UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LINDA LEE, as surviving spouse of DARRIS LEE, DECEASED, and HAROLD S. BRENNER, as Assignees of TERRY HOLMES AUTOMOTIVE GROUP, LLC and WARNER ROBINS FORD LINCOLN-MERCURY, INC., Plaintiffs, v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, Defendant.	CIVIL ACTION NO. 1:12-CV-3540-CAP

ORDER

This matter is before the court on Universal Underwriters Insurance Company's ("Universal") motion for summary judgment [Doc. No. 38] and the plaintiffs', Linda Lee and Harold Brenner, motion for summary judgment [Doc. No. 40]. The parties seek judgment as a matter of law on the issue of whether claims initially filed by Linda Lee and Harold Brenner in state court are covered under an insurance policy between Universal and Terry Holmes Automotive Group, LLC and Warner Robins Ford Lincoln-Mercury, Inc.

I. Introduction

A. Factual Allegations

The plaintiffs and Universal have filed statements of material facts in support of their respective summary judgment motions. The parties objected to the materiality of certain facts set forth in the parties' statements of material fact while not denying the truth of the factual allegations. With respect to the factual allegations that the court has determined are material, in the absence of a valid objection, the court considers them undisputed. The following are the undisputed material facts set forth by the parties.

On June 1, 2005, Terry Holmes Ford Lincoln Mercury in Warner Robins, Georgia (hereinafter "the dealership") performed a recall repair on a 2000 Ford Expedition owned by Darris Lee.[1] A service technician replaced the speed control deactivation switch on the vehicle. At the time of the service, the dealership was covered by an insurance policy purchased from Universal, a subsidiary of Zurich American Insurance Company. The insurance policy continued in effect until it was cancelled on June 1, 2007.

On December 11, 2008, Darris Lee was driving his vehicle on Route 200 near Fernandina Beach, Florida. Harold Brenner was in the front passenger

[1] The dealership and its maintenance operations were owned and operated by Terry Holmes Ford at the time of the service.

seat of the vehicle. While approaching slowing traffic, Darris Lee was unable to slow or stop the vehicle. To avoid colliding with other vehicles, Darris Lee drove the vehicle onto the grass shoulder resulting in him losing control of the vehicle and causing it to roll over several times. The occupants were ejected from the vehicle. Darris Lee died at the scene, and Harold Brenner contends that he suffered severe, permanent injuries because of the crash.

Following the automobile crash, Charlie Miller inspected the vehicle on February 18, 2009, and June 18, 2013, and reviewed additional information provided to him. Charlie Miller identified damage to the cruise control cable that caused it to saw into the plastic casing and create a small groove. This condition eventually caused the cruise control cable to stick, resulting in the throttle remaining open. On June 1, 2005, when the dealership performed the recall repair of the vehicle, the service technician worked directly in the area where the cruise control cable was bent.

On or about December 28, 2009, Linda Lee, the surviving spouse of Darris Lee, filed a lawsuit against Terry Holmes Ford in the State Court of Houston County. Linda Lee alleged in the complaint that the dealership negligently installed, inspected, maintained, repaired or replaced the vehicle and its component parts on June 1, 2005. Linda Lee also alleged that the dealership's negligence caused the crash on December 11, 2008. On or about

December 10, 2010, Harold Brenner filed a lawsuit against Terry Holmes Ford in the State Court of Houston County. Harold Brenner asserted substantially similar allegations to those asserted by Linda Lee in her complaint—negligent repair by the dealership resulting in the crash that occurred on December 11, 2008. Terry Holmes, as the principal for the dealership, tendered claims for the state court lawsuits to Universal on January 20, 2010, for the lawsuit filed by Linda Lee and in December 2010 for the lawsuit filed by Harold Brenner. Universal denied coverage of both claims based on its position that the date of loss fell outside of the coverage period. Universal identified December 11, 2008, as the relevant date of loss.

Following Universal's denial of the claims, Terry Holmes Ford admitted liability related to the state court lawsuits. Linda Lee, Harold Brenner, and Terry Holmes Ford entered into agreements not to execute and to assign the rights of the insured as well as a stipulation of admission of liability. Pursuant to the agreements, the parties submitted the issue of damages to an arbitrator, Tom Tobin, to determine the proper amount of damages to be awarded to Linda Lee and Harold Brenner. Following a brief hearing, the arbitrator awarded damages in the amount of $4,200,000 for Darris Lee's death and $1,200,000 for the injuries sustained by Harold Brenner. On June 1, 2012, the State Court of Houston County entered a final judgment against

Terry Holmes Ford for $4,200,000 plus interest in Linda Lee's case and for $1,200,000 plus interest in Harold Brenner's case.

B. Procedural History

On September 10, 2012, Linda Lee and Harold Brenner filed a lawsuit against Universal in the State Court of Fulton County as assignees of the dealership [Doc. No. 1-1]. Universal removed the case to the United States District Court for the Northern District of Georgia [Doc. No. 1]. Following discovery, the parties filed opposing motions for summary judgment on October 30, 2013 [Doc. Nos. 38, 40].

II. Discussion

The complaint, originally filed in the State Court of Fulton County, asserts a claim for breach of contract. The plaintiffs allege that Universal breached its duty to defend the lawsuits filed previously in the State Court of Houston County and its duty to indemnify the insured—the dealership and the affiliated entities. The parties seek summary judgment with respect to the breach of contract claim.

A. Summary Judgment Standard

Rule 56(a) of the Federal Rules of Civil Procedure authorizes summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The

party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970). The moving party's burden is discharged merely by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir. 1996). Once the moving party has adequately supported its motion, the nonmovant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). When deciding a motion for summary judgment, it is not the court's function to decide issues of material fact but to decide only whether there is such an issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). The applicable substantive law will identify those facts that are material. *Id.* at 248. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will not preclude the entry of summary judgment as those facts are not material. *Id.*

Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* "Genuine" factual issues must have a real basis in the record. *See Matsushita*, 475 U.S. at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (citations omitted).

B. Challenge to the Underlying Judgment

Universal decided not to indemnify or defend the underlying lawsuits filed by Linda Lee and Harold Brenner in the State Court of Houston County. As a result, Linda Lee, Harold Brenner, and Terry Holmes Ford reached an agreement that resulted in the State Court of Houston County entering a consent judgment in the total amount of $5,400,000 in favor of Linda Lee and Harold Brenner. The Supreme Court of Georgia has held that an insurer refuses to indemnify or defend an insured at its own peril. *S. Guar. Ins. Co. v. Dowse*, 605 S.E.2d 27, 29 (Ga. 2004). An insurer that refuses to indemnify or defend a valid claim is liable for breach of contract. *Id.*

> In Georgia, an insurer that denies coverage and refuses to defend an action against its insured, when it could have done so with a reservation of its rights as to coverage, "waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement [within the policy's limits] made in good faith[,] plus expenses and attorneys' fees."

Id. (citation omitted). Under Georgia law, Universal may challenge the underlying consent judgment only by establishing that it was not made in good faith. However, Universal waived this right. Rule 8(c)(1) identifies fraud as an affirmative defense. Universal did not assert collusion, or any other form of fraud, as a defense to this action. Rather, Universal argued that the underlying judgment should be set aside on the basis of collusion for the first time in its motion for summary judgment. Universal's attempt to raise the affirmative defense of fraud is procedurally improper. The court concludes that Universal has waived the right to challenge the underlying judgment on the basis that it was not made in good faith.

C. Coverage Pursuant to the Insurance Policy

The issue before the court is whether the insurance policy between Universal and the insured provides coverage for the final judgments held by the plaintiffs, Linda Lee and Harold Brenner. The parties dispute whether the occurrence for purposes of the insurance policy was the date of the negligent repair or the date that the negligent repair ultimately caused the automobile crash. The date of the occurrence is significant to the coverage determination because the insurance policy was terminated on June 1, 2007, prior to the date of the automobile crash on December 11, 2008, but after the date of the negligent repair on June 1, 2005.

1. Policy Language

Two parts of the insurance policy are at issue in this case—the Garage Unicover Part 500 and the Umbrella Coverage Part 980. In relevant part, the portion of the insurance policy comprising the Garage Unicover Part 500 states the following:

> **INSURING AGREEMENT** – WE will pay all sums the INSURED legally must pay as DAMAGES (including punitive DAMAGES where insurable by law) because of INJURY to which this insurance applies caused by an OCCURRENCE arising out of GARAGE OPERATIONS or AUTO HAZARD.[2]
>
> …
>
> WE have the right and duty to defend any SUIT asking for these DAMAGES. WE may investigate and settle any claim or SUIT

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[2] Garage Operations is defined in the insurance policy as "the ownership, maintenance or use of that portion of any premises where YOU conduct YOUR AUTO business and all other operations necessary or incidental thereto." Insurance Policy [Doc. No. 41-9 at 19].

Auto hazard is defined in the insurance policy as the following:

> [T]he ownership, maintenance, or use of any AUTO YOU own or which is in YOUR care, custody or control and:
>
> > (1) used for the purpose of GARAGE OPERATIONS;
> > (2) used principally in GARAGE OPERATIONS with occasional use for other business or nonbusiness purposes;
> > (3) furnished for the use of any person or organization.

Insurance Policy [Doc. No. 41-9 at 18].

> WE consider appropriate. OUR payment of the limit shown in the declaration ends OUR duty to defend.

Insurance Policy [Doc. No. 41-9 at 18]. The insurance policy defines an occurrence as the following:

> "OCCURRENCE", with respect to COVERED POLLUTION DAMAGES, INJURY Groups 1 and 2 means an accident, including continuous or repeated exposure to conditions, which results in such INJURY or COVERED POLLUTION DAMAGES during the Coverage Part period neither intended nor expected from the standpoint of a reasonably prudent person.
>
> …
>
> All INJURY or COVERED POLLUTION DAMAGES arising out of continuous or repeated exposure to substantially the same general conditions will be considered as arising out of one OCCURRENCE.

Insurance Policy [Doc. No. 41-9 at 20]. The Umbrella Coverage Part 980 of the insurance policy provides coverage for losses in excess of the coverage provided by other parts of the insurance policy, e.g. the Garage Unicover Part 500. In relevant part, the section of the insurance policy comprising the Umbrella Coverage Part 980 states the following:

> INSURING AGREEMENT – WE will pay for LOSS,[3] subject to the terms and conditions of this Coverage Part, in excess of:

[3] Loss is defined in the insurance policy as "all sums the INSURED legally must pay as DAMAGES because of INJURY to which this insurance applies caused by an OCCURRENCE." Insurance Policy [Doc. No. 41-10 at 8].

> (a) coverage provided in any UNDERLYING INSURANCE;
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> (b) coverage provided to an INSURED in any other insurance;
>
> (c) in the absence of (a) or (b) the retention shown in the declarations.
>
> WE have the right and duty to defend any SUIT for LOSS not covered by other insurance, but WE have no right or duty to defend SUITS for LOSS not covered by this Coverage Part. WE may investigate and settle any claim or SUIT WE consider appropriate.

Insurance Policy [Doc. No. 41-10 at 6]. The Umbrella Coverage Part 980 uses the same definition of occurrence as noted previously in this order. Insurance Policy [Doc. No. 41-10 at 8].

2. Application of the Policy Language

Under Georgia law, ordinary rules of contract construction are used to interpret contracts of insurance. *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 498 S.E.2d 492, 494 (Ga. 1998). Well-known rules of contract construction include the following: "Any ambiguities in the contract are strictly construed against the insurer as drafter of the document; any exclusion from coverage sought to be invoked by the insurer is likewise strictly construed; and insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible." *Id.* However, in

situations where the terms of the insurance agreement are clear and unambiguous, "the court is to look to the contract alone to ascertain the parties' intent." *Id.*

The language in the insurance policy that is the subject of this lawsuit is ambiguous. With respect to the definition of an occurrence, the policy does not indicate clearly what must occur during the policy period to trigger coverage. The definition can be interpreted two ways, either requiring that the accident occur during the policy period, or requiring that the injury, which results from the accident, occur during the policy period. In other words, that the negligent repair occurred during the policy period or that the automobile crash and bodily injuries occurred during the policy period. Applying the basic rule of contract construction that ambiguities are construed against the drafter, the court interprets the insurance policy as requiring only that the negligent repair occur during the policy period.

