STATE OF MICHIGAN

COURT OF APPEALS

GULF UNDERWRITERS INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellee,

v

MCCLAIN INDUSTRIES, INC., MCCLAIN E-ZPACK, INC., MCCLAIN GALION, INC., a/k/a GALION HOLDINGS, INC., SHELBY STEEL PROCESSING COMPANY, MCCLAIN TUBE, MCCLAIN GROUP LEASING, INC., MCCLAIN SOUTHLAND COMPANY, d/b/a SOUTHLAND EQUIPMENT CORPORATION, MCCLAIN INTERNATIONAL, F.S.C., and MCCLAIN LEASING CORPORATION,

Defendants/Counter-Plaintiffs/Cross-Appellants,

and

GLEN HOLLIS and DEIDRE HOLLIS,

Defendants,

and

DAVID C. COOK,

Defendant-Appellant,

and

DANIEL BERG,

Defendant/Cross-Appellant.

UNPUBLISHED
August 5, 2008

No. 273768
Macomb Circuit Court
LC No. 2005-000711-CK

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM

In this insurance dispute, the trial court granted summary disposition in favor of plaintiff Gulf Underwriters Insurance Company ("Gulf Underwriters") pursuant to MCR 2.116(C)(10) and denied cross-motions for summary disposition filed by defendants David C. Cook and several affiliated corporate defendants (collectively referred to as the "McClain defendants"). The trial court determined that Gulf Underwriters had no duty to defend or indemnify any of the McClain defendants in pending or future product liability actions against them and awarded Gulf Underwriters judgment of $227,708.65 against the McClain defendants for defense costs already incurred. Cook, a plaintiff in a product liability action against the McClain defendants, appeals as of right. Defendant Daniel Berg and the McClain defendants have filed cross-appeals. We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Proceedings

Gulf Underwriters issued four liability insurance policies to the McClain defendants from 2000 to 2004. Each policy included a self-insured retention endorsement ("SIR endorsement"), which provides in pertinent part:

> In consideration of the premium charged, it is hereby agreed that such coverage as is afforded by this policy shall be excess of a 250,000 Self-Insured Retention each "claim." It is also agreed that all expenses and costs under the Supplementary Payments section stated in the Coverage Form (Section 1) shall contribute to the exhaustion of the 250,000 Self-Insured Retention Limit and all such expenses and costs shall be entirely borne by the insured.
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> All the terms of the policy including, but not limited to, those with respect to notice of "claim" or "suit" and the Company's right to investigate, negotiate, defend and settle any "claim" apply irrespective of the application of the Self-Insured Retention.
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> The Company may, but is not obligated to, pay all or part of the Self-Insured Retention to effect settlement of any "claim," "suit" or expense. Upon notification of the action taken, the insured shall promptly reimburse the Company for such Self-Insured Retention amount paid by the Company. . . .
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> * * *
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> The Self-Insured Retention obligation to this contract shall be considered to be an executory contract under all circumstances and payments on this obligation shall be paid by the insured. *Failure to make the payment entitles the insurer to terminate the contractual obligation between the parties as a failure to the Self-Insured Retention endorsement is a material breach to the entire contract.* In the event of a bankruptcy filing, the contract is deemed executory as under 11 U.S.C. 365, and the payments of the self-insured retention shall be made on a monthly basis and treated as an administrative expense under 11 U.S.C. 507(a)(1).

Section IV of the policy, titled COMMERCIAL GENERAL LIABILITY CONDITIONS, provided,

> 1. Bankruptcy
>
> > Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

Cook and Berg, along with other individuals, allegedly sustained injuries associated with products manufactured by the McClain defendants. Cook filed a product liability action against the McClain defendants and Berg notified the McClain defendants of his intention to file suit. As the tort claims were pending, the McClain defendants filed certificates of dissolution with the state of Michigan. The parties do not dispute that the McClain defendants were insolvent at the time of dissolution and that they claimed an inability to pay the SIR endorsement limit because of their insolvency. The parties also agree that Gulf Underwriters paid some expenses toward the McClain defendants' defense of these claims, notwithstanding the McClain defendants' failure to comply with the SIR endorsement.

Gulf Underwriters brought this action against the McClain defendants, Cook, Berg, and other individual defendants and sought a declaration that it was not obligated to provide coverage for the McClain entities because the McClain defendants failed to comply with the SIR endorsement. Gulf Underwriters also asked to be reimbursed for expenses it had already incurred in defending the personal injury claims against the McClain defendants. The McClain defendants filed a counterclaim seeking a declaratory judgment that the insurance policies remained in full force and effect notwithstanding their insolvency.

