STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH OVERBECK, Personal Representative of the Estate of GENE OVERBECK, Deceased,

Plaintiff-Appellant,

v

UNITED SERVICE AUTOMOBILE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
June 26, 2007

No. 274626
Antrim Circuit Court
LC No. 06-008242-NO

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

In this declaratory action involving the limits applicable to a no-fault automobile insurance policy, defendant United Service Automobile Association (USAA) appeals as of right the trial court's grant of summary disposition in favor of plaintiff. We reverse and remand for entry of an order granting summary disposition in favor of defendant.

In March 2003, Patricia Overbeck parked her car in a garage attached to her home, but neglected to turn the car off. Sometime later, both Patricia and her husband Gene Overbeck were overcome by carbon monoxide gas.

Elizabeth Overbeck, as the personal representative of Gene's estate, sued Patricia for wrongful death. At the time of her death, Patricia's automobile insurer was USAA. The policy provided normal liability coverage limits of $500,000 per person with a maximum of $1,000,000 per accident. However, the policy also contained the following exclusion:

> There is no coverage for [Bodily Injury] for which a covered person becomes legally responsible to pay a member of that covered person's family residing in that covered person's household. This exclusion applies only to the extent that the limits of liability for this coverage exceed $20,000 for each person or $40,000 for each accident.

Based on this exclusion, USAA authorized settlement in the amount of $20,000. Plaintiff responded by commencing the present declaratory action.

In the complaint for declaratory relief, plaintiff asked the trial court to determine that the exclusion did not apply to either the claims of the estate or the beneficiaries of the estate, because neither the estate nor the beneficiaries resided in Patricia's household at the time of the accident. In the alternative, plaintiff asked the trial court to determine that the exclusion was unconscionable, violated the state's financial responsibility laws, or was ambiguous and not intended by Patricia to be part of the contract.

After a hearing in October 2006, the trial court determined that the exclusion should be read literally. The trial court explained,

> Now in this case the insurance company probably reasonably expected that in a wrongful death action due to personal injury out of an auto accident to a relative or a family member in the same household that they're limited to 20,000 each, but that's not what it literally says. It says the exclusion is for situations in which the covered person, which we apparently concede is Mrs. Overbeck, becomes legally responsible to pay a member of that covered person[']s family residing in the covered person[']s household, that would be Mr. Overbeck. If she were responsible legally to pay money to Mr. Overbeck, that would be within the language of this policy and that is the holding of – that would be the literal language of the policy.
>
> However, in this case, Mr. Overbeck died and she, Mrs. Overbeck, owes no money to Mr. Overbeck, he's not here. Under the Wrongful Death Act . . . the tortfeasor owes money to the estate of the deceased person and certain heirs . . . .

Because Gene's estate is not a member of Patricia's family and did not reside with Patricia and because the heirs did not reside with Patricia, the trial court determined that the exclusion did not apply. Instead, it concluded that the higher $500,000 limit applied. Accordingly, the trial court issued an order granting summary disposition in favor of plaintiff.

This appeal followed.

On appeal, USAA argues that the trial court erred when it determined that the exclusion did not apply. Specifically, USAA argues that, under the Wrongful Death Act, Gene's estate stands in the shoes of Gene himself for all purposes incident to enforcement of the wrongful death claim. As a result, USAA further argues, a legal obligation to pay Gene's estate, regardless of the ultimate beneficiaries, must be treated as an obligation to pay Gene. Because Gene was a member of Patricia's family and resided with her, USAA concludes, the exclusion applies. We agree.

This Court reviews de novo the trial court's decision to grant summary disposition. *Hamade v Sunoco (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006). This Court also reviews de novo the proper interpretation of a contract. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005).

Resolution of this case turns on the proper interpretation of exclusion C of the insurance policy under which USAA insured Patricia at the time of her death. In interpreting this exclusion, our primary obligation is to ascertain the intent of the contracting parties. *Quality*

Products and Concepts Co v Nagel Precision, Inc, 469 Mich 362, 375; 666 NW2d 251 (2003). In order to determine the parties' intent, we first examine the language in the contract, "giving it its ordinary and plain meaning if such would be apparent to a reader of the instrument." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Where a contract is unambiguous, it is not open to judicial construction and must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

Exclusion C of the policy provides,

> There is no coverage for [Bodily Injury] for which a covered person becomes legally responsible to pay a member of that covered person's family residing in that covered person's household. This exclusion applies only to the extent that the limits of liability for this coverage exceed $20,000 for each person or $40,000 for each accident.

Thus, the question presented in this appeal is whether payment pursuant to Patricia's legal liability to plaintiff, the Estate of Gene Overbeck, falls within the scope of the exclusion. We hold that it does.

Had Gene survived the carbon monoxide poisoning, the policy clearly would have limited Patricia's liability to $20,000. It is not relevant to our determination that the personal representative of his estate actually brought the suit. A wrongful death claim "is a derivative one" and "[t]he cause of action belongs to the deceased." *Allstate Ins Co v Muszynski*, 253 Mich App 138, 143; 655 NW2d 260 (2002) quoting *Toth v Goree*, 65 Mich App 296, 298; 237 NW2d 297 (1975). A personal representative "stands in the deceased's place for *all purposes incident to the enforcement of that claim, including rights and privileges personal to the deceased in his lifetime.*" *McNitt v Citco Drilling Co*, 60 Mich App 81, 88; 230 NW2d 318 (1975) (emphasis in original). Because Gene and his estate are indistinguishable for the purpose of this litigation, and it is undisputed that Gene and Patricia resided together before their deaths, the exclusion applies. See, e.g., *In re Venneman's Estate*, 286 Mich 368, 377-378; 282 NW 180 (1938) (suit under former version of wrongful death act compensates the deceased).

The trial court's order granting plaintiff 's motion for summary disposition is reversed. This case is remanded for entry of an order defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey

I concur in result only.

/s/ Michael R. Smolenski