

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PROGRESSIVE MICHIGAN INSURANCE  
COMPANY,

Plaintiff-Appellee,

v

ROZAFI TRANSPORT, INC., and GJERGI  
RROGOMI,

Defendants,

and

GWENDOLYN NEILL, Personal Representative of  
the Estate of WILLIAM J. NEILL IV,

Intervening Defendant-Appellant.

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PROGRESSIVE MICHIGAN INSURANCE  
COMPANY,

Plaintiff-Appellee,

v

ROZAFI TRANSPORT, INC., and GJERGI  
RROGOMI,

Defendants-Appellants,

and

GWENDOLYN NEILL, Personal Representative of  
the Estate of WILLIAM J. NEILL IV,

Intervening Defendant.

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UNPUBLISHED  
June 9, 2009

No. 283000  
Macomb Circuit Court  
LC No. 2006-004495-NI

No. 283395  
Macomb Circuit Court  
LC No. 2006-004495-NI

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

These consolidated appeals arise from plaintiff Progressive Michigan Insurance Company's action for declaratory relief concerning its duty to defend and indemnify its insured, defendant Rozafa Transport, Inc. ("Rozafa Transport"), and Rozafa Transport's employee, Gjergi Rrogomi, in a separate wrongful death action brought by intervening defendant Gwendolyn Neill, as Personal Representative of the Estate of William J. Neill IV, against Rozafa Transport and Rrogomi in connection with the death of William Neill. The trial court granted Progressive's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10), concluding that an exclusion in Progressive's commercial automobile insurance policy negated its liability for coverage and, accordingly, it was not required to defend or indemnify Rozafa Transport and Rrogomi in the underlying wrongful death action. Intervening defendant Neill now appeals as of right in Docket No. 283000, and defendants Rozafa Transport and Rrogomi appeal as of right in Docket No. 283395. We reverse and remand.

This action arises from an accident at a Ford Visteon Plant, which occurred when William Neill, a journeyman millwright, and James Victor Borelli, a millwright apprentice, were removing conveyor components from a truck owned by Rozafa Transport and driven by Rrogomi. While the truck was being unloaded, a large piece of equipment ("piece D") weighing approximately 800 pounds fell from the truck and struck William Neill, causing his death. It is undisputed that, before piece D fell, Rrogomi had removed the straps that secured the load and had at least partially pushed back the truck's retractable metal tarp, and that Borelli had used a forklift vehicle to remove two other pieces of equipment. However, the circumstances that caused piece D to fall from the truck were disputed. Both Borelli and Rrogomi denied any involvement in causing piece D to fall. According to Borelli, his forklift was away from Rozafa Transport's truck when piece D fell off the truck. Borelli also claimed that his forklift never touched any pallets except those that he had removed. Borelli believed that the metal tarp of Rozafa Transport's truck was pushed back immediately before piece D fell, thereby allowing piece D to fall, but Rrogomi claimed that he had pushed it back earlier.

Intervening defendant Gwendolyn Neill, as the personal representative for William's estate, filed a wrongful death action against defendants Rozafa Transport and Rrogomi, alleging that Rrogomi's negligence during the unloading process proximately caused William's death. Progressive thereafter filed this declaratory action against Rozafa Transport and Rrogomi, seeking a declaration that it had no duty to defend or indemnify them in Neill's underlying wrongful death action. Neill was permitted to intervene. The trial court subsequently granted Progressive's motion for summary disposition, concluding that Progressive was not liable for coverage under its commercial automobile policy pursuant to an exclusion for "[b]odily injury . . . resulting from or caused by the movement of property by a mechanical device, other than a hand truck, not attached to an insured auto."

The interpretation of an insurance contract is an issue of law, which we review de novo on appeal. *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). We likewise review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Progressive moved for summary disposition under MCR 2.116(C)(9) and (10). A motion for

summary disposition under MCR 2.116(C)(9) “tests the sufficiency of a defendant’s pleadings and is properly granted when the party has failed to state a valid defense to a claim.” *In re Mary Griffin Revocable Grantor Trust*, 281 Mich App 532, 536; 760 NW2d 318 (2008), lv pending. “A defense is invalid for purposes of MCR 2.116(C)(9) when the party’s pleadings are so clearly untenable as a matter of law that no factual development could possibly deny the opposing party’s right to recovery.” *Id.*

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. In reviewing a motion under this subrule, the court must consider the affidavits, depositions, admissions, or other documentary evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. MCR 2.116(G)(3)(b); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Allstate Ins Co v Dep’t of Mgt & Budget*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003).

Although the trial court stated that it granted Progressive’s motion under both MCR 2.116(C)(9) and (10), it relied on the documentary evidence submitted by Progressive in granting the motion. Because the trial court did not limit its consideration to the pleadings alone, and because Progressive similarly did not allege that it was entitled to summary disposition on the basis of the pleadings alone but rather relied on documentary evidence in support of its motion, summary disposition was not appropriate under MCR 2.116(C)(9). Thus, we consider whether summary disposition was appropriate under MCR 2.116(C)(10).

Defendants Rozafa Transport and Rrogomi, and intervening defendant Neill, initially argue that William Neill’s death arose from an event that is within the scope of coverage under Progressive’s automobile policy. An insurer’s duty to defend and indemnify is tied to the availability of coverage. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996). However, the duty to defend is broader than the duty to indemnify, and an insurer must provide a defense “if the allegations of a third party against the policyholder even arguably come within the policy coverage.” *Id.* at 450-451. “This is true even where the claim may be groundless or frivolous.” *Id.* As explained in *American Bumper & Mfg Co, supra* at 451-452:

“An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has a duty to look behind the third party’s allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured’s favor.” [Citations omitted, quoting *Protective Nat’l Ins Co v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991), quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980).]

In this case, it is undisputed that Progressive’s policy provides coverage for “bodily injury . . . for which an insured becomes legally responsible because of an accident arising out of the ownership, maintenance or use of an insured auto.” Neill’s wrongful death complaint alleged

that William Neill's death was caused by Rrogomi's negligent conduct in operating and unloading Rozafa Transport's truck, which was an insured vehicle under Progressive's policy. In addition, although the circumstances surrounding the accident were disputed, the submitted evidence showed that William Neill was killed when he was struck by a large piece of equipment that fell from Rozafa Transport's truck. These allegations and evidence were sufficient to show that coverage under Progressive's policy was possible on the basis that William Neill's death arose out of the use of an insured automobile.

Indeed, in granting Progressive's motion for summary disposition, the trial court stated that "Progressive does not dispute that the subject accident falls within the contractual language providing for coverage[.]" Similarly, in its brief on appeal, Progressive asserts that "[r]ealistically speaking, the loss that is described in this case fits within the general definitions of a covered loss." Progressive instead asserts that the question of its duty to defend and indemnify is dependent on whether any of the exclusions contained in its policy apply. It was on this basis that the trial court granted Progressive's motion, agreeing with Progressive that its liability for coverage was negated by an exclusion. But "determining the scope of coverage under an insurance policy is a separate question from whether liability is negated by an exclusion." *Tenneco, Inc, supra*, 281 Mich App at 444. Thus, the resolution of this case does not turn on the question of coverage, but rather on the applicability of the exclusions raised by Progressive.

The trial court found that Progressive's liability for coverage was negated by the following exclusion in Progressive's policy:

Coverage under this part I, including our duty to defend, does not apply to:

\* \* \*

8. Bodily injury or property damage resulting from or caused by the movement of property by a mechanical device, other than a hand truck, not attached to an insured vehicle.

The trial court found that this exclusion was applicable, reasoning as follows:

According to the evidence submitted by Progressive, the accident occurred when employee(s)/agent(s) of Ford attempted to remove the load by using a hi lo truck that was capable of being driven, had adjustable forks, and was separate and distinct from the vehicle that was driven by Rrogomi. . . . Rozafa and Rrogomi have failed to submit any opposing evidence. Under these circumstances, the Court is persuaded that the accident is excluded from coverage[.]

Thus, the trial court focused on whether the forklift was "a mechanical device, other than a hand truck, not attached to an insured vehicle." But even if the forklift qualifies as such a device, the exclusion applies only if William Neill's death resulted from or was caused by the movement of property by the device. Progressive did not assert in its motion that the forklift moved or touched piece D, only that, during the course of unloading, Borelli moved another piece of equipment and then piece D fell. However, the submitted deposition testimony established a

question of fact whether the forklift was linked to the movement of property, which thereby caused piece D to fall and strike William Neill.

In particular, Borelli testified that he had previously removed piece B, and was in the process of moving piece E on his forklift, after having already removed the piece from Rozafa Transport's truck, when the accident occurred. Moreover, Borelli testified that he did not strike any of the other pieces of equipment before removing pieces B and E. According to Borelli, after removing piece E, he cleared Rozafa Transport's truck and had driven away from it, preparing to unload piece E, when he stopped to allow another oncoming truck to pass. Borelli claimed that one or two minutes had elapsed between the time he removed piece E from Rozafa Transport's truck and the time piece D fell off the truck. Borelli denied causing part D to fall off Rozafa Transport's truck and instead believed that the equipment fell after Rrogomi pulled back the remaining portion of the truck's tarp, thereby allowing piece D to fall off.

Viewed most favorably to defendants Rozafa Transport and Rrogomi, and intervening defendant Neill, the evidence reveals a genuine issue of material fact whether William Neill's death resulted from or was caused by the movement of property by the forklift. Therefore, the trial court erred in granting Progressive's motion for summary disposition on the basis of exclusion 8.<sup>1</sup>

Defendants Rozafa Transport and Rrogomi, and intervening defendant Neill, also argue that exclusion 9 in Progressive's policy is inapplicable to negate coverage. Although Progressive alternatively argued below that exclusion 9 was also applicable, the trial court did not reach this issue. Exclusion 9 provides:

Coverage under this part I, including our duty to defend, does not apply to:

\* \* \*

9. Bodily injury or property damage resulting from or caused by the handling of property:

a. before it is moved from the place where it is accepted by the insured for movement into or onto your insured auto; or

b. after it has been moved from your insured auto to the place where it is finally delivered by the insured.

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<sup>1</sup> We disagree with Progressive's argument that it was entitled to summary disposition because defendants Rozafa Transport and Rrogomi, and intervening defendant Neill, failed to present any independent evidence in opposition to its motion. Even though these defendants did not present additional evidence, the issue is whether the evidence that was submitted established that there was no genuine issue of material fact.

Exclusion 9(a) is not applicable because William Neill's death was not caused by or result from the handling of the equipment before Rrogomi accepted it from the distributor, Steel Master Transfer, Inc., for movement onto his truck. Exclusion 9(b) would be applicable only if William Neill's death was caused by or resulted from the handling of piece D *after* it had been "moved from" Rozafa Transport's truck. Because it is undisputed that piece D had not yet been removed from Rozafa Transport's truck, this exclusion also does not apply. Thus, Progressive was not entitled to summary disposition on the basis of exclusion 9.

Reverse and remand for further proceedings consistent with the opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Donald S. Owens  
/s/ Pat M. Donofrio