

57 This case involves an insurer's duty to defend its insured under a general commercial
58 liability insurance policy. The trial court granted summary judgment in favor of the insured,
59 holding that the exclusion in the policy did not relieve the insurer of the duty to defend. We
60 affirm.

61 Plaintiff/Appellee, Marsh Furniture Company, Inc. (Marsh Furniture), is a manufacturer
62 of kitchen cabinets, with its principal place of business located in High Point, North Carolina.
63 Marsh Kitchens of Memphis (Marsh Kitchens) is a regional distributor of Marsh Furniture's
64 products. Defendant/Appellant, Pennsylvania Manufacturers Association Insurance Company
65 (PMA), is the insurer for Marsh Furniture under a general commercial liability policy.

66 On March 31, 1993, Jeff Curry, d/b/a Curry Homes (Curry), filed a civil warrant in the
67 General Sessions Court of Shelby County, Tennessee. The civil warrant named Marsh Kitchens
68 as defendant and stated the following:

69 Breach of contract and breach of warranty in the sale of kitchen cabinets which
70 were installed in new homes built by [Curry]. Cabinets emitted unacceptably high
71 levels of formaldehyde vapor, and [Curry] was forced to remove the cabinets sold
72 by [Marsh Kitchens], purchase cabinets from an alternative source, and reinstall
73 the new cabinets. [Curry] sues [Marsh Kitchens] for breach of contract, breach of
74 warranty, consequential damages, attorney fees, and costs.
75

76 On November 8, 1993, Marsh Kitchens filed a third-party complaint against Marsh Furniture
77 seeking damages for any and all sums which might be adjudged against Marsh Kitchens as a
78 result of the lawsuit brought by Curry.

79 Marsh Furniture was insured by a commercial general liability policy (Policy) issued by
80 PMA. The relevant portions of the policy provide as follows:

81 SECTION I- COVERAGES

82 COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

83 1. Insuring Agreement.
84 a. We will pay those sums that the insured becomes legally obligated
85 to pay as damages because of "bodily injury" or "property damage"
86 to which this insurance applies. We will have the right and duty to
87 defend any "suit" seeking those damages.

88 * * * *

89 2. Exclusions.
90 This insurance does not apply to:

91 * * * *

92 j. "Property damage" to:

93 * * * *

94 (6) That particular part of any property that must be restored,
95 repaired or replaced because "your work" was incorrectly
96 performed on it.

97 * * * *

98 k. "Property damage" to "your product" arising out of it or any part of

99 it.

100
101 * * * *

102 n. Damages claimed for any loss, cost or expense incurred by you or
103 others for the loss of use, withdrawal, recall, inspection, repair,
104 replacement, adjustment, removal or disposal of:

- 105 (1) "Your product;"
- 106 (2) "Your work;"
- 107 (3) "Impaired property;"

108 if such product, work, or property is withdrawn or recalled from
109 the market or from use by any person or organization because of
110 a known or suspected defect, deficiency, inadequacy or dangerous
111 condition in it.

112 * * * *

113 SECTION V - DEFINITIONS

114 * * * *

115 3. "Bodily injury" means bodily injury, sickness or disease sustained by a
116 person, including death resulting from any of these at any time.

117 * * * *

118 5. "Impaired property" means tangible property, other than "your product" or
119 "your work," that cannot be used or is less useful because:

120 a. It incorporates "your product" or "your work" that is known or
121 thought to be defective, deficient, inadequate or dangerous; or

122 b. You have failed to fulfill the terms of a contract or agreement;

123 if such property can be restored to use by:

124 a. The repair, replacement, adjustment or removal of "your product"
125 or "your work;" or

126 b. Your fulfilling the terms of the contract or agreement.

127 * * * *

128 9. "Occurrence" means an accident, including continuous or repeated

129 exposure to substantially the same general harmful conditions.

130 * * * *

131 12. "Property damage" means:

132 a. Physical injury to tangible property, including all resulting loss of use of
133 that property. All such loss of use shall be deemed to occur at the time of
134 the physical injury that caused it; or

135 b. Loss of use of tangible property that is not physically injured. All such
136 loss shall be deemed to occur at the time of the "occurrence" that caused it.

137 13. "Suit" means a civil proceeding in which damage because of "bodily injury,"
138 "property damage," "personal injury" or "advertising injury" to which this
139 insurance applies are alleged.

140 After Marsh Kitchens filed its third-party action against Marsh Furniture, Marsh Furniture made
141 demand upon PMA to provide a defense and coverage in the underlying lawsuit. In a letter to
142 Marsh Furniture's counsel, PMA refused to defend or provide coverage for Marsh Furniture,
143 alleging that it had no duty to provide a defense or coverage under the terms of its Policy when
144 the underlying claim sought costs for "replacing the cabinets" and did not allege "bodily injury or
145 property damage."

146 Marsh Furniture then filed this declaratory judgment action, seeking an order requiring
147 PMA to provide Marsh Furniture with a defense and with coverage in the event of an adverse
148 judgment. Marsh Furniture also sought an order requiring PMA to pay Marsh Furniture damages

149 and litigation costs incurred as a result of PMA's breach of contract.

150 PMA filed a motion for summary judgment, contending that it had no duty to provide a
151 defense or coverage in the underlying lawsuit pursuant to the terms of the Policy. Marsh
152 Furniture filed a cross-motion for summary judgment. The trial court partially granted Marsh
153 Furniture's cross-motion for summary judgment and denied PMA's motion for summary
154 judgment. It held that PMA had a duty to provide a defense in the underlying action and to
155 reimburse Marsh Furniture for its reasonable attorney's fees, expenses, and costs incurred in
156 defending itself in the underlying action. In regard to the issue of coverage, the trial court ruled
157 that the parties' motions for summary judgment should be denied pending the findings of fact to
158 be determined at the trial of the underlying dispute. The underlying suit was later voluntarily
159 nonsuited, and the issue of policy coverage was never addressed by the trial court. Thus, the only
160 issues on appeal are those pertaining to PMA's duty to defend.

161 On appeal, PMA argues that the trial court erred in ruling that PMA had a duty to provide
162 a defense for Marsh Furniture and reimburse it for attorney's fees, expenses, and costs incurred
163 in defense of the underlying action. Our review involves purely a question of law, *de novo* on
164 the record with no presumption of correctness, to determine whether the trial court erred in its
165 partial grant of summary judgment. *See Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

166 Insurance contracts are subject to the same general rules of construction and enforcement
167 that are applied to other contracts. *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990). Unless
168 there is fraud or mistake, a contract must be interpreted as written even though it contains terms
169 which may be harsh or unjust. *Allstate Ins. Co. v. Wilson*, 856 S.W.2d 706, 708 (Tenn. App.
170 1992). In construing contracts, the words expressing the parties' intention should be given their
171 usual and ordinary meaning. *Id.* at 709. In case of doubt as to the meaning of an insurance
172 policy, the language of the policy should be interpreted against the party who has drawn it.
173 *Travelers Ins. Co. v. Aetna Casualty & Sur. Co.*, 491 S.W.2d 363, 365 (Tenn. 1973).

174 _____The general rule is that "the obligation of an insurance company under a policy provision
175 requiring it to defend an action brought against the insured by a third party is determined from
176 the allegations of the complaint in that action." *Graves v. Liberty Mut. Fire Ins. Co.*, 745
177 S.W.2d 282, 283 (Tenn. App. 1987). Where the allegations of the complaint against the insured
178 are ambiguous and there is doubt as to whether they state a cause of action sufficient under the

179 policy to compel the insurer to defend, the doubt should be resolved in favor of the insured.
180 *Dempster Bros., Inc. v. United States Fidelity & Guar. Co.*, 54 Tenn. App. 65, 71, 388 S.W.2d
181 153, 156 (1964).

182 In the instant case, the civil warrant filed by Curry against Marsh Kitchens alleged
183 "breach of contract, breach of warranty, consequential damages, attorney fees, and costs" arising
184 from the installation and removal of kitchen cabinets which emitted an unacceptable level of
185 formaldehyde vapor. PMA first contends that the civil warrant contained no allegation of
186 "bodily injury" or "property damage" as the terms are defined in the Policy. PMA asserts that
187 Curry's civil warrant seeks only to recover losses suffered as a result of having to replace or
188 repair a deficient product. PMA notes that such losses are specifically excluded from coverage
189 under provisions (j), (k), and (n) of the exclusions section of the Policy; consequently, there was
190 no obligation to defend Marsh Furniture in the third-party action filed by Marsh Kitchens.

191 PMA cites *Vernon Williams & Son Construction, Inc. v. Continental Insurance Co.*,
192 591 S.W.2d 760 (Tenn. 1979), in which an insured contractor sued his insurer under a
193 comprehensive general liability policy to enforce the insurer's alleged obligation to defend and to
194 pay indemnity in a suit brought by a contracting property owner for faulty construction. The
195 insuring clause and the policy definitions were similar to the provisions of the Policy in the
196 instant case. *See id.* at 761-62. The Tennessee Supreme Court held that a claim limited to
197 remedying faulty workmanship did not constitute property damage under the insured's
198 comprehensive general liability policy and thus did not trigger an obligation to defend. *Id.* at
199 763, 765. The *Vernon Williams* Court stated:

200 We are convinced that the standard comprehensive general liability policy does
201 not provide coverage to an insured-contractor for a breach of contract action
202 grounded upon faulty workmanship or materials, where the damages claimed are
203 the cost of correcting the work itself.

204
205 *Id.* at 765.

206 In response, Marsh Furniture cites two cases from other jurisdictions in which the courts
207 address the issue of whether emission of formaldehyde into a home constitutes property damage.
208 *See American Protection Ins. Co. v. McMahan*, 562 A.2d 462 (Vt. 1989); *Colonial Gas Co. v.*

209

210

211 *Aetna Casualty & Sur. Co.*, 823 F. Supp. 975 (D. Mass. 1993). In both cases, the courts
212 determined that the diminution in value of a home arising from the emission of formaldehyde
213 into the home constituted property damage under the provisions of the applicable insurance
214 policy. Marsh Furniture notes that the civil warrant in the underlying action seeks “consequential
215 damages,” which can include property damage under Tenn. Code Ann. § 47-2-715(2)(b). Thus,
216 since the claim for damages in the civil warrant can include property damage covered by the
217 Policy, PMA would be required to provide a defense. Marsh Furniture also points to a letter
218 from PMA to counsel for Marsh Furniture in which PMA denies any duty to defend but states
219 that it would “reevaluate [its] position” if the complaint in the underlying action were amended
220 “to include consequential damages.”

221 The Tennessee Supreme Court’s decision in *Vernon Williams* would be controlling in
222 this case if the civil warrant in the underlying action clearly sought only damages for the cost of
223 correcting faulty workmanship. However, the bare allegations in the civil warrant are broader
224 than this and include a claim for “consequential damages.” Since consequential damages can
225 include property damage under Tenn. Code Ann. § 47-2-715(2)(b) and since excessive
226 formaldehyde emissions in a home can result in property damage under *American Protection*
227 and *Colonial Gas*, it is unclear from the face of the complaint in the underlying cause whether
228 damages are sought that fall within the ambit of the Policy provisions. Where the allegations of
229 the complaint against the insured are ambiguous and there is doubt as to whether they state a
230 claim sufficient to compel the insurer to defend, this doubt must be resolved in favor of the
231 insured. *Dempster Bros.*, 54 Tenn. App. at 71, 388 S.W.2d at 156. Therefore, the trial court
232 correctly held that PMA was required to provide a defense in the underlying action and to
233 reimburse Marsh Furniture for its reasonable attorney’s fees, expenses, and costs incurred in
234 defending itself.

235

