STATE OF MICHIGAN

COURT OF APPEALS

RYDER TRUCK RENTAL, INC., Plaintiff-Appellant,	UNPUBLISHED November 17, 2000
v	No. 211521 Wayne Circuit Court
CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellee.	LC No. 96-691070-CK

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

PER CURIAM.

Plaintiff appeals by right the trial court's orders granting defendant's motion for summary disposition and denying plaintiff's motion for reconsideration in this action seeking a declaratory judgment that defendant was liable for its failure to defend plaintiff as an additional insured under an endorsement to an automobile insurance policy. We reverse.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. We agree. A trial court's grant of a motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review by this Court. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In so doing, the entire record is reviewed, including affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in the light most favorable to the nonmovant. *Id*., quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Further, the construction and interpretation of an insurance contract is a question of law that is reviewed de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

The duty of an insurer to defend an action against an insured depends on the allegations in the complaint, and the duty extends to allegations that "even arguably come within the policy coverage." *US Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 493; 506 NW2d 527 (1993), quoting *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989). However, the duty to defend is not determined solely on the basis of terminology used in the plaintiff's pleadings. *USF&G, supra*. "Instead, a court must focus on the cause of the injury to ascertain whether coverage exists." *Id*. at 494.

With respect to the injury that occurred in this case, the complaint alleged that while attempting to exit the rear of the truck, Jerry Die's foot slipped off the truck floor and became wedged between the truck's bumper assembly and the undercarriage. As a result, Die sustained injury. The insurance policy issued by defendant required that the liability arise out of "ownership, maintenance or use" of a vehicle. The endorsement to the insurance policy providing coverage for plaintiff required that the liability arise out of the "operation and use" of the truck. Defendant first argues that coverage does not exist because contrary to the language of the endorsement, the vehicle was not being both operated and used when the injury occurred. However, after reading the entire insurance contract and giving meaning to all its terms, *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997), we conclude that defendant's assertion would give the contractual language a strained construction, which should be avoided, *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996).

When examining an insurance contract, any conflicts between clauses should be harmonized, and the contract should be interpreted so as to render it reasonable and enforceable. *South Macomb Disposal*, *supra*. If a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail. *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990). Nevertheless, the word "or" may be read as "and," and vice versa, as necessary to harmonize the provisions in an insurance contract and thereby effectuate the intent of the parties as gathered from the contract construed as a whole. 2 Couch, Insurance, 3d, § 22.5, p 22-13.

Although defendant urges this Court to adopt its technical construction of the endorsement contained in the policy, we cannot. The language defendant used in the endorsement must be liberally construed and given a construction most favorable to plaintiff. A technical construction is not favored. *Hilburn v Citizens' Mutual Automobile Ins Co*, 339 Mich 494, 498; 64 NW2d 702 (1954). After reviewing the policy and the endorsement, we find no conflict between them. To interpret the endorsement as defendant urges would render it unreasonable and in disharmony with the policy's language. Moreover, defendant's interpretation would circumvent and thwart both the statutory intent of the Michigan no-fault act, MCL 500.3101 *et seq;* MSA 24.13101 *et seq*., and the contractual intent of the insurance policy at issue.

The rental contract between plaintiff and its customer, Weathervane Window, Inc., the named insured under the policy issued by defendant, requires Weathervane to provide a standard policy of automobile liability insurance "covering both Ryder and Customer as insureds for the ownership, maintenance, use or operation of the Vehicles . . . ." Because Weathervane, the customer, was based in Michigan, defendant provided a Michigan no-fault insurance policy. Equally important is that apparently the purpose of the endorsement was to add plaintiff as an additional insured as required by the rental contract between plaintiff and Weathervane, and which also satisfied the no-fault act's provision mandating that vehicle owners maintain no-fault insurance. See MCL 500.3101(1); MSA 24.13101(1).

Defendant, however, also asserts that it had no intention of providing coverage for plaintiff in the present factual scenario, i.e., for bodily injury relating to the use of a rented vehicle when the injury may also be related to a defect in the vehicle. *Fragner v American Community Mutual Ins Co*, 199 Mich App 537, 540; 502 NW2d 350 (1993) ("[i]f an insurer intends to exclude coverage under certain circumstances, it should clearly state those circumstances in the section of its policy entitled 'Exclusions'"). In addition, defendant concedes in its appellate brief that a literal reading of the coverages offered in the endorsement could encompass the instant factual situation even were there possible products liability claims as well. Thus, applying the rule of reasonable expectation to a reading of the entire insurance policy in question, certainly plaintiff had a reasonable expectation of coverage. *Gelman Sciences, Inc v Fidelity & Casualty Co*, 456 Mich 305, 318; 572 NW2d 617 (1998), amended on other grds sub nom in *Arco Industries Corp v American Motorists Ins Co*, 456 Mich 1230; 576 NW2d 168 (1998), quoting *Vanguard Ins Co v Clarke*, 438 Mich 463, 472; 475 NW2d 48 (1991).

Plaintiff asserts that the trial court applied an improper standard of causation in the present case. We agree. "The tort standard of causation is not determinative of causation in an insurance case." *Pacific Employers Ins Co v Michigan Mutual Ins Co*, 452 Mich 218, 224; 549 NW2d 872 (1996). In insurance cases, the concern is not with the question of culpability or why the injury occurred, but only with the nature of the injury and how it happened. *Vanguard Ins Co, supra* at 466 n 3. In terms of causation, however, the insured must show more than the minimal "but for" causation. *Pacific Employers, supra*. "[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." *Id*. at 225, quoting *Thornton v Allstate Ins Co*, 425 Mich 643, 650; 391 NW2d 320 (1986). "The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." *Pacific Employers, supra*, quoting *Thornton, supra*. Because the Court of Appeals cases the trial court relied on predate the correct standard for causation set forth in *Thornton, supra*, on which *Pacific Employers* relied, the trial court erred in applying the improper standard of causation, i.e., efficient and predominant rather than "foreseeably identifiable."

With respect to the issue whether a sufficient causal connection existed between Die's injury and the truck's use and whether, as a result, coverage existed under the contract rendering defendant's failure to defend a breach of its duty to do so, we conclude that such connection existed. Under *Pacific Employers*, the injury must be "foreseeably identifiable" with the normal use, maintenance and ownership of the vehicle in order for there to be the requisite causal connection. This standard does not implicate the legal theories a plaintiff raises, but rather focuses on the factual nature of the injury.

The bottom line is that through the endorsement, defendant extended Michigan no-fault coverage to plaintiff as the owner of the vehicle involved. The policy, in compliance with the Michigan no-fault act,[1] provided coverage for bodily injury liability caused by an occurrence and "arising out of the ownership, maintenance, or use, *including loading and unloading* of an automobile." There is no dispute that Die fell during the process of unloading and/or exiting the truck.[2] The specific reasons for his fall are irrelevant to the issue of whether defendant has a duty to defend: it does. Similarly, defendant will have an obligation to indemnify plaintiff Ryder for bodily injury damages *if* plaintiff is determined to be negligent. Both the express wording of defendant's insurance contract and Michigan case law unequivocally provide for no-fault coverage for bodily injury arising from using an automobile. We are aware of no Michigan law, case or statutory, nor has defendant cited any, that limits the extent of no-fault coverage provided to owners to situations only involving potential vicarious liability or only for certain types of torts. Indeed, any attempt to do so would likely violate the no-fault statutory scheme, and in this case, the express language of the contract. Thus, interpreting the language of the endorsement at issue so as to preclude coverage for bodily injury caused by an occurrence arising out the ownership, maintenance, or use, including unloading of any automobile constitutes an impermissible contravention of both the no-fault act and the terms of defendant's policy.

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[1] MCL 500.3105(1); MSA 24.13105(1).

[2] We note that Jerry Die's deposition testimony indicates that his injury may have occurred while he was in the unloading process. Under this scenario, defendant still had a duty to defend because the possibility of coverage is clearer. The insurance policy specifically stated that coverage would be provided for bodily injury arising out of the

The specific nature of the tort claim asserted against plaintiff does not determine the existence of insurance coverage. The initial question to be answered by review of the complaint is: Are there factual allegations that someone suffered bodily injury caused by an occurrence and arising out of the ownership, maintenance or use, including loading or unloading, of an automobile. If the answer to that initial question is "yes," then the insurance carrier is required to defend and indemnify the insured for those damages for which the insured is found liable as a result of its negligence. Because it is obvious in the instant factual situation that Die's complaint against plaintiff alleges bodily injury from an occurrence arising out of the ownership, maintenance or use, including loading or unloading of an automobile, defendant has agreed to both defend and indemnify plaintiff in the event it is found to be negligent.

The perspective that must be taken in assessing this incident is that Die would not have been injured at all but for his use of the vehicle, i.e., exiting and/or unloading the truck. Thus, the injury at issue here did not just occur "but for" the alleged defect. Instead, one looks to see if the injury appears related to a characteristic of the vehicle itself and its normal usage. An injury that occurs while exiting and/or unloading the rear of a vehicle, and here one that was designed for carrying cargo, is "foreseeably identifiable" with the normal use, maintenance and ownership of the vehicle such that there was a sufficient causal connection from which a duty to defend arose. Moreover, the general conclusion that exiting and/or unloading a vehicle is a normal part of its "use" has long been supported by case law. *Pacific Employers Ins, supra* at 227 (disembarkation of a child from a school bus constituted "use"); *Krueger v Lumbermen's Mutual Casualty Co*, 112 Mich App 511, 516-517; 316 NW2d 474 (1982) (stepping out of vehicle into a hole constituted "use" and was foreseeably identifiable with the process of alighting from a

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"unloading" of the vehicle.

vehicle such that there was recovery of no-fault benefits). Because the instant factual scenario fell within the contractual language of the no-fault policy defendant issued covering plaintiff, defendant had a duty to defend and to indemnify if its insured is found liable.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin