STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN STATES INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

HOME INDEMNITY COMPANY,

Defendant-Appellant/Cross-Appellee,

and

MARTIN LEASING COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 24, 2000

No. 213834
Kent Circuit Court
LC No. 97-002818-CK

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

In this declaratory judgment action, defendant Home Indemnity Company (Home) appeals as of right from an order granting summary disposition to plaintiff American States Insurance Company (American) pursuant to MCR 2.116(I)(2) and declaring that Home is obligated to defend against one of the lawsuits brought by an employee of the parties' insured, Martin Leasing Company (Martin). American cross-appeals as of right, challenging the trial court's order denying its motion for summary disposition brought pursuant to MCR 2.116(C)(10), which sought declaration that American is not obligated to defend against a second lawsuit brought by the same Martin employee. We affirm in part, reverse in part and remand.

FACTS

In April 1991, Martin and General Motors Corporation (GM) entered into a "Master Agreement for Motor Transportation Services" (Master Agreement) in which Martin agreed to transport GM's goods. The Master Agreement also provided that Martin was to defend and indemnify GM from the liability associated with serving as a carrier.

A. The Insurance Policies

Martin was covered by two insurance policies. One policy was a general commercial liability policy between Martin and American. That "Commercial General Liability Coverage Form" excludes coverage for "'[b]odily injury' . . . arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . owned or operated by or rented or loaned to any insured. Use includes operation and 'loading and unloading.'" The other policy was a motor vehicle policy between Martin and Home. That "Truckers Coverage Form" provides commercial liability coverage and insures the payment of personal injury benefits for any "insured" who sustains bodily injury "caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'"

B. The Hect Claims

In January 1994, Ralph Hect, a Martin employee, injured his shoulder while making a delivery at GM's parking lot. While manually cranking down the support legs on his trailer, Hect slipped on ice in the parking lot. We will refer to this claim as the "trailer cranking incident." In January 1995, Hect reinjured the same shoulder when cargo, which GM employees loaded into Hect's truck, shifted after a sudden stop. We will refer to this claim as the "load shifting incident." Hect filed separate lawsuits against GM for each incident.

GM demanded that Martin defend both suits and provide indemnity pursuant to the terms of the Master Agreement.[1] Martin, in turn, requested that Home defend the two suits and provide indemnity coverage. When Home refused Martin's request, American, as Martin's general liability insurer, assumed the defense in both actions against GM. American then brought this declaratory judgment action to determine the respective rights and obligations of the parties under the insurance contracts. American also sought reimbursement from Home for costs incurred while defending the third party claims.

STANDARD OF REVIEW

We review de novo a trial court's decision in regard to a motion for summary disposition in a declaratory judgment action. *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). Likewise, the interpretation of contractual language is an issue of law that is reviewed de novo on appeal. *Morley v Auto Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Under MCR 2.116(I)(2), summary disposition is properly granted to the

[1] GM filed suit to compel Martin's compliance. Saginaw Circuit Court case no. 96-13643-NI-3. That suit was ultimately dismissed per stipulation of the parties.

opposing party if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996).

ANALYSIS

A. Home's Appeal

Home argues that the trial court erred in concluding that Home is obligated to defend against Hect's "load shifting incident" claim. Home claims that, since GM is not expressly named as an "insured" in the "Trucker's Coverage Form," no coverage should be afforded. We disagree that Home is not obligated to defend against the claim resulting from the "load shifting incident."

The definition of "insured" in Home's "Truckers Coverage Form" does not expressly name or expressly exclude GM. The fact that GM is not expressly mentioned in the policy does not end our inquiry. To determine Home's duty with respect to the "load shifting incident," we look to the language of the insurance policy to interpret the policy's terms under "Michigan's well-established principles of contract construction." *Nabozny v Pioneer State Mut Ins Co*, 233 Mich App 206, 210; 591 NW2d 685 (1998). An insurance contract must be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992); *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). The language of the contract is to be given its ordinary, plain meaning and technical, constrained constructions should be avoided. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991); *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). We construe exclusionary clauses strictly against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996).

In the present case, § II.A. of the "Truckers Coverage Form" provides that Home

> will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto" . . . [w]e have the right and duty to defend any "suit" asking for such damages . . . [h]owever, we have no duty to defend "suits" for "bodily injury" or "property damage" . . . not covered by this Coverage Form.

Further, § II.B. of the policy contains various exclusions to coverage, as well as several exceptions to those exclusions. Section II.B. provides that the insurance

> does not apply to . . . [l]iability assumed under any contract or agreement. But this exclusion does not apply to liability for damages . . . [a]ssumed in a contract or agreement that is an "insured contract" provided [that] the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement . . . .

Section VI.F.5. of the policy defines "insured contract" as "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another to pay for 'bodily injury' or 'property damage' to a third party or organization."

Under the plain meaning of those sections, the Master Agreement between Martin and GM is an "insured contract" pursuant to which Home is obligated to defend and indemnify GM in connection with the "load shifting incident." By executing the Master Agreement, Martin contractually agreed to indemnify, defend and hold GM harmless for damages arising out of claims by Martin's employees.[2] Martin assumed any tort liability GM may incur as the result of bodily injury to their employees. Thus, the Master Agreement is an "insured contract" as the term is defined in Home's "Trucker's Coverage Form." Essentially, Home has provided coverage to GM by virtue of the Master Agreement. Simply phrased, Martin's contractual obligation to defend and indemnify GM from tort liability in the "load shifting incident" has been shifted to Home via the "Trucker's Coverage Form" because Martin as the "insured" assumed that liability and the liability is for bodily injury caused by an accident and resulting from the ownership, maintenance or use of a covered auto.

We reject Home's argument that the Master Agreement cannot be viewed as an "insured contract" because Hect, as a Martin employee, is an "insured" and cannot also be a "third party" under the definition of "insured contract." Home's "Trucker's Coverage Form" does not define "third party." Thus, we find no reason an employee who may be deemed an "insured" cannot also be considered a "third party." If Home intended to exclude an "insured" from being considered a "third party," it could have drafted the policy accordingly.[3]

American's "Commercial General Liability Coverage Form" plainly and unambiguously excludes coverage for bodily injury arising from the use of an auto, while Home's "Trucker's Coverage Form" expressly provides primary coverage for auto-related injury, which the policy extends to liability assumed under an "insured contract" such as the Master Agreement. Therefore, Home is obligated to defend and indemnify GM with respect to the "load shifting incident" and the trial court properly granted summary disposition to plaintiff under MCR 2.116(I)(2) on the basis that American was entitled to judgment as a matter of law.

C. American's cross-appeal

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[2] Section 9 of the Master Agreement provides:

> [Martin] agrees to indemnify, defend and hold GM . . . harmless from and against any and all liabilities . . . of whatever type or nature, including damage or destruction of any property, or injury (including death) to any person, arising out of . . . any claims or actions by [Martin's] agents, employees or subcontractors.

[3] We note that the exclusion in § II.B.4 of the "Trucker's Coverage Form" undermines the notion that an employee cannot be a third party under an insured contract.

American argues on cross-appeal that the trial court erred in denying its motion for summary disposition in regard to the "trailer cranking incident" given that American's "Commercial General Liability Coverage Form" excludes coverage for auto-related injury. American claims that, because the alleged injury arose out of Hect's use of Martin's truck, Home is responsible for coverage. We agree that only Home is liable for coverage of the "trailer cranking incident" under the plain, unambiguous terms of the policies.

American's "Commercial General Liability Coverage Form" expressly excludes coverage for injury arising out of the use of an auto. Section I.2(g) of the "Commercial General Liability Coverage Form" excludes from coverage: "'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . owned or operated by . . . any insured. Use includes operation and 'loading or unloading.'" In contrast, Home's "Trucker's Coverage Form," as discussed, *supra*, expressly covers such auto related injury, stating: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" Given those provisions, the determinative issue is whether the injury Hect allegedly suffered in connection with the "trailer cranking incident" arose out of or resulted from the ownership, maintenance or use of an owned or covered auto.[4]

Our Supreme Court has recently interpreted the phrase "arising out of the use of a motor vehicle" in the context of a claim for no-fault benefits under MCL 500.3105(1); MSA 24.13105(1). In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), the Court held that "the clear meaning of [§ 3105] is that the Legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *Id*. at 220; see *Morosini v Citizens Ins Co of America (After Remand)*, 461 Mich 303, 309-310; 602 NW2d 828 (1999). Although the present case does not involve a no-fault claim, we find the Court's interpretation of the "arising out of" language in *McKenzie* instructive to the present case given the similar language used in the American and Home policies and given that Home's policy provides PIP coverage.[5]

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[4] We note that Hect's decision to frame his complaint in connection with the "trailer cranking incident" as a premises liability claim is not dispositive of the present issue. The cause of Hect's alleged injury is determinative of whether coverage exists and, given the specific language of the policies, determinative of which party is obligated to defend and indemnify with respect to the claim. As stated in *United States Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 493-494; 506 NW2d 527 (1993), "the duty to defend and the duty to indemnify are not determined solely on the basis of the terminology used in a plaintiff's pleadings. Instead, a court must focus on the cause of the injury to ascertain whether coverage exists. It is the substance rather than the form of the allegations in the complaint which must be scrutinized." (Citations omitted); see also *Gorzen v The Westfield Ins Co*, 207 Mich App 575, 578; 526 NW2d 43 (1994) (holding that a court must look to the underlying cause of an injury to determine coverage, not the theory of liability asserted in a complaint).

[5] We recognize that the Home coverage provision uses the phrase "resulting from" while the American exclusion utilizes the specific "arising out of" language at issue in *McKenzie, supra*. However, given the Supreme Court's conclusion in *McKenzie* that the clear meaning of the "arising out of" language in the

It is clear that Hect was using Martin's truck as a motor vehicle at the time of the "trailer cranking incident." Upon arriving at the GM plant, Hect began to back the truck up to the loading dock at the rear of the plant. He then exited the truck to crank the legs of the trailer down in furtherance of making the delivery. His injury occurred while he was cranking the mechanism attached to the side of the trailer that moves the legs of the trailer downward. Under those circumstances, Hect was using the truck for a transportational purpose at the time of his alleged injury. *McKenzie, supra* at 220, 226; see *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 636-637; 563 NW2d 683 (1997); *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 32; 528 NW2d 681 (1995).

Our determination that Hect's use of the truck was sufficiently related to its transportational function does not end our inquiry. It is also necessary to determine whether there was sufficient causal connection between Hect's alleged injury and his use of the truck.[6] *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218; 549 NW2d 872 (1996) involved circumstances similar to the present case. In *Pacific*, the plaintiff general liability insurer of a school district sued, seeking a declaratory judgment that the defendant auto insurer of the school district was liable for injuries suffered by a kindergarten-age child who was struck by a car after being dropped off at the wrong stop by a school district bus. *Id*. at 220. The plaintiff's general liability policy and the defendant's auto policy contained language essentially identical to the policy language at issue in the present case regarding auto-related injuries. *Id*. at 221-222. There was no question in *Pacific* that the bus was "used" to transport

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no-fault act indicates "the Legislature intended coverage of injuries *resulting from* the use of motor vehicles . . . ," *id*. at 220 (emphasis added), the use of the phrase "resulting from," as opposed to "arising out of" in the Home policy is not determinative of the present issue. See also *Century Mut Ins Co v League Gen Ins Co*, 213 Mich App 114, 116; 541 NW2d 272 (1995) (involving an insurance policy that included "resulting from" language similar to Home's provision in the present case). Even if the phrase "resulting from" presents a more stringent standard than the phrase "arising out of," this case meets the higher threshold. As discussed in detail, *infra*, the injury Hect allegedly suffered while attempting to crank the legs of Martin's truck's trailer was directly caused by the crank affixed to the side of the trailer and, therefore, clearly "resulted from" his use of the truck.

We further recognize that the interpretation of the "arising out of" language in *McKenzie, supra*, was dependent on the additional qualifying phrase "as a motor vehicle," which is not included in either policy at issue in the present case. Because we view *McKenzie* as merely instructive to the present case and because principles of causation are directly determinative of the present issue, and not whether Hect's "use" of Martin's truck met the *McKenzie* standard, the additional language in §3105 at issue in *McKenzie* does not affect our decision. See *id*. at 222 n 8. Nor does the fact that Hect's entitlement to PIP coverage is impacted by his employment status.

[6] We note that the *McKenzie* majority did not need to consider the causal connection between the plaintiff's injuries and his "use" of his motor vehicle because it determined his use of the vehicle was not closely related to the transportational function. *Id*. at 226. The Court noted that it may be analytically helpful to consider causation separately from the question of whether a motor vehicle is being used as a motor vehicle. *Id*. at 222 n 8; see also *Morosini, supra* at 311 n 8 (the majority agreeing with the main point of Justice Cavanagh's concurrence regarding the need for a sufficient causal connection, but reiterating that its conclusion was based on the determination that the plaintiff's use of his vehicle was not closely related to the transportational function of motor vehicles under *McKenzie*).

the child shortly before the accident; however, whether that use caused the child's injuries was not as clear. In analyzing the issue of causation, the Court stated:

> The tort standard of causation is not determinative of causation in an insurance case. The insured must show more than the minimal "but for" causation. See *Thornton v Allstate Ins Co*, 425 Mich 643, 650, 391 NW2d 320 (1986), in which this Court adopted a causation standard set forth in *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17, 235 NW2d 42 (1975), that stated:
>
> > "[W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." [*Pacific, supra* at 224-225 (footnote omitted).]

The Court concluded that the child's injury was sufficiently related to the use of the bus and held that the defendant auto insurer was solely responsible for providing coverage to the school district for the injury that arose out of the use of the covered motor vehicle. *Id*. at 228; see also *Century Mut Ins Co v League General Ins Co*, 213 Mich App 114, 121; 541 NW2d 272 (1995).

In *Century, supra*, this Court adopted a three-part test, first relied upon in *Thornton, supra*, for determining causation in cases involving automobile coverage issues. The test requires the following for a finding of causation:

> 1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury. [*Century, supra* at 121, citing *Thornton, supra* at 651 and 6B Appleman, Insurance Law & Practice (Buckley ed), § 4317, pp 367-368.]

Here, Hect testified during deposition that the pavement surrounding the loading dock he was attempting to back the truck up to was icy. He stated that he exited the truck and began to crank the legs of the trailer down. Hect specified that he slipped and fell while making that cranking motion. According to Hect, it was the combination of the cranking motion and the icy conditions that caused him to fall. He stated that, as he was falling, his arm and shoulder impacted the crank that was attached to the side of the truck's trailer. When asked whether his arm impacted the ground, Hect stated: "No, caught in the crank." The only injury Hect alleges in his complaint with respect to the incident is an injury to his right shoulder.

Given Hect's undisputed testimony, we are convinced that any injury resulting from the "trailer cranking incident" was causally connected to Hect's use of Martin's truck. The accident arose out of Hect's act of preparing to unhook the trailer and, therefore, arose out of the inherent nature of the truck

and its actual use. *Century, supra* at 121. Hect's testimony that the cranking motion was a reason he fell and his allegation that the injury he suffered was specifically caused by his shoulder impacting the crank indicate there was more than an "incidental, fortuitous or but for" connection between his "use" of the truck and his injury. See *Pacific, supra* at 224-225; *Century, supra* at 117; Cf. *Daubenspeck v Auto Club of Michigan*, 179 Mich App 453, 454-455; 446 NW2d 292 (1989); *Rajhel v Auto Club Ins Ass'n*, 145 Mich App 593, 594; 378 NW2d 486 (1985). The truck's cranking mechanism did not simply contribute to cause the condition that produced Hect's injury, but itself was a factor in producing the injury.[7] See *Keller v Citizens Ins Co of America*, 199 Mich App 714, 715-716; 502 NW2d 329 (1992), quoting *Thornton, supra* at 651; Cf. *Wakefield Leasing Corp v Transamerica Ins Co*, 213 Mich App 123, 128-129; 539 NW2d 542 (1995).

Under these circumstances, we conclude that Hect's alleged injury arose out of or resulted from[8] his use of Martin's truck. Therefore, under the plain, unambiguous language of American's exclusion regarding auto-related injury, American is not responsible for coverage related to the "trailer cranking incident."[9] Such is true regardless of the fact that Hect slipped on ice on GM's premises while cranking the trailer legs. In *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 (1991), our Supreme Court refused to apply principles of concurrent causation to nullify an unambiguous insurance policy exclusion for auto-related injuries in the plaintiff's homeowner's policy. *Id*. at 466; see also *USF&G, supra* at 495; *Auto-Owners Ins Co v Titan Indemnity Corp*, 195 Mich App 428, 432-433; 491 NW2d 247 (1992). Here, according to Hect's undisputed testimony regarding the incident, the crank attached to the truck's trailer was an injury producing instrumentality and the direct terms of the auto-related occurrence exclusion therefore apply. See *Vanguard, supra* at 473.

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[7] In *Rajhel*, where the plaintiff slipped on ice while walking from her disabled truck to a tow truck, this Court concluded that the injury "was unrelated to the plaintiff's maintenance, etc., of a motor vehicle, since the injury could 'just as well have occurred elsewhere.'" *Rajhel, supra* at 595, quoting *Denning v Farm Bureau Ins Co*, 130 Mich App 777, 782; 344 NW2d 368 (1983). In *Daubenspeck*, where the plaintiff slipped on ice located between his car and a gas pump, after he finished pumping gas and before replacing the gas cap, the Court concluded that "even assuming that the act of refueling constitutes maintenance, the connection between the act of pumping gas and plaintiff's slip and fall was merely incidental, fortuitous, or 'but for.' Plaintiff was injured by losing his footing on a patch of ice, an injury which could 'just as well have occurred elsewhere.'" *Daubenspeck, supra* at 455. In contrast to *Rajhel* and *Daubenspeck*, in the instant case, Hect's slip and fall was caused in part by the motion, force and leverage required to crank down the legs of the trailer, and the connection between the vehicle and the slip on ice was not simply incidental, fortuitous or but for. Further, he re-injured his shoulder by falling on the crank, not by falling on the icy ground.

[8] See, *supra*, n 5.

[9] The truck fits the definition of "auto" within American's policy, which includes "a land motor vehicle, trailer or semitrailer designed for travel on public roads . . . ." Further, the truck was owned by Martin, the named insured, and was operated by Hect, an employee, who was also an insured under the policy. Because Martin and its employees are the insureds under the policy, and not General Motors, the exclusion for bodily injury "arising out of the . . . use . . . of any . . . 'auto' . . . owned or operated by . . . any insured" applies.

We further conclude that the alleged injury resulting from the "trailer cranking incident" falls within the plain, unambiguous language of Home's "Trucker's Coverage Form."[10] Therefore, Home is responsible for coverage with respect to that incident. Home's duty to defend the suit based on the "trailer cranking incident" arises by way of its obligation with respect to an "insured contract," which was discussed, *supra*, in regard to the first issue on this appeal.

Given our resolution of that issue, we need not analyze American's additional argument regarding the doctrines of waiver and estoppel.

CONCLUSION

In sum, Home is obligated under the plain, unambiguous language of its "Trucker's Coverage Form" to defend against both lawsuits filed by Hect. Thus, Home is liable to American for costs American incurred while defending both suits. Any duty Home has in regard to indemnity for those lawsuits is dependent on their outcome. American's policy exclusion of coverage for auto-related injury absolves American of any responsibility to defend or indemnify with regard to either of Hect's lawsuits.

Affirmed in part, reversed in part and remanded for entry of judgment consistent with this decision. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra

[10] The truck used by Hect fits the definition of "auto" included in the Home policy, which also includes "a land motor vehicle, trailer or semitrailer designed for travel on public roads . . . ." There is no dispute as to whether the specific truck used by Hect in connection with the "trailer cranking incident" was one of the trucks covered under the "Trucker's Coverage Form."