STATE OF MICHIGAN

COURT OF APPEALS

WESTFIELD INSURANCE COMPANY,

Plaintiff-Appellant,

v

STEVEN THOMAS MITCHELL, MIC GENERAL INSURANCE CORPORATION and ALLSTATE INSURANCE COMPANY,

Defendants,

and

JESSE ADAM MCCLUSKY and SARAH SUZANNE CANEVER,

Defendants-Appellees,

UNPUBLISHED
May 30, 2000

No. 209558
Genesee Circuit Court
LC No. 97-545696-CK

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff filed this declaratory judgment action seeking a determination that it was not obligated to defend or indemnify defendant Canever in an underlying lawsuit brought against Canever by defendant McClusky. Plaintiff appeals by leave granted the trial court's order denying its motion for reconsideration of the court's earlier order denying plaintiff's motion for summary disposition. We affirm.

Plaintiff asserts that coverage is excluded under the following provision of its homeowner's insurance policy:

> I. **Coverage E-Personal Liability and Coverage F-Medical Payments to Others** do not apply to **bodily injury** or **property damage**:
>
> * * *

e. arising out of

(1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an **insured**. [Emphasis in original.]

The duty of an insurance carrier to defend and indemnify in an underlying tort action depends upon the allegations in the complaint. *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989). The duty extends to allegations that "arguably come within the policy coverage." *Id.*, quoting *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980). However, the duty to defend and indemnify is not determined solely by the terminology used in the pleadings. "Rather, 'it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists . . . .'" *Allstate, supra* at 662-663, quoting *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984). It is the substance rather than the form of the allegations in the complaint that must be scrutinized. *Allstate, supra* at 663, quoting *Illinois Employers Ins, supra.*

This Court's decision in *Farm Bureau Gen'l Ins Co of Michigan v Riddering*, 172 Mich App 696; 432 NW2d 404 (1988), a factually similar case, establishes that where the driver of a vehicle fails to consent to, and is surprised by, a passenger's actions in grabbing the steering wheel, there is no operation or use of the vehicle by the passenger. In this case, an examination of the allegations in McClusky's complaint, as well as Mitchell's deposition testimony, reveals that Mitchell consented to and was not surprised by Canever's actions in taking hold of the steering wheel. Thus, unlike the situation in *Riddering*, neither the lack of permission nor the existence of surprise provides a basis for concluding that there was no operation or use of the vehicle by Canever.

Nonetheless, the question remains whether Canever's action in taking hold of the steering wheel, with Mitchell's consent, falls within the exclusion that applies to the "use . . . of motor vehicles . . . operated by . . . an insured." The term "use" is to be defined broadly, and may include a range of activity unrelated to actual driving. *Pacific Employers Ins Co v Michigan Mutual Ins Co*, 452 Mich 218, 226; 549 NW2d 872 (1996). The decision in *American Economy Ins Co v Hughes*, 854 P2d 500 (Or App, 1993), supports the conclusion that a passenger who grabs a steering wheel and sends the car out of control is "using" a motor vehicle. However, this Court in *Century Mutual Ins Co v League Gen Ins Co*, 213 Mich App 114, 120; 541 NW2d 272 (1995), recognized that, "for an injury to arise out of the use of an automobile, the causal connection with the automobile must be more than incidental, fortuitous, or but for." "[T]he injury must be foreseeably identified with the normal use, maintenance and operation of the vehicle." *Id.*, quoting *A & G Associates, Inc v Michigan Mutual Ins Co.*, 110 Mich App 293, 296; 312 NW2d 235 (1981). Clearly, there was "use" of the vehicle in this case. Apart from the broad reading that is to be given to the term "use," the connection between the automobile and McClusky's injury is more than incidental or fortuitous.

The question therefore becomes whether the vehicle was "operated" by Canever. "Operating" does not mean the same thing as "using." *Pacific Employers Ins Co, supra* at 226 n 11; *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 88; 514 NW2d 185 (1994); *West Bend Mutual Ins Co*

v Milwaukee Mutual Ins Co, 384 NW2d 877, 879 (Minn, 1986). The term "use" is distinguishable from and independent of the term "operating." *Dowell, supra*. While operation of a motor vehicle necessarily involves its use, it does not follow that any use of a motor vehicle necessarily involves the operation of that vehicle. *West Bend, supra*. Although plaintiff points out that there is some precedent for the notion of "joint" operators, we decline to find joint operators as a matter of law in this case. The remarks cited in *West Bend* regarding the possibility that both a driver and a passenger could operate a vehicle at the same time are obiter dictum, as they were not essential to the resolution of the case. *Gallagher v Keefe*, 232 Mich App 363, 374; 591 NW2d 297 (1998). Moreover, the case of *Flager v Associated Truck Lines, Inc*. 52 Mich App 280; 216 NW2d 922 (1974), is distinguishable because each girl had a function absolutely necessary to the operation of the scooter. In other words, the scooter could be controlled only by the two girls acting together. *Id*. at 283. The Court in *Flager* recognized that the case involved "extremely unique facts." *Id*. In *Massey v Scripter*, 401 Mich 385, 396-397; 258 NW2d 44 (1977), the Court recognized the unique facts of *Flager* and held that the case did not apply to a tandem bike situation because, unlike *Flager*, two riders were not necessary for the vehicle to be operative.

Similarly, in this case, only one person was needed for the truck to be operative. Instead, on this particular point, we find this Court's decision in *Riddering* to be instructive. In discussing what constitutes "operation" of a vehicle, this Court in *Riddering* stated:

> Operation includes more than simple control . . . . While Ms. Riddering did exercise some control over the vehicle by grabbing the steering wheel, steering is only part of operating a vehicle. Operation necessarily includes the additional functions of controlling the gas and brake pedals and all other components necessary to make a vehicle run. Operation includes control over all the parts that allow the vehicle to move, not just the steering function. Obviously, one cannot operate a vehicle only with the steering—there must be acceleration to get anywhere and there must be braking to stop the vehicle, along with control over other key components, such as the engine. [*Riddering, supra* at 703.]

Application of the decision in *Riddering* to this case could easily lead to the conclusion that only one "operator" of the vehicle existed in this case, that being Mitchell. Mitchell consistently indicated that he kept a hand on the steering wheel at all times, including when Canever also did. Thus, despite the fact that Canever's steering "overtook" Mitchell's, only Mitchell had control over all functions of the vehicle so as to have been operating it as required in *Riddering*. Thus, if Canever, the insured, were not operating the truck, the homeowner's exclusion would not apply. Accordingly, because a genuine issue of material fact exists as to whether Canever was operating the vehicle, the trial court did not err in denying plaintiff's motion for reconsideration and plaintiff's motion for summary disposition.

We affirm.

/s/ Roman A. Gribbs
/s/ Joel P. Hoekstra
/s/ Jane E. Markey