STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA, as Subrogee of Mansinh and Jaya Lalji,

Plaintiff,

v

NORTHLAND INSURANCE COMPANY,

Defendant and Third-Party Plaintiff-Appellee,

and

COMMERCE & INDUSTRY INSURANCE COMPANY,

Third-Party Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 196970
Macomb Circuit Court
LC No. 95-002338 NF

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Third-party defendant Commerce & Industry Insurance Company (hereinafter Commerce) appeals the trial court's order granting third-party plaintiff Northland Insurance Company's (hereinafter Northland) motion for summary disposition pursuant to MCR 2.116(C)(10), ordering that Commerce provide pro rata contribution for personal property insurance (PPI) benefits paid by Northland to plaintiff. We affirm.

The facts in this case are not in dispute. Superior Products owned a trailer with an attached hydraulic crane that was used for transporting sewer pipes. This trailer was insured by Commerce under a comprehensive business insurance policy. This policy included no-fault automobile coverage, including PPI benefits.

On June 7, 1994, a tractor owned by Superior Pipe Haulers, Inc., (hereinafter Superior Pipe) and driven by Jerry Dunham, was towing the trailer owned by Superior Products. Unnoticed by Dunham, the hydraulic boom crane on Superior Product's trailer was left in the raised position. While driving, the extended crane caught on a power-line, causing it to fall on residential property owned by plaintiff's insureds. The downed power-line ignited a fire, severely damaging the home and property. On the date of the accident, Superior Pipe's tractor was insured by defendant Northland Insurance Company.

Plaintiff paid its insureds $264,584.66 to compensate them for the loss. Plaintiff, as subrogee of its insureds, then instituted proceedings against Northland claiming that it was liable to pay benefits for the damage to the property under Superior Pipe's insurance policy. Citizens filed a motion for partial summary disposition, seeking an adjudication of Northland's liability. The trial court granted this motion, only as to the issue of Northland's liability.

Northland then filed a third-party complaint against Commerce, claiming that it was entitled to pro rata contribution of any PPI benefits paid because the trailer constituted a motor vehicle under Michigan's No-Fault Act, and was therefore equally liable for PPI benefits arising out of the accident. Commerce filed for summary disposition pursuant to MCR 2.116(C)(10), claiming that the language of its insurance policy only provided excess coverage. Northland filed a cross motion for summary disposition pursuant to MCR 2.116(C)(10), claiming that the insured trailer constituted a motor vehicle under Michigan's No-Fault Act, and therefore, pursuant to statute, Commerce was responsible for pro rata contribution for all PPI benefits of which Northland was adjudicated liable. The trial court denied Commerce's motion and granted Northland's motion.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Industrial Machinery & Equipment Co, Inc v Lapeer Co Bank & Trust*, 213 Mich App 676, 678; 540 NW2d 781 (1995). The party moving for summary disposition pursuant to MCR 2.116(C)(10) is entitled to judgment as a matter of law only if there is no genuine issue of any material fact. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 196-197; 534 NW2d 491 (1995). When reviewing a motion pursuant to MCR 2.116(C)(10), this Court may consider all the pleadings, affidavits, and admissions, granting the benefit of the doubt to the non-moving party. *Id*. Commerce argues that it is not responsible for pro rata contribution of PPI benefits, and therefore, the trial court erred in granting Northland's motion for summary disposition. We disagree.

The Michigan No-Fault Act mandates that an insurer provide property protection damage to insurance benefits (PPI), regardless of fault. MCL 500.3121; MSA 24.13121 provides, in pertinent part:

> (1) Under property protection insurance an insurer is liable to pay benefits for accidental tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125, and 3127. However, accidental damage to tangible property does not include accidental damage to tangible property, other than the insured motor

vehicle, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles.

MCL 500.3125; MSA 24.13125 provides:

> A person suffering accidental property damage shall claim property protection insurance benefits from insurers in the following order of priority: insurers of owners or registrants of vehicles involved in the accident; and insurers of operators of vehicles involved in the accident.

Because both Commerce and Northland are insurers of the owners of the vehicles involved in the accident, they have the same priority as to their PPI obligation.[1] MCL 500.3127; MSA 24.13127 states as follows:

> The provisions for distribution of loss and for reimbursement and indemnification among personal protection insurers as set forth in subsection (2) of section 3115 and in section 3116 also applies to property protection insurers.

MCL 500.3115(2); MSA 24.13115(2) is the applicable rule as to contribution between Northland and Commerce. It provides:

> When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers.

Commerce claims that, pursuant to the express contractual language of its insurance policy, it maintains the status of an excess insurer for payment of PPI benefits, and only has a duty to contribute when the loss exceeds Northland's policy limits. Commerce's policy provision at issue states:

> 5. OTHER INSURANCE
>
> a. For any covered "auto"' you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Liability Coverage this Coverage Form provides for the "trailer" is:
>
> (1) Excess while it is connected to a motor vehicle you do not own.
>
> (2) Primary while it is connected to a covered "auto" you own.

In drafting an insurance policy, the parties have the right to employ whatever terms they wish, and the courts will not rewrite them as long as the terms do not conflict with pertinent statutes or public policy. *St Paul Fire & Marine Ins Co v American Home Assur Co*, 444 Mich 560, 565; 514 NW2d 113 (1994). In the present case, even assuming the excess coverage provision was intended to apply to PPI benefits, we find that applying it in this case would be improper. The above statutory

scheme specifically determines the priority of payment of PPI benefits among multiple insurance carriers, and application of the excess coverage provision in this case would be in direct conflict with that statutory scheme. Therefore, the provision is unenforceable. *Id.* Thus, because Commerce and Northland are in the same order of priority, Northland is entitled to a partial recoupment from Commerce. MCL 500.3115(2); MSA 24.13115(2); *Hastings Mut Ins Co v State Farm Ins Co*, 177 Mich App 428, 436-439; 442 NW2d 684 (1989). Therefore, the trial court did not err in determining that Commerce's contractual excess coverage provision was unenforceable.

Commerce also argues that *Frankenmuth Mutual Ins Co v Continental Ins Co*, 450 Mich 429; 537 NW2d 879 (1995) dictates that it is not responsible for pro rata contribution. We believe *Frankenmuth* is distinguishable from the present case. In *Frankenmuth*, the issue centered on allocation of defense costs among multiple no-fault insurers, each of whom may have been liable for loss arising out of a single automobile accident. *Id*. at 433. The issue of contribution for PPI benefits among insurers sharing the same priority was never addressed. Additionally, the Court specifically determined that the duty to defend is defined by the policy language. *Id*. In the present case, the duty to contribute for PPI benefits owed is dictated by statute. Therefore, the Court's holding in *Frankenmuth* cannot be applied to the present case.

Commerce's final argument is that, pursuant to *Turner v Auto Club Ins Ass'n*, 448 Mich 22; 528 NW2d 681 (1995), it is not liable for PPI benefit payments because the crane was not actively involved in the accident. In *Turner*, the Court determined that in order for an insurer to be liable for PPI benefits, two criteria must be met. First, there must be a sufficient causal connection between the damage and the use of a motor vehicle. *Id.* at 31-32. This causal connection is defined by MCL 500.3121(1); MSA 24.13121(1), which requires that PPI benefits are to be paid for tangible, physical property damage, "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." The Court has interpreted this provision to mean that:

> . . . the relationship between the use of the vehicle as a motor vehicle and the injury must be "more than incidental, fortuitous, or 'but for,'" and the vehicle's connection with the injury should be "directly related to its character as a motor vehicle." [*Id.* at 32 (citing, *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986).]

Second, after a sufficient causal connection has been established, in order for an insurer to be liable for PPI benefit payments, the insured's vehicle must be "involved in the accident," as required by MCL 500.3125; MSA 24.13125. *Id* at 37.[2] However, this phrase is not defined in the No-Fault Act. Consequently, the Court interpreted the language as follows:

> . . . we hold that for a vehicle to be considered "involved in the accident" under § 3125, the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident. Showing a mere "but for" connection between the operation or use of the motor vehicle and the damage is not enough to establish that the vehicle is "involved in the accident." Moreover, physical contact is not required to establish that the vehicle was "involved in the accident," nor is fault a relevant consideration in the determination whether a vehicle is "involved in an accident."

> Finally, as already indicated by our discussion in part A, the concept of being "involved in the accident" under § 3125 encompasses a broader causal nexus between the use of the vehicle and the damage than what is required under § 3121(1) to show that the damage arose out of the ownership, operation, maintenance, or use of the motor vehicle as a motor vehicle. [*Id.* at 39 (emphasis added).]

In the present case, the crane would have never pulled down the power lines had it not been attached to a moving trailer at the time. Additionally, the trailer was being used for transportation, an activity that is directly related to its status as a motor vehicle. *Id.* at 32. Thus, the movement of the trailer, coupled with the attached crane, is what caused the lines to be pulled down. Therefore, we hold that the use of the trailer cannot be said to have a merely "incidental," "fortuitous," or "but for" connection with the damage because the movement of the trailer acted as "the instrumentality of the injuries." *Id*. at 33.

Accordingly, we find that the trial court did not err in ruling that Commerce was responsible to reimburse Northland for one-half of the PPI benefits paid to Citizens.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Roman S. Gribbs

[1] A trailer is a motor vehicle under the no-fault act. *Parks v DAIIE*, 426 Mich 191, 198; 393 NW2d 833 (1982); *Kelly v Inter-City Truck*, 121 Mich App 208, 211; 328 NW2d 406 (1982). See also, *Great American v Old Republic*, 180 Mich App 508, 512 n 8; 448 NW2d 493 (1989); *Truby v Farm Bureau*, 175 Mich App 569, 573; 438 NW2d 249 (1988).

[2] This requirement stems from the fact that the damage triggering no-fault PPI coverage under MCL 500.3121; MSA 24.13121 need only be caused by a motor vehicle, not necessarily the insured vehicle. However, to determine the responsible insurers, MCL 500.3125; MSA 24.13125 mandates that only insurers of vehicles or operators involved in the accident are liable for PPI benefits.