The parties filed cross-motions for summary disposition. The trial court granted summary disposition for Gulf Underwriters and held that the McClain defendants' failure to pay the SIR endorsement limit negated Gulf Underwriters' obligation to defend and indemnify the McClain defendants. The court also awarded Gulf Underwriters $227,708.65 for defense costs incurred to date. Cook, Berg, and the McClain defendants now appeal.

II. Analysis

Although Gulf Underwriters is not subject to the provisions of MCL 500.3006, we agree with defendants' contention that the insolvency provision provides an exception to the requirement that McClain Industries must satisfy the SIR endorsement limit before Gulf Underwriters is required to defend and indemnify defendants.[1] Cook argues that MCL 500.3006

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[1] We review a trial court's decision on a summary disposition motion de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed*, *supra*. The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of any material fact. *Id.*

precludes Gulf Underwriters from denying coverage based on the McClain defendants' insolvency because the statute requires insurers to include a provision in the policy stating that "the insolvency or bankruptcy of the person insured shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy." Yet MCL 500.3006 is inapplicable to this case because Gulf Underwriters is a "surplus lines carrier," i.e., an insurer that is not authorized by the state insurance commissioner to transact insurance in the state of Michigan. MCL 500.108; MCL 500.1903(1)(d). Therefore, Gulf Underwriters was not subject to the requirements of MCL 500.3006. MCL 500.1904(2).[2]

Regardless, Gulf Underwriters included a similar insolvency provision in the insurance policies at issue in this case. The provision states, "Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part."

Insurance policies are subject to the same principles of contract interpretation that apply to other types of contracts. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005). Contractual language must be given its ordinary and plain meaning, and every word, clause, and phrase must be given effect. *Id.* at 715. A court must avoid a construction that would render any part of the contract surplusage or nugatory. *Id.* Contracts must be considered as a whole, harmonizing all parts of the contract as much as possible. *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989). We will enforce policy language as written, however inartfully worded or clumsily arranged, and we will not infer an ambiguity where none exists in order to rewrite a policy under the guise of interpretation. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 338; 632 NW2d 525 (2001); *Van Hollenbeck v Ins Co of North America*, 157 Mich App 470, 477; 403 NW2d 166 (1987), *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982).

Gulf Underwriters' assertion that the SIR endorsement precludes coverage unless the insured pays the SIR limit has the effect of barring coverage when the insured is insolvent. Gulf Underwriters maintains that there is a distinction between denying coverage based on insolvency and denying coverage pursuant to the SIR endorsement, but this is a distinction without a difference when the insured is insolvent and cannot pay the SIR limit because of that insolvency. Although Gulf Underwriters is not articulating the McClain defendants' insolvency as its reason for denying coverage, its reliance on the SIR endorsement serves that purpose by allowing it to avoid paying coverage for an insolvent insured. Essentially, Gulf Underwriters' proposed construction of its policies renders the insolvency provision nugatory, which is contrary to principles of contract interpretation. See *Royal Prop Group*, *supra* at 715. Therefore, the trial court erred when it failed to give effect to the insolvency provision and declared that Gulf Underwriters properly could deny coverage pursuant to the SIR endorsement.

Gulf Underwriters' SIR endorsement provides,

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[2] See *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 725; 706 NW2d 426 (2005), which holds that a surplus lines insurance carrier's forms are not subject to the insurance code, except that the policy may not contain language that misrepresents the true nature of the policy or class of policies.

> *All the terms of the policy* including, *but not limited to*, those with respect to notice of "claim" or "suit" in the Company's right to investigate, negotiate, defend and settle any "claim" *apply irrespective of the application of the Self-Insured Retention*. [Emphasis added.]

This language prevents the SIR endorsement from trumping the insolvency provision. The SIR endorsement clearly and unambiguously provides that Gulf Underwriters is obligated to provide coverage in excess of the initial $250,000 of defense and indemnification costs, and the insolvency provision does not affect this term of the policy. Further, although the insolvency provision precludes Gulf Underwriters from relying on the McClain defendants' insolvency to avoid its obligations under the policy, the policy does not obligate Gulf Underwriters to pay the initial $250,000 toward each claim. Rather, Gulf Underwriters is only obligated to pay amounts in excess of the $250,000 SIR limit in relation to each claim against the McClain defendants.

Gulf Underwriters also asserts a claim for unjust enrichment, which the trial court resolved by ordering the McClain defendants to reimburse Gulf Underwriters for defense costs incurred in the personal injury claims. The amount of these costs was less than $250,000, so this portion of the trial court's order is consistent with the parties' respective rights and obligations under the policies. Accordingly, we affirm the trial court's money judgment in favor of Gulf Underwriters.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly