DIVISION ONE
FILED: 12/28/2010
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, Plaintiff/Appellant, v. ERNEST S. MAMOE and CINDY Y. MAMOE, husband and wife, Defendants/Appellees.	)	1 CA-CV 10-0063 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Procedure)

Appeal from the Superior Court of Maricopa County

Cause No. CV2008-013127

The Honorable Douglas L. Rayes, Judge

AFFIRMED

Thomas, Thomas & Markson, P.C. Phoenix
By Benjamin C. Thomas, Esq.
And Neal B. Thomas, Esq.
And Michael G. Kelley, Esq.
Attorneys for Plaintiff/Appellant

Wallin Harrison P.L.C. Gilbert
By Steven E. Harrison, Esq.
And N. Patrick Hall, Esq.
Attorneys for Defendants/Appellees

T H O M P S O N, Judge

¶1 Plaintiff State Automobile Mutual Insurance Company

(State Auto) appeals the trial court's grant of summary judgment in favor of defendants Ernest Mamoe and his wife Cindy Mamoe (collectively Mamoe), finding that Mamoe qualified as an insured under a business automobile insurance policy issued by State Auto to Mamoe's employer, B & F Contracting, Inc. (B & F). For the reasons that follow, we affirm.

¶2 Mamoe, an employee of B & F, was working near a manhole in Las Vegas, Nevada on September 5, 2007, when he was struck by an unidentified vehicle. Prior to the accident, Mamoe had parked his work vehicle, a truck owned by B & F, in the far left southbound lane of Nellis Boulevard, which was closed and marked off with barricades. Mamoe needed to access gauges which were located inside a manhole which was partially in the middle lane of the boulevard and approximately six to ten feet away from the truck. Mamoe moved some barricades closer to the manhole and turned on the safety lights of the truck. He proceeded to remove the manhole cover and removed the gauges from the manhole. As he laid the gauges on the ground next to the manhole in order to retrieve some tools from the truck, Mamoe was hit and injured by the unidentified driver. At the time he was struck, Mamoe was between six and ten feet from the truck.

¶3 Mamoe made a claim to State Auto for uninsured motorist and medical payment benefits pursuant to B & F's

business automobile insurance policy. State Auto denied the claim and filed a complaint for declaratory relief. State Auto then filed a motion for summary judgment, arguing that Mamoe did not qualify as an insured because he was not "occupying" the vehicle at the time of the accident. Mamoe filed a response and cross-motion for summary judgment. The trial court denied State Auto's motion for summary judgment and granted Mamoe's cross-motion for summary judgment. State Auto timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) § 12-2101(B)(2010).

¶4 Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). We review the grant of summary judgment de novo to determine whether any genuine issue of material fact exists, and we view the evidence and all reasonable inferences in favor of the nonmoving party. *Chalpin v. Snyder*, 220 Ariz. 413, 418, ¶ 17, 207 P.3d 666, 671 (App. 2008) (citation omitted). Summary judgment should be granted "if the facts produced in support of [a] claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim. . .." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Here, at issue is the interpretation of an

insurance contract, a matter of law we review de novo. *Tobel v. Travelers Ins. Co.*, 195 Ariz. 363, 366, 988 P.2d 148, 151 (App. 1999) (citing *American States Ins. Co. v. C & G Contracting, Inc.*, 186 Ariz. 421, 423, 924 P.2d 111, 113 (App. 1996)).

¶5 On appeal, State Auto argues that because Mamoe was not "occupying" or "upon" the truck there was no coverage. The State Auto uninsured motorist coverage portion of the policy stated, in relevant part:

> **B. Who is An Insured**
>
> If the Named Insured is designated in the Declarations as:
>
> . . .
>
> 2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
>
> a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto." . . .
>
> **F. Additional Definitions**
>
> As used in this endorsement:
>
> . . .
>
> 2. "Occupying" means in, upon, getting in, on, out or off.

> 3. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
>
> c. That is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must either:
>
> (1) Hit an "insured", a covered "auto" or a vehicle an "insured" is "occupying" . . . .

The trial court, citing *Manning v. Summit Homes Ins. Co.*, 128 Ariz. 79, 623 P.2d 1235 (App. 1980), found that Mamoe was "occupying" his work truck when he was struck by the unidentified motorist. In *Manning*, the appellant was struck and injured by an uninsured motorist while standing near the covered vehicle waiting to assist the named insured with putting on tire chains. *Id.* at 79, 623 P.2d at 1235. We held that "at the time of the accident, appellant's activities were in such close proximity to the car and so related to its operation and use as to be an integral part of her occupancy and use of the car. She was therefore 'upon' the car within the meaning of the policy provision." *Id.* at 83, 623 P.2d at 1239.

¶6 In this case, Mamoe met the test set forth in *Manning*. Mamoe was between six and ten feet from the insured vehicle when he was struck. Mamoe's truck was specially equipped with lights and equipment for his work in and around manholes, and he was

using the truck for such purposes when he was hit. *Manning* has been the law in Arizona for thirty years; State Auto could have written its policy differently but did not do so. We find no error in the trial court's decision denying State Auto's motion for summary judgment and granting Mamoe's cross-motion for summary judgment.

¶7 Mamoe requests an award of attorneys' fees and costs on appeal and in the trial court pursuant to A.R.S. §§ 12-341 (2010), -341.01(A)(2010), -341.01(C)(2010), and Rule 21(c), Arizona Rules of Civil Appellate Procedure. As Mamoe acknowledged below in their Notice Withdrawing Defendant's Application for Attorneys' Fees and Statement of Costs, a fee request in a declaratory action is premature when the defendants have not yet shown that they are entitled to judgment on the merits of their underlying claim for personal injury damages. *See Nationwide Mut. Ins. Co. v. Stevens,* 166 Ariz. 372, 375, 802 P.2d 1071, 1074 (App. 1990) (upholding trial court's ruling that prevailing party in a declaratory action could not claim attorneys' fees until after decision on the merits of underlying damages claim), *overruled on other grounds by Deese v. State Farm Mut. Auto. Ins. Co.,* 172 Ariz. 504, 509, 838 P.2d 1265, 1270 (1992). We note that ARCAP 21(c) is not a substantive rule regarding a fee claim, it is a procedural rule. Mamoes' request for attorneys' fees and costs is denied, as is State Auto's.

The request pursuant to A.R.S. § 12-341.01(C) is also denied.

¶8 For the foregoing reasons, we affirm the grant of summary judgment in favor of Mamoe.

/s/

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JON W. THOMPSON, Judge

/s/

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DONN KESSLER, Presiding Judge

/s/

_____
DANIEL A. BARKER, Judge