

**NOTICE:** This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2021 IL App (3d) 190473-U

Order filed September 20, 2021

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2021

COUNTRY MUTUAL INSURANCE COMPANY,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois.
Plaintiff-Appellee,	)	
v.	)	
JACOB FROBISH, JAMES ROEDER, BRIAN SEVERSON and TOWNSHIP OFFICIALS OF ILLINOIS RISK MANAGEMENT ASSOCIATION,	)	Appeal No. 3-19-0473 Circuit No. 17-MR-6
Defendants	)	
(Township Officials of Illinois Risk Management Association and James Roeder,	)	Honorable Robert C. Marsaglia,
Defendants-Appellants).	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) Appellate court has jurisdiction to consider appeal under Supreme Court Rule 303(a)(1).

(2) Allegations in underlying complaint that township employee caused property damage by excavating and digging out a ditch failed to impose a duty to defend under township employee's individual farm insurance policy.

¶ 2 Plaintiff, Country Mutual Insurance Company (Country Mutual), filed a declaratory judgment complaint, asserting that it had no duty to defend insured, James Roeder, in an underlying action filed against him individually and in his capacity as township highway commissioner. Roeder and Township Officials of Illinois Risk Management Association (TOIRMA) filed a counterclaim for declaratory judgment, seeking a ruling that Country Mutual owed a duty to defend Roeder and that Country Mutual was obligated to reimburse TOIRMA for incurred defense costs. The circuit court of Grundy County ruled that Country Mutual had a duty to defend one count of the tort action and was not required to reimburse TOIRMA for the cost of defending Roeder. Defendants, TOIRMA and Roeder, appeal, claiming that the trial court correctly ruled that Country Mutual owed Roeder a duty but incorrectly found that Country Mutual only had a duty to defend one count in the underlying action. We affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 Defendant James Roeder is the Goodfarm Township highway commissioner. The township is self-insured through TOIRMA, a risk management association that provides liability insurance for township officials and employees. The policy includes coverage for Roeder as township highway commissioner. Roeder also has an individual farm policy, Agriplus Farm Liability Policy (Agriplus), through Country Mutual.

¶ 5 TOIRMA's self-insured policy provides:

“The Association will pay on behalf of the “Member” or ‘Members’ all ‘Loss’ from an occurrence which the ‘Member’ or ‘Members’ shall become legally obligated to pay because of a ‘Wrongful Act’ \*\*\*.”

The policy defines “members” as “all persons who were, now[,] are or shall be lawfully elected or lawfully appointed officials” of the township. It also defines a “wrongful act” as “any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by any ‘Members’, as public officials or employees of the [township].” The TOIRMA policy also includes a provision for other insurance:

“Other Insurance

If any ‘member’ has other insurance insuring a ‘Loss’ covered by this Agreement, the COVERAGE provided by this agreement shall apply in excess of such other insurance.”

¶ 6

Country Mutual’s Agriplus policy provides liability coverage as follows:

“SECTION 1

Liability, Coverage A

If a claim is made or a suit is brought against an ‘insured’ for damages because of ‘bodily injury’ or ‘property damage’ caused by an ‘occurrence’ to which this coverage applies, ‘we’ will:

1. Pay up to ‘our’ limit of liability for the damages for which an ‘insured’ is legally liable. Damages include prejudgment interest awarded against an ‘insured’; and
2. Provide a defense at ‘our’ expense by counsel of ‘our’ choice, even if the suit is groundless, false or fraudulent.”

The policy also contains an exclusion for “expected or intended injury”:

“E. Liability, Coverage A \*\*\* [does] not apply to the following:

1. Expected Or Intended Injury

‘Bodily injury’ or ‘property damage’ which may reasonably be expected or intended to result from the intentional acts of an ‘insured’ even if the resulting ‘bodily injury’ or ‘property damage’:

- a. Is of a different kind, quality or degree than initially expected or intended; or
- b. Is sustained by a different person, entity, real property or personal property, than initially expected or intended.

This exclusion applies regardless of whether any ‘insured’ personally participated in or committed the alleged act and regardless of whether any ‘insured’ subjectively intended the ‘bodily injury’ or ‘property damage’ for which a claim is made.”

Like the TOIRMA policy, Country Mutual’s policy includes a provision for “other insurance,” which states that coverage under the Agriplus policy is “excess over other valid and collectible insurance.”

¶ 7 In August 2016, Brian Severson filed a lawsuit against Roeder, naming Roeder individually and as the Goodfarm Township highway commissioner. In his complaint, Severson stated that he owned 40 acres of farmland in Goodfarm Township and raised certified organic crops on the property. He asserted that on multiple occasions Roeder requested permission to enter his property to excavate a ditch to alleviate flooding on property adjacent to his 40 acres and that Severson denied his requests. Severson claimed that despite his refusals, Roeder, acting as the township highway commissioner, modified the natural drainage of groundwater on Severson’s property by installing a culvert and excavating a ditch along the roadway. Severson claimed that Roeder’s

actions as the township highway commissioner caused his property to flood and contaminated his organic farmland with chemicals, fertilizers, herbicides, and insecticides.

¶ 8 Severson sought injunctive relief based on four counts. Count I, entitled “Injunction Against Highway Commissioner for Trespass,” requested an injunction against Roeder “as Goodfarm Township Highway Commissioner.” Severson claimed that by diverting the groundwater out of its natural course and onto his farmland, Roeder committed an ongoing and continuing trespass on Severson property. He requested an injunction against Roeder, compelling him to replace the soil that had been removed and fill in the ditch. He also requested a permanent injunction prohibiting Roeder from entering his property.

¶ 9 Count II, named as “Injunction Against Highway Commissioner for Nuisance,” sought a mandatory injunction against Roeder, “in his capacity as Goodfarm Township Highway Commissioner,” compelling him to remove the soil from Severson’s real estate and fill in the ditch. The second count also requested a permanent injunction against Roeder and his agents and employees from entering Severson’s property.

¶ 10 Count III sought injunctive relief against Severson’s neighbor, Jacob Frobish.<sup>1</sup> Severson alleged that Frobish cut a small channel in an adjacent field, causing water to drain east along the roadway ditch and onto Severson’s property, and requested a permanent injunction that would prevent Frobish from diverting water onto his farmland.

¶ 11 Count IV sought an injunction against Roeder, individually, for breach of an easement agreement. In that count, Severson alleged that Roeder was the “farm tenant and apparent agent of Jack B. Kemper and Sandra K. Kemper and other unknown owners of the north half of the

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<sup>1</sup> Frobish filed a motion for summary judgment against Country Mutual on the issue of Country Mutual’s duty to defend him in the underlying suit, which the trial court granted finding that Country Mutual owed a duty to defend. Frobish was ultimately dismissed and is no longer a party to this lawsuit or the appeal.

Northwest Quarter of Section 15 in Goodfarm Township, and successors in interest to Elizabeth Schrotberger as owner of the same real estate.” Severson asserted that in 1960, Schrotberger, as owner of the dominant estate, entered into an easement agreement with the owner of the northwest quarter of section 14 and the northeast quarter of section 15 as the servient estate, which is now Severson’s property. The agreement allowed Schrotberger to construct and maintain a tile drain across the servient estate’s land. Count IV alleged, in part:

“Notwithstanding the terms of the Easement Agreement \*\*\*, on September 17, 2014, Defendant Roeder, in his capacity as Goodfarm Township Highway Commissioner, caused one Dan Wilkinson of Precision Farm Drainage, Inc. \*\*\* to enter onto and upon the real estate owned by Plaintiff and described above, with excavating machines and equipment and then and there proceeded to reopen, excavate and dig out a ditch running east and west for approximately 760 feet along the north boundary of Plaintiff’s real estate.”

Severson further alleged that Roeder directed Wilkinson to reopen the ditch over the tile drain in “direct breach of said Easement Agreement.” The prayer for relief requested a finding that Roeder breached the terms of the agreement by causing the reopening of the ditch and requested a “mandatory” injunction compelling him to fill it in.

¶ 12           Roeder tendered the defense of Severson’s suit to TOIRMA, and TOIRMA in turn named Country Mutual. In response, Country Mutual filed the complaint at issue in this appeal, seeking a declaratory judgment that it did not owe any duty to defend or indemnify Roeder under the Agriplus policy.

¶ 13           Roeder and TOIRMA answered the complaint and filed a joint counterclaim for declaratory judgment. The counterclaim sought a ruling that Country Mutual owed a duty to indemnify Roeder

in the underlying lawsuit and that Country Mutual was obligated to reimburse TOIRMA for all costs incurred in providing a defense for Roeder in the underlying action.

¶ 14 Defendants also filed a joint motion for judgment on the pleadings. In their motion, they claimed that Country Mutual had failed to provide any assistance to Roeder in the underlying lawsuit and that TOIRMA had been funding Roeder's entire defense. They argued that: (1) Country Mutual owed a duty to defend and indemnify Roeder; (2) the duty to defend required Country Mutual to defend all counts of the complaint; and (3) Country Mutual was obligated to reimburse TOIRMA for the costs it had incurred in defending Roeder thus far. In response, Country Mutual filed a cross-motion for judgment on the pleadings, asking the court to find that it did not have a duty to defend Roeder.

¶ 15 On May 10, 2018, the trial court issued a written order finding that Country Mutual was only obligated to defend count IV of Severson's underlying action. The court stated:

“[Country Mutual] is obligated to defend Roeder on Count IV. The actions alleged to have been undertaken by Roeder in that count are in his role as township highway commissioner. However, the count also alleges that he violated other agreements unrelated to his role as township highway commissioner. It is possible that his activities as highway commissioner would also violate other unrelated legal obligations. For that reason, he will be covered by both entities on a pro rata basis.”

At the conclusion of the order, the trial court denied defendants' motion for judgment on the pleadings and partially granted Country Mutual's motion. The court again emphasized that “[Country Mutual] is not obligated to defend Roeder or indemnify his potential liability as to any activities as township highway commissioner, but for those actions which are alleged to have violated unrelated agreements.”

Both Country Mutual and defendants filed timely motions to reconsider, which the trial court denied on July 11, 2019. Defendants filed a notice of appeal with the circuit clerk on August 6, 2019.

¶ 16

## II. ANALYSIS

¶ 17

### A. Jurisdiction on Appeal

¶ 18

Country Mutual initially raises the jurisdiction of this court to decide the appeal, arguing that the May 10, 2018, and July 11, 2019, orders were interim orders that are not appealable without an express finding by the trial court that there is no just reason for delaying appeal. Country Mutual cites Supreme Court Rule 304(a) (eff. March 8, 2016) and claims that without such an express finding this court lacks jurisdiction.

¶ 19

Defendants respond that our jurisdiction to consider this appeal is not based on Supreme Court Rule 304(a) but rather Supreme Court Rule 303(a)(1) (eff. July 1, 2017). They argue that court's order denying the parties' motions to reconsider was a final judgment, and therefore, under Rule 303, they filed a timely notice of appeal conferring jurisdiction on this court.

¶ 20

Defendants are correct. "A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005). The trial court's judgment of May 10, 2018, fixed absolutely the rights of Country Mutual and TOIRMA regarding Country Mutual's duty to defend and indemnify Roeder in the underlying action. Thus, it was a final and appealable judgment governed by the jurisdictional rules of Supreme Court Rule 303(a)(1). See *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill.App.3d 372, 380 (2007) (order in declaratory judgment action was final and appealable where it fixed absolutely the rights of the parties on issues concerning insurance coverage).



¶ 21 Supreme Court Rule 303(a)(1) provides:

“The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed \*\*\*, within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions.” Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017).

¶ 22 Here, the May 10, 2018, order determined the rights of the parties regarding their duty to defend the underlying action and was a final judgment. Both Country Mutual and defendants filed timely motions to reconsider the judgment, and, on July 11, 2019, the court entered an order disposing of those motions and resolving all remaining claims. If defendants wished to appeal the May 10, 2018, order, they were required to do so within 30 days of the order denying their motion to reconsider. Defendants filed their notice of appeal on August 6, 2019, well within the time limit imposed under Rule 303(a)(1). We therefore have jurisdiction to decide the matter before us.

¶ 23 B. Country Mutual’s Duty to Defend

¶ 24 Defendants contend that the trial court erred in partially granting Country Mutual’s motion for judgment on the pleadings and limiting its duty to defend Roeder to one count of the underlying complaint. Defendants maintain that while the court correctly found that Country Mutual owed a duty to defend, it erred in limiting the scope of that duty to the acts alleged in count IV.

¶ 25 A motion for judgment on the pleadings is, like a motion for summary judgment, limited to the pleadings. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 138 (1999). Judgment on the pleadings is properly granted if the pleadings disclose that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Id.*

We review a judgment on the pleadings de novo. *State Farm Fire & Casualty Co. v. Tillerson*, 334 Ill. App. 3d 404, 407 (2002).

¶ 26 In a declaratory judgment action such as that presented here, where the issue is whether the insurer has a duty to defend, a court ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 107-08 (1992). If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997).

¶ 27 An insurer may not refuse to defend its insured unless it is clear from the face of the underlying complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). Under Illinois law, when an insurer has a duty to defend against one claim in a suit, it has a duty to defend against all claims, even if some of the claims standing alone would be beyond the scope of the policy. *Tillerson*, 334 Ill. App. 3d at 407-08.

¶ 28 An insurer's duty to defend is much broader than its duty to indemnify. *General Agents Insurance Company of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154 (2005). Thus, the threshold that the complaint must satisfy in order to present a potential coverage claim is low. *La Rotunda v. Royal Globe Insurance Co.*, 87 Ill. App. 3d 446, 451 (1980). The underlying complaint and the insurance policy should be liberally construed in favor of the insured. *Wilkin Insulation Co.*, 144 Ill. 2d at 74.

¶ 29 In construing the language of an insurance policy, a court's primary goal is to ascertain the true intent of the parties. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 359 Ill. App.

3d 872, 883 (2005). When the policy’s language is clear and unambiguous, its plain and ordinary meaning is enforced. *Koloms*, 177 Ill. 2d at 479. When construing the policy, the court must read the policy as a whole, taking into account the type of insurance purchased, the nature of the risk involved, and the overall purpose of the insurance contract. *Id.* Our review of the interpretation of an insurance policy is *de novo*. *Traveler’s Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill.2d 278, 292 (2001).

¶ 30 Roeder’s Agriplus policy states that Country Mutual will defend the insured “if a claim is made or a suit is brought against an ‘insured’ for damages because of ‘bodily injury’ or ‘property damage’ caused by an ‘occurrence’ to which this coverage applies.” The policy defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions” which results in property damage. The policy does not define “an accident.”

¶ 31 The use of the word “occurrence” in insurance policies broadens coverage and eliminates the need to find an exact cause of damages, as long as they are neither intended nor expected by the insured. *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 965 (1991). Nevertheless, the occurrence must still be accidental. *Id.* “Even where a complaint alleges an act is ‘negligent,’ if the allegations show that what is truly alleged can only be characterized as an intentional act, the substance will control.” *Country Mutual Insurance Co. v. Dahms*, 2016 IL App (1<sup>st</sup>) 141392, ¶ 47.

¶ 32 In this case, the Agriplus policy does not define “accident.” The ordinary meaning of “an accident” has been described as “an unforeseen occurrence, usually of an untoward or disastrous character or an unforeseen, sudden or unexpected event of an inflictive or unfortunate character.” *Id.* ¶ 45. If an injury is not expected or intended by the insured, it is considered an accident. *Id.*

However, where the resulting defect is no more than the natural and ordinary consequence of an intentional act, it is not caused by an accident. *Tillerson*, 334 Ill. App. 3d at 409.

¶ 33 Country Mutual argues that given the plain and ordinary meaning of the word “accident,” the allegations in Severson’s complaint fail to trigger Country Mutual’s duty to defend Roeder under the Agriplus policy. A review of the allegations in the under complaint is required to answer the duty question. Counts I, II, and III, clearly do not impose a duty to defend under the Agriplus policy. They expressly allege property damage based on Roeder’s conduct as the township highway commissioner and the conduct of a neighboring landowner and request injunctive relief. The issue, and the ultimate focus of our analysis, is whether the final count, count IV, alleges property damage caused by “an accident” that would trigger Country Mutual’s duty to defend Roeder.

¶ 34 Count IV of Severson’s complaint alleges that Roeder, “in his capacity as Goodfarm Township Highway Commissioner,” directed Wilkinson to reopen, excavate and dig out a ditch along Becker Road, the north boundary of Severson’s property. Count IV also alleges that Roeder “caused one Dan Wilkinson” to move his equipment onto Severson’s property and excavate a ditch. In count IV, Severson further alleges that by causing Wilkinson to reopen the ditch, Roeder breached an easement agreement and caused flooding on his property. These allegations do not describe conditions that fall within the plain and ordinary meaning of an accident. They do not describe an unforeseen, sudden, or unexpected event. The additional water flow and alleged easement breach are, instead, the natural and ordinary consequences of Roeder’s intentional act as the township highway commissioner of hiring Wilkinson to excavate the ditch. Thus, Country Mutual does not have a duty to defend Roeder.

¶ 35 Even construed liberally in favor of the insured, the facts alleged in count IV do not fall within, or potentially within, the policy coverage. Count IV alleges that Roeder breached the easement based on his conduct as a “farm tenant,” but it does not allege any farming method that caused Severson’s property to flood or that resulted in a breach of that easement. Count IV specifically states that Roeder was acting in his capacity as the highway commissioner when he reopened the ditch and caused damage to Severson’s property. Indeed, the entire complaint alleges that the actions Roeder took were on behalf of the township and that he directed the excavation of the ditch while acting as the township commissioner. Based on the allegations in the underlying complaint, there was nothing accidental or unintentional about the work that Roeder was doing as a township employee.

¶ 36 Having found that Country Mutual is not obligated to defend Roeder under the Agriplus policy, we affirm the trial court’s denial of defendants’ motion for judgment on the pleadings. The trial court erred, however, in finding that Country Mutual had a duty to defend count IV. We therefore reverse that portion of the court’s order and remand to the trial court with directions to enter an order granting plaintiff’s cross-motion for judgment on the pleadings *in toto*.

¶ 37 III. CONCLUSION

¶ 38 The judgment of the circuit court of Grundy County is affirmed in part and reversed in part, and the cause is remanded with directions.

¶ 39 Affirmed in part and reversed in part; remanded with directions.