injuries as "resulting damage" from the subcontractors' unintended faulty work.

C. Bodily injury liability

State Auto argues that it should not be liable for bodily injuries because 1) Plaintiffs were not the named "insured" and 2), as third-party claimants, cannot claim direct causation of bodily injuries by State Auto. Specifically, State Auto points to the Court of Appeals discussion in Jones, supra, at 658, the Plaintiffs'

> "personal injuries did not result from [the insurer's] negligence but were caused by the negligence of [the insured's] employee. The only injury possibly incurred by the [Plaintiffs] as a result of [the insurer's] negligence is that their judgment against [the insured] may not be satisfied.... This is economic loss only."

By the same logical analysis that the insurer's negligence could not "cause" bodily injury, the insurer's misrepresentation could not cause **direct** economic loss[14] either. Yet, applying the legal analyses of Maryland's Court of Appeals in Walpert, Flaherty, and Jones as discussed above, this Court finds Plaintiffs should be permitted to recover for bodily injury claim which they released, due to the improper denial of their claims, to the same extent that they may recover for property damage.

Unlike the plaintiffs in Jones, Plaintiffs here did provide evidence that they had a substantial basis for their belief that, absent a substantial compromise or insurance provided by State Auto, Mona would lack the assets to satisfy their claim and probably would file for bankruptcy. Cf., Jones, supra, at footnote 10. As determined by the jury, State Auto's false representations as to the insurance coverage for Mona damaged Plaintiffs, causing them to compromise and settle their claims for substantially less than they might have sought otherwise.

The decisive issue is not "what is the nature of their claim" so long as it could have been covered under the policy. Rather, the decisive issue is "whether they were persons identified to the insurer as persons to whom the representations of insurance would be supplied and who were likely to rely on these representations." Having resolved this issue in Plaintiffs' favor, based on the foregoing discussion, the Court will not repeat the reasons here.

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definition of "resulting damage" from the subcontractors' exception.

D. Attorney's fees and costs

Plaintiffs are not entitled to seek counsel fees under the authority of the declaratory judgment statute. Md. Code, Courts and Jud. Proc. Art., § 3-412; City of New Carrollton v. Belsinger Signs, 266 Md. 229 (1972).

Orally, Plaintiffs' counsel argued that the basis for such an award should be Maryland Rule 1-341 as the jury, in effect, had found "bad faith" by its verdict. This Court agrees that the verdict, in effect, represents such a finding.

However, the award of counsel fees is discretionary and not automatic. The Court takes note that, in his argument to the jury for punitive damages, Plaintiffs' counsel suggested that the jury could consider the facts as to the time, expense, and legal costs that Plaintiffs incurred as a result of State Auto's intentional misrepresentation and its improper refusal to pay valid claims. The jury, apparently taking these arguments to heart, awarded $500,000 punitive damages.

Considering this award, this Court in its discretion finds that it is not appropriate to provide an award of counsel fees and costs under Rule 1-341 or as supplementary relief under Courts Article, § 3-410 or 3-412. Century I Condominium v. Plaza Condominium, 64 Md. App. 107 (1985).

A separate Order providing for declaratory judgment and entry of a final judgment consistent with the jury's verdict is attached.

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Philip T. Caroom
JUDGE

cc: C. Edward Hartman, III, Esq
Herbert R. O'Conor, Esq.
Mary C. Baldwin, Esq.

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

ROBERT DAVIS & JUNE DAVIS
Plaintiffs *

v.

* No. C2003-86729

STATE AUTO PROPERTY & CASUALTY INSURANCE CO., et al.
Defendants *

ORDER PROVIDING DECLARATORY JUDGMENT AND ENTRY OF FINAL JUDGMENT IN ACCORDANCE WITH JURY'S VERDICT

For the reasons stated in the foregoing opinion, based on the merits trial and the jury's verdict herein, it hereby is by the Anne Arundel County Circuit Court, on this ____ day of December, 2004,

DECLARED that Plaintiffs Robert Davis and June Davis were third-party beneficiaries of the commercial general liability insurance policy issued by State Auto Property & Casualty Insurance Company ("State Auto") to Mona Builders & Developers, Inc ("Mona"); and it is further

DECLARED that said insurance policy provided coverage for any "resulting damage" and "bodily injury" from "accidents" including unintended faulty work by subcontractors of Mona; and it is further;

ORDERED that final judgment shall be entered by the Clerk of the Court on this date in favor of Robert Davis and June Davis and against State Auto in the amounts of $524, 727 compensatory damages, plus $500,000 punitive damages, plus 10% judgment interest; and it is further

ORDERED that the request of Plaintiffs for attorneys fees and costs, and any other request for relief still outstanding hereby is denied.

_____
Philip T. Caroom
JUDGE

cc: C. Edward Hartman, III, Esq
Herbert R. O'Conor, Esq.
Mary C. Baldwin, Esq.