The Georgia Supreme Court has not ruled on the specific issue that is before the court. However, in a case before the Supreme Court of Georgia on certification from the United States Court of Appeals for the Eleventh Circuit, the dissenting justice stated, "'[T]he very nature of an "occurrence" as opposed to a "claims-made" policy is to provide coverage for property damage that occurred during the policy period whenever that liability is imposed.'"

Boardman, 498 S.E.2d at 498 (quoting *Tr. of Tufts Univ. v. Commercial Union Ins. Co.*, 616 NE.2d 68, 74 (Mass. 1993)). The United States District Court for the Northern District of Georgia, relying on *Boardman*, has held,

> Absent a specific provision in the insurance contract saying that an "occurrence" requires discovery or manifestation, the Court must conclude that such a trigger does not apply. Furthermore, where a contract defines an "occurrence" as including "continuous and repeated exposure," as in this case, the Court concludes that the appropriate trigger is a continuous one.

Arrow Exterminators, Inc. v. Zurich American Ins. Co., 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001). "With a continuous trigger, all liability policies in effect from the exposure to manifestation provide coverage and are responsible for the loss." *Id.* at 1346. The insurance policy at issue in this case does not require discovery or manifestation of the injury during the policy period.

The court concludes that the judgments held by the plaintiffs are covered under the policy. Terry Holmes Ford, the insured in the underlying litigation that resulted in the judgments, admitted liability to the claims asserted by Linda Lee and Harold Brenner in the underlying lawsuits. The admission of liability included an admission that the dealership negligently repaired Darris Lee's Ford Expedition on June 1, 2005. The negligent repair of the vehicle is the occurrence. As a result of the negligent repair of the

vehicle, the physical condition of the vehicle continually deteriorated causing the automobile crash on December 11, 2008. Therefore, the injuries to Darris Lee and Harold Brenner arose out of continuous or repeated exposure to substantially the same general conditions—the negligent repair of the vehicle and the resulting deterioration to the vehicle. The court concludes as a matter of law that Universal is liable for breach of contract.

D. Attorney's Fees and Costs

The plaintiffs have filed the current lawsuit under an assignment of rights from the insured, Terry Holmes Ford. In support of the plaintiffs' motions for summary judgment, the parties submitted copies of the agreements not to execute and to assign the rights of the insured. The agreements assign the right to claim coverage under the policy and recover any funds. However, with respect to the recovery of attorney's fees and costs, the agreement between Linda Lee and Terry Holmes Ford states,

> Notwithstanding anything contained in this Section 3 or elsewhere in this Agreement, the assignment set forth in Section 3A above excludes the right of Lee to recover attorneys' fees and costs pursuant to O.C.G.A. § 33-4-6 or any other applicable statute or law under which Holmes Automotive Group or Warner Robins Ford possess similar rights, including, but not limited to a bad faith claim against any insurer for failing to provide Holmes Automotive Group or Warner Robins Ford a defense or coverage to the claims asserted in the Lawsuit.

Linda Lee Agreement at 5 [Doc. No. 41-5] (emphasis added). The agreement between Harold Brenner and Terry Holmes Ford contains similar language. Harold Brenner Agreement at 5 [Doc. No. 38-9 at 47]. The court concludes that the plaintiffs may not seek attorney's fees. The agreements by which the insured's rights were assigned to the plaintiffs do not assign this right.

III. Conclusion

The court DENIES Universal's motion for summary judgment [Doc. No. 38], and GRANTS IN PART and DENIES IN PART the plaintiffs' motion for summary judgment [Doc. No. 40]. Universal breached its duty to indemnify the insured because the judgments held by the plaintiffs are covered by the terms of the insurance policy. The court awards the plaintiffs $5,400,000 plus interest at the rate set by Georgia statute, O.C.G.A. § 7-4-2. The parties are ORDERED to submit, either jointly or separately, a computation of the amount of interest through the date of entry of this order within 14 days of the date of this order. The parties must show the basis for the computation.

SO ORDERED this 25th day of June, 2014.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge