STATE OF MICHIGAN

COURT OF APPEALS

DELON ERIC BATTAGLIA,

Plaintiff-Appellant,

v

LOU DOUCET, INC., d/b/a ANTHONY'S PIZZA,

Defendant,

and

STATE MUTUAL INSURANCE COMPANY,

Garnishee Defendant-Appellee.

UNPUBLISHED
June 26, 2001

No. 217683
Oakland Circuit Court
LC No. 95-490638-NI

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of garnishee defendant State Mutual Insurance Company. We affirm.

This action arises out of an automobile accident that occurred on September 7, 1994. Plaintiff was riding a motorcycle and was struck by a vehicle driven by Steven Clament, an employee of defendant Lou Doucet, Inc. Clament was delivering a pizza and apparently ran a stop sign. Plaintiff suffered serious injuries as a result of the collision. Plaintiff filed suit on January 25, 1995, against Doucet, Steven Clament, and Christine Clament, Steven's mother and the owner of the vehicle that Steven was driving when he struck plaintiff. An amended complaint was filed on April 12, 1995, and Doucet then notified State Mutual of the lawsuit. State Mutual informed Doucet, by a letter dated May 3, 1995, that the claims were not covered under its commercial general liability policy because of the automobile exclusion.

Doucet and plaintiff subsequently entered into a consent judgment, dated December 21, 1995, based on liability due to Doucet's negligent hiring and negligent supervision.[1] Apparently, discovery revealed that Steven Clament had a history of traffic violations and that, contrary to Doucet's usual hiring process, no background check was performed on Steven Clament regarding his driving record. Plaintiff then filed a garnishment action against State Mutual. State Mutual, in its disclosure dated August 20, 1996, denied that it owed any monies, contending that the claim was barred by the automobile exclusion. The trial court ultimately granted summary disposition in favor of State Mutual, finding that the claim fit within the automobile exception to the policy and, therefore, State Mutual was not liable under the policy. The trial court also held that State Mutual was not liable because it did not know of or participate in the consent judgment.

Plaintiff first argues that the trial court erred in finding that his claim was barred by the automobile exclusion such that State Mutual was not liable under the policy. We review de novo a trial court's ruling on a motion for motion for summary disposition under MCR 2.116(C)(10), which tests the factual support for a claim. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537; 620 NW2d 836 (2001). The pleadings, affidavits, admissions, depositions, and documentary evidence filed in the action or submitted by the parties must be considered by the court, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *DeBrow, supra*, pp 538-539. Summary disposition is appropriate where the evidence fails to establish a genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

The automobile exclusion relied on by State Mutual provides:

> This insurance does not apply to:
>
> * * *
>
> g. "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

Plaintiff argues that his claim arises out of Doucet's negligent hiring and negligent supervision of his employee Steven Clament and not out of the use of an auto. This fact, however, has no bearing on whether insurance coverage existed for the injuries sustained by plaintiff. It is unassailable that plaintiff was injured as a result of an automobile accident. Such an injury is specifically excluded under the insurance policy.

Here, the automobile exclusion does not preclude legal claims arising from the ownership, maintenance, or use of an automobile. Rather, the insurance policy unambiguously states that it does not apply to bodily injury arising out of the ownership, maintenance, or use of

[1] The amount of the consent judgment was $225,000, less $85,000 received by plaintiff from Steven and Christine Clament, for a total of $140,000.

any auto owned or operated by any insured. Because the policy exclusion clearly focuses on the injury sustained, rather than a legal claim, the fact that plaintiff was injured as a result of an automobile accident dictates that the automobile exclusion applies to plaintiff's claim. Further, we note that the insurance policy specifically states:

> b. This insurance applies:
>
> (1) To "bodily injury" and "property damage" only if:
>
> (a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (b) The "bodily injury" or "property damage" occurs during the policy period.

Thus, the terms of the policy are quite clear that there is coverage for bodily injury, but not for certain legal claims.

Therefore, we are left with the question whether the employee was an insured under the policy. The policy defines an insured as "[y]our employees, other than your executive officers, but only for acts within the scope of their employment." Because Clament was unquestionably an employee of Doucet and injured plaintiff while acting within the scope of his employment (delivering a pizza), Clament was clearly an insured under the policy.

Accordingly, the trial court did not err in granting summary disposition in favor of State Mutual, finding that the claim fit within the automobile exception to the policy and that State Mutual was not liable under the policy. Because of our resolution of this issue, we need not decide whether the consent judgment can be enforced against State Mutual because of lack of notice.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra