

12CA1298 Duff v United Services Automobile Association 08-29-2013

COLORADO COURT OF APPEALS

DATE FILED: August 29, 2013

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Court of Appeals No. 12CA1298  
El Paso County District Court No. 11CV5768  
Honorable Michael P. McHenry, Judge

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Michael Duff,

Plaintiff-Appellant,

v.

United Services Automobile Association (USAA),

Defendant-Appellant.

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JUDGMENT AFFIRMED

Division IV  
Opinion by JUDGE HAWTHORNE  
Webb and Richman, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**

Announced August 29, 2013

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Lloyd C. Kordick & Associates, Lloyd C. Kordick, Colorado Springs, Colorado,  
for Plaintiff-Appellant

Wheeler Trigg O'Donnell LLP, John M. Vaught, Jessica G. Scott, Kenneth E.  
Stalzer, Denver, Colorado, for Defendant-Appellee

Plaintiff, Michael Duff, appeals the district court's judgment on the pleadings for defendant, United Services Automobile Association (USAA), and denying Duff's motion for partial summary judgment. We affirm.

### I. Facts and Procedural History

After Duff was injured in a car accident, he settled his claims with the tortfeasor in exchange for \$55,000. Duff did not agree to indemnify her for any subrogation claims that might be asserted against her.

USAA, which was Duff's insurer, had previously paid Duff \$5,000 under the medical payment provision of Duff's policy. After Duff settled with the tortfeasor, USAA filed suit against the tortfeasor, seeking reimbursement for the \$5,000 it had paid Duff. Rather than reimburse USAA, the tortfeasor filed a third-party complaint against Duff, alleging that he had breached his settlement contract with her by not paying USAA's \$5,000 lien.

Duff demanded in writing that USAA defend him against the tortfeasor's claim, but USAA did not do so. After the tortfeasor's claim was dismissed, Duff demanded that USAA pay \$27,216.86 in

attorney fees that he owed to his attorney for defending him against the tortfeasor's breach of contract claim.

After USAA declined to pay the fees, Duff filed the present action against USAA, asserting claims of bad faith breach of insurance contract, outrageous conduct, and statutory insurance bad faith. Duff's complaint indicated that each claim was based on USAA's failure to defend him and failure to reimburse him for his defense in the tortfeasor's third-party action against him.

USAA in turn filed a C.R.C.P. 12(c) motion for judgment on the pleadings, arguing that it had no duty to defend Duff in the tortfeasor's action. Duff then filed a response to USAA's motion and his own motion for partial summary judgment. He argued that USAA had a duty to defend him because the tortfeasor's action arose out of the car accident.

The district court subsequently granted USAA's motion for judgment on the pleadings and denied Duff's motion for partial summary judgment. Duff appeals the court's order.

## II. The District Court Properly Treated USAA's Motion as a Motion for Judgment on the Pleadings and not as One for Summary Judgment

Whether a district court properly treats a motion as one for judgment on the pleading is a legal question we review de novo. See *Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP*, 293 P.3d 55, 59 (Colo. App. 2011).

C.R.C.P. 12(c), which governs motions for judgment on the pleadings, provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

C.R.C.P. 12(c).

However, “a document that is referred to in or is attached to a complaint may be reviewed by the court on a motion for judgment on the pleadings without converting the motion to one for summary judgment.” *Hannon Law Firm, LLC*, 293 P.3d at 59. A court may also rely on “any facts of which the court will take judicial notice” when ruling on a motion for judgment on the pleadings. *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001)

(quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367, at 509-10 (2d ed. 1990)).

Here, in resolving USAA's motion, the court relied on Duff's USAA policy and on the tortfeasor's third-party complaint, neither of which is a "matter[] outside the pleadings" for purposes of C.R.C.P. 12(c) because Duff referred to both documents in his complaint. *See Hannon Law Firm, LLC*, 293 P.3d at 59. He also cited to his USAA policy as "Exhibit 6," which was later submitted to the court. *See id.*; *City & Cnty. of Denver*, 18 P.3d at 754.

Moreover, both documents were central to Duff's claims because his claims were based on USAA's failure to defend him in the tortfeasor's third-party action against him, despite USAA's alleged duty to do so set forth in his policy. *Cf.* James Wm. Moore et al., *Moore's Federal Practice* § 56.30[4], at 56-225 & -226 (3d ed. 2005) (a document referred to in a complaint that is central to the plaintiff's claim is not a "matter outside the pleading" and does not require conversion to a summary judgment motion when ruling on a motion to dismiss for failure to state a claim); *Colo. Justice Reform Coal. v. Ortiz*, 121 P.3d 288, 294 (Colo. App. 2005) (standards for

resolving motion for judgment on the pleadings are consistent with those for resolving motion to dismiss for failure to state a claim).

Accordingly, the district court properly treated USAA's motion as one for judgment on the pleadings and not as a summary judgment motion.

### III. The District Court Properly Entered Judgment on the Pleadings Because USAA Had No Duty to Defend Duff in the Tortfeasor's Third-Party Action Against Him

We review de novo whether a district court properly entered judgment on the pleadings, and we apply the same standards applied by the district court in resolving the motion. *Conn. Gen. Life Ins. Co. v. A.A.A. Waterproofing, Inc.*, 911 P.2d 684, 687 (Colo. App. 1995), *aff'd and remanded sub nom. Constitution Assocs. v. N. H. Ins. Co.*, 930 P.2d 556 (Colo. 1996).

The standards for resolving a motion for judgment on the pleadings are consistent with those employed in resolving a motion to dismiss. *BSLNI, Inc. v. Russ T. Diamonds, Inc.*, 2012 COA 214, ¶ 13. In considering a motion for judgment on the pleadings, a court must construe the allegations in the pleadings strictly against the movant and must accept the allegations in the opposing party's pleadings as true. *In re Parental Responsibilities of I.M.*, 2013 COA

107, ¶ 17. A court may only enter judgment on the pleadings when the material facts are undisputed, and the movant is legally entitled to judgment. *Id.*

Here, the district court applied the proper legal standards and correctly concluded that USAA was legally entitled to judgment. Duff's claims were based on USAA's failure to defend him against the tortfeasor's action, but, as explained below, USAA had no duty to defend him in that action.

To determine whether an insurer has a duty to defend an insured in any particular action, a court must consider whether the allegations in the underlying complaint against the insured, if true, would trigger coverage under the terms of the insured's policy. *Melssen v. Auto-Owners Ins. Co.*, 2012 COA 102, ¶ 23. The premise of this "complaint rule" is that the source of the insurer's duty to defend is contractual, deriving from the insurance policy itself. *Id.* at ¶ 25.

When reviewing an insurance policy, a court must apply well-settled contract interpretation principles. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002). Thus, it must give words in a

contract their plain meaning according to common usage and should avoid strained interpretations. *Id.*

Here, Duff's USAA insurance policy imposes a duty on USAA to defend him in certain circumstances. Specifically, the policy provides: "We will pay compensatory damages for BI or PD for which any covered person becomes legally liable because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages." It further provides: "Bodily injury (referred to as BI) means bodily harm, sickness, disease, or death. . . . Property damage (referred to as PD) except as modified in Part C, means physical injury to, destruction of, or loss of use of tangible property."

As stated, the tortfeasor's third-party complaint against Duff asserted a single claim for breach of contract, alleging that he had "breached his contract with [the tortfeasor] by not paying [USAA's] lien." A breach of contract action is plainly not "a suit seeking" "compensatory damages for BI or PD." *See, e.g., TCD, Inc. v. Am. Fam. Mut. Ins. Co.*, 2012 COA 65, ¶¶ 12-15. Thus, pursuant to the plain terms of Duff's policy, USAA had no duty to defend him in the tortfeasor's breach of contract action against him. *See id.* (insurer

had no duty to defend when insured's policy only imposed duty to defend against actions for damages for bodily injury or property damage, and the underlying complaint against insured did not seek those damages).

Furthermore, because each of Duff's claims in the present action is based on his assertion that USAA wrongfully failed to defend him in the tortfeasor's action against him, and because USAA had no duty to defend Duff in that action, USAA is legally entitled to judgment. Accordingly, the district court properly granted USAA's motion for judgment on the pleadings and denied Duff's motion for partial summary judgment. *See In re Parental Responsibilities of I.M.*, ¶ 17 (court may enter judgment on the pleadings when the material facts are undisputed and movant is legally entitled to judgment).

#### IV. Duff Failed to Preserve His Other Arguments Because He Did Not Raise Them to the District Court

Duff contends, for four additional reasons, that the district court erred in entering judgment on the pleadings: (1) USAA is estopped from asserting that it has no duty to defend Duff in the tortfeasor's action against him because it had previously agreed to

defend him; (2) whether USAA committed statutory insurance bad faith is a jury question; (3) USAA is contractually required to pay for Duff's defense because Duff incurred the expenses at USAA's request; and (4) USAA committed insurance bad faith and outrageous conduct by prompting the tortfeasor's action against Duff and by requiring Duff "to pursue endless claims and appeals for attorney fees from [the tortfeasor's insurer]." We do not, however, address these contentions because Duff failed to raise them in the district court. *See Stapleton v. Pub. Emps. Ret. Ass'n*, 2013 COA 116, ¶ 24 (declining to address issue not specifically raised in the district court).

The judgment is affirmed.

JUDGE WEBB and JUDGE RICHMAN concur.

# Court of Appeals

STATE OF COLORADO  
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CHRIS RYAN  
CLERK OF THE COURT

PAULINE BROCK  
CHIEF DEPUTY CLERK

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(I), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT:

Janice B. Davidson  
Chief Judge

DATED: December 26, 2012

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