STATE OF MICHIGAN

COURT OF APPEALS

BRISTOL WEST INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED October 23, 2008
v	No. 279379 Shiawassee Circuit Court
RICHARD SCOTT and KENNETH W. SCOTT SR., Defendants-Appellees.	LC No. 06-003908-CK

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

PER CURIAM.

In this action seeking a declaratory judgment, plaintiff appeals as of right the trial court's order denying its motion for summary disposition and granting defendants' motion under MCR 2.116(C)(10). Because we conclude that the "business use" exclusion does not apply and that plaintiff has a duty to defend defendants in the underlying action, we affirm.

I

Defendant Kenneth Scott Sr. (Ken Sr.) operated Scotty's Big Tow, the activities of which included the buying and selling of scrap metal. On July 13, 2005, Ken Sr. borrowed his son's, defendant Richard Scott's (Richard), Ford F-350 pickup truck to haul an Easy Dump trailer, which contained a load of scrap metal, to Ovid Iron & Metal (the junkyard). Ken Sr.'s other son, Kenneth Scott Jr. (Ken Jr.) accompanied him. At the junkyard, Ken Sr. and Ken Jr. unhooked the trailer from the pickup truck and turned the pickup truck around so that it faced the trailer, allowing Ken Sr. and Ken Jr. to connect jumper cables from the pickup truck's battery to the trailer. The pickup truck's battery powered the trailer's hydraulic lift. When Ken Sr. activated the hydraulic lift, the scrap metal shifted and the trailer lurched forward, pinching Ken Jr.'s right ring finger between the trailer hitch and the pickup truck's front bumper.[1]

Before the accident, plaintiff had issued Richard a no-fault insurance policy, which listed the pickup truck as a covered automobile. Ken Jr., alleging that his injury constituted a serious

[1] Ken Jr.'s finger was severed from his hand.

impairment of body function, sued Ken Sr. and Richard for all noneconomic losses and any economic losses in excess of his no-fault benefits (the underlying action). Plaintiff then filed the present action, seeking a declaratory judgment from the trial court that it was not obligated to defend or indemnify its insureds, Richard and Ken Sr. The parties cross-moved for summary disposition. The trial court granted defendants' motion and denied plaintiff's motion.

II

On appeal, plaintiff claims the trial court erred in denying its motion for summary disposition because coverage for defendants' liability for Ken Jr.'s injury was excluded under the policy's "business use" exclusion. Plaintiff also claims that it has no duty to provide a defense to defendants in the underlying action because the complaint was simply an attempt to trigger coverage under the policy.[2]

A

We review de novo a trial court's decision on a motion for summary disposition. *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005). Summary disposition is proper under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 683; 741 NW2d 579 (2007).

We also review de novo the interpretation of an insurance contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). If the language of a no-fault insurance policy is neither ambiguous nor contrary to the no-fault act, the policy is to be enforced as written. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). Dictionary definitions may be used to ascertain the plain and ordinary meaning of terms undefined in the contract. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007).

B

Plaintiff claims that, because the pickup truck was being used by Ken Sr. in his scrap metal business at the time of the injury and because Ken Sr. was paid for the scrap metal by the junkyard, the policy's "business use" exclusion precludes coverage for defendants' liability. We disagree.

The policy's "business use" exclusion provides that plaintiff will not provide liability coverage:

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[2] At oral arguments, plaintiff conceded that, pursuant to the plain language of MCL 500.3131(1) and MCL 500.3135(1), an insurer is required to provide residual liability coverage for its insured's liability for an injury caused by the insured's "use of a motor vehicle." In other words, the insured's liability need not arise out of a "use of a motor vehicle as a motor vehicle." Accordingly, to decide the present appeal, we only need address the two issues stated above.

> For that "insured's" liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for compensation or fee, including, but not limited to, delivery of magazines, newspapers and food.

The term "carry" is defined as "to move while supporting or holding; take from one place to another; transport." *Random House Webster's College Dictionary* (1992). Clearly, the pickup truck had been used to carry property. By pulling the trailer to the junkyard, the pickup truck transported the scrap metal to the junkyard. However, at the time of the injury, the pickup truck was no longer "being used to carry" the scrap metal. The scrap metal was at its final destination; it was to be dumped at the junkyard. And, in order for the scrap metal to be dumped, the trailer had been unhitched from the pickup truck. Accordingly, at the time of the injury, the pickup truck was no longer in the process of transporting the scrap metal.

In addition, even when the pickup truck was "being used to carry" the scrap metal to the junkyard, it was not "for compensation or fee." Although Ken Sr. received compensation for the scrap metal he delivered to the junkyard, this compensation related to the value of the scrap metal. The junkyard did not compensate or pay a fee to Ken Sr. for carrying the scrap metal to the junkyard, distinguishing the present case from *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 595-596; 669 NW2d 304 (2003), rev'd on other grounds 469 Mich 1003 (2004) (an employee's transportation of pizza was for compensation because the employee had been hired to deliver pizzas).

Because the pickup truck was not "being used to carry" the scrap metal at the time of the injury, and because when the pickup truck was "being used to carry" the scrap metal it was not "for compensation or fee," we affirm the trial court's holding that the policy's "business use" exclusion does not apply in the present case.

C

Plaintiff also claims that it has no duty to defend defendants. According to plaintiffs, the complaint in the underlying action, which it claims contains no factual support for allegations of negligence arising out of Ken Sr.'s use of the pickup truck, was simply an attempt to trigger coverage under the policy. We disagree.

The duty to defend arises from the language of the insurance policy. *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 117; 617 NW2d 725 (2000). The policy issued by plaintiff provides:

> We will settle or defend, as we consider appropriate, any claim or suit asking for these damages [damages for "bodily injury" . . . for which any "insured becomes legally responsible because of an auto accident"]. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted through an offer of settlement or payment. We have no duty to defend any suit or settle any claim for "bodily injury" . . . not covered under this policy."

An insurer's duty to defend is broader than its duty to indemnify. *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74; 755 NW2d 563 (2008). Whether an insurer has a duty to

defend its insured in a tort action depends on the allegations of the complaint. *Fitch v State Farm Fire & Cas Co*, 211 Mich App 468, 471; 536 NW2d 273 (1995). "[I]f the allegations of the underlying suit *arguably* fall within the coverage of the policy, the insurer has a duty to defend its insured." *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 526; 679 NW2d 106 (2004) (emphasis in original) (quotations and citations omitted). However, if coverage is not possible, then the insurer has no duty to provide a defense. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 315; 575 NW2d 324 (1998); see also *Tobin v Aetna Cas & Surety Co*, 174 Mich App 516, 518; 436 NW2d 402 (1988) (there is no duty to defend when the complaint is simply written in a manner to trigger coverage).

In the underlying complaint, Ken Jr. alleged that Ken Sr. operated the pickup truck, along with the trailer, in a careless and reckless manner. Admittedly, the underlying complaint does not contain an allegation of a specific negligent act by Ken Sr. in the use of the pickup truck. However, the facts contained within the underlying complaint were few, and the only operation of the pickup truck by Ken Sr. referred to in the complaint was his use of the pickup truck to power the trailer's hydraulic lift. Accordingly, it can be concluded that when Ken Jr. alleged that Ken Sr. operated the pickup truck in a careless and negligent manner, he was referring to Ken Sr.'s use of the pickup truck to power the trailer's hydraulic lift. We, therefore, reject plaintiff's contention that Ken Jr. failed to allege a negligent use of the pickup truck in the underlying complaint.

In the policy, plaintiff promised to defend any claim seeking damages for bodily injury for which its insured, defendants, were legally responsible because of an auto accident. In the underlying complaint, Ken Jr. alleged a negligent use of the pickup truck by Ken Sr. and that, as a result of Ken Sr.'s negligence, he suffered the amputation of his right ring finger. Accordingly, the allegations of the underlying complaint arguably fall within the coverage of the policy. Plaintiff has a duty to defend its insureds. *Shuler, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra