STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE CO,

Plaintiff-Appellee/Cross-Appellant,

v

SUPER KICKER RODEO PRODUCTIONS, JOEY JOHNSTON d/b/a SUPER KICKER RODEO, and JOE JOHNSTON,

Defendants/Third-Party Plaintiffs-Appellants/Cross-Appellees,

and

ACE AMERICAN INSURANCE CO,

Third-Party Defendant-Appellee.

UNPUBLISHED
July 14, 2009

No. 286455
Mecosta Circuit Court
LC No. 07-017963-CK

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendants Super Kicker Rodeo Productions, Joey Johnston, and Joe Johnston (collectively, "Super Kicker"), appeal as of right an order granting summary disposition in favor of plaintiff Progressive Michigan Insurance ("Progressive") and third-party defendant ACE American Insurance ("ACE"). Progressive cross-appeals but does not dispute the trial court's decision, instead arguing that the trial court erred in rejecting an alternative basis for reaching the same result. We affirm the trial court's grant of summary disposition as to ACE, reverse the trial court's grant of summary disposition as to Progressive, and remand.

This case arises out of an underlying suit filed by Donielle E. Hart against Super Kicker for injuries she sustained while "helping" at the rodeo.[1] Progressive commenced the instant suit for declaratory judgment that it owed no duty to indemnify or defend Super Kicker. Super

[1] The underlying suit was for negligence. The nature of the "help" that Hart was rendering at the rodeo is disputed between the parties and material to the outcome of this matter.

Kicker commenced a third-party action against ACE seeking a declaratory judgment that ACE was obligated to defend and indemnify defendants. It is undisputed that Super Kicker was generally covered by insurance policies with both insurers and that the injury was also generally covered by both insurance policies. The insurers' arguments are premised on the applicability of exclusions from coverage contained in their policies.

Super Kicker Rodeo, or Super Kicker Rodeo Productions, is a rodeo owned by Joe and Catherine Johnston, husband and wife; at the time of the injury it was simply a "doing business as" entity, but it is now a limited liability corporation. Super Kicker employed several individuals in various roles, including bullfighters, a clown, a "pickup man," stock loaders, and some miscellaneous roles filled by different people at different events; Johnston considered them to be "independent contractors" who were paid a fixed sum per appearance. Hart is the Johnstons' niece. Rodeos were family businesses, and Hart had been around them "helping out" all her life. Hart's mother and Hart apparently "needed to be a part of" the Super Kicker rodeo operation, and the Johnstons accommodated them by finding things for them to do, "enough to keep them going up and down the road with us." Catherine Johnston explained that Super Kicker had no need for anyone to do the things that the Harts did, and the only compensation the Harts received was traveling expenses, usually $50 to $100, but sometimes nothing at all after an unprofitable show.[2] These sums, when paid, were paid to Hart's mother, who was Catherine Johnston's sister. Johnston opined that actually her "life would have been easier if in fact [Hart's family] hadn't come to any rodeos." Donielle Hart explained that she "just kind of helped out wherever [she] was needed," and she was not paid a salary; furthermore, she explained that she would have helped out irrespective of whether she received any money.

The injury at issue occurred on July 15, 2004. After the rodeo of that day, Donielle Hart and "the guys" were working on tearing down the chutes used for receiving bulls or horses returning from bucking.[3] The teardown process involved dismantling the chutes into their component metal panels, placing them in groups, loading them onto a "drop-deck semitrailer" using a "skid steer" (or forklift), and securing them. Hart explained that she did not like heights, so she never participated in any part of the process that involved getting onto the trailer, which would have included the actual loading of the panels onto the trailer. Hart testified that, in fact, she did not have any involvement at all in the loading of the panels, only in the disassembly thereof. Hart explained that, usually, Josh, Justin, or Ronnie did the loading, and "then someone would be on top of the trailer and tie [the panels] with a rope." The "very last thing" was to strap the panels down after tying them.

On the day of the injury, Cody was the person on top of the trailer tying the panels. The panels had already been tied, and the rest of the group was in the process of getting the straps to strap the panels down. Hart, Josh, and Bevington "were walking around the end of the trailer to

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[2] Progressive asserts that Hart or her family "always" received some cash payment, but we find no support for this assertion in the record.

[3] The "guys" that Hart could remember were the Johnstons' sons Josh and Cody; Super Kicker's bullfighters, Robert Ball and Justin Bevington; and another person named Ronnie Ludholtz.

go up to the semi to get the straps," when Cody said "'oh, shit.'" Hart looked up and saw the panels fall onto her. Hart testified that she was, at some point, "told that the rope broke," but she did not know why, and apparently the rope itself was disposed of. Hart suffered severe injuries, including nearly severing her foot and causing a depressed skull fracture, leading to ongoing pain, ongoing surgeries, memory problems, an inability to do most of the physical activities she had previously enjoyed, and medical expenses.

Progressive filed the instant action for declaratory judgment on May 10, 2007, and this case was consolidated with the underlying action for discovery. Super Kicker filed a third party complaint against ACE on March 11, 2008. The insurers both moved for summary disposition. The trial court held a hearing. It concluded that there was a genuine question of fact as to whether Hart was an "employee" for the purposes of certain policy exclusions for employees, and it denied summary disposition to the extent the insurers relied on those exclusions. However, the trial court also found that there was no genuine question of fact that Hart was "loading or unloading" the trailer for the purposes of an exclusion in each insurers' policy that referred to loading or unloading. The trial court therefore granted summary disposition in favor of both insurers.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court reviews de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Unambiguous contracts are enforced as they are written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

We first observe that whether Hart was "loading or unloading" is irrelevant under the ACE insurance policy. The policy exclusion upon which ACE relies is broad and covers injuries "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." The policy defines "use" as including "loading or unloading." However, ACE correctly explains that the focus is not on whether loading or unloading was taking place, let alone whether Hart was involved in that loading or unloading, but rather whether the injury resulted from any use of an auto. Because the term "auto" is defined as including a trailer in the ACE policy, it is clear that Hart's injury resulted from the use of an auto. Irrespective of whether she was loading or unloading the trailer, the trial court correctly found that the policy exclusion applies as to ACE.

The policy exclusion upon which the trial court granted summary disposition to Progressive applies to injuries "resulting from anyone who is not [Super Kicker's] employee loading or unloading an auto." Again, the definition of an "auto" includes the trailer. For the purposes of analyzing this exclusion, Progressive has agreed to assume that Hart was "not [Super Kicker's] employee." The term "loading or unloading" is not defined in Progressive's insurance policy.

Super Kicker argues that Hart was not engaged in anything that could be considered "loading or unloading." Progressive argues that at a minimum, by her own testimony Hart was walking by the trailer because she was in the process of retrieving the straps necessary to complete the loading process; therefore, she was participating in the loading.[4] Progressive also argues that the trial court correctly found that Hart's assistance in tearing down the panels and making them ready for movement onto the trailer was participation in a team effort to "load" the trailer.

We find that Hart was not engaged in the loading process. Her role was only to dismantle the panels and place them where they could be loaded, not to load them. Instructively, Michigan has "adopted a broad meaning of the terms 'loading' and 'unloading'" as used in the no-fault act, and they are construed as including acts that are merely preparatory to actual movement of property. *Thompson v TNT Overland*, 201 Mich App 336, 338-339; 505 NW2d 918 (1993). This "complete operation rule" encompasses "both the loading and unloading process to include the entire process involved in the movement of goods from the moment they begin their movement toward the insured vehicle to be placed therein until they have been turned over at the place of destination to the party to whom the delivery is to be made." *Jervis Webb Co v Everest Nat'l Ins Co*, 251 Mich App 692, 701; 650 NW2d 722 (2002).

However, the "complete operation rule" does *not* encompass activities that are not "'preparatory to the actual lifting onto or lowering of property'" or "'acts incidental to the completion of the loading or unloading process.'" *Thompson*, *supra*, quoting *Bell v F J Boutell Driveway Co*, 141 Mich App 802, 809; 369 NW2d 231 (1985), and *Gibbs v United Parcel Service*, 155 Mich App 300, 305; 400 NW2d 313 (1986). Thus, in *Thompson*, delivery of an already-loaded trailer did not constitute part of the loading or unloading process. The focus of "loading or unloading" remains on the physical movement of objects to and from the vehicle or other transport. "Preparatory" activities refer to preparation *for that movement*. It would defy all reason to extrapolate the definition of "loading or unloading" to include any and all activities merely leading up to that movement.

Here, Hart's role was disassembly of the panels at the rodeo and stacking those disassembled panels. Although the ultimate goal of doing so was to be movement of those panels onto the trailer, Hart's activities were not incidental to or necessary for *the movement itself*. As previously noted, there is *no* support in the record for Progressive's assertion that Hart was actually carrying the straps necessary to complete the loading. The only evidence we find is that she was walking in a group of people who were setting out to retrieve the straps; there is no evidence that she was even participating in the retrieval itself.

Additionally, and perhaps more importantly, the policy exclusion at issue refers to injuries "resulting from anyone who is not your employee loading or unloading an auto." In other words, the policy exclusion does not depend on *who or what is injured*. Rather, the policy exclusion depends on the *cause* of the injury: a non-employee engaging in loading or unloading.

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[4] Progressive asserts that Hart was carrying the straps, but we find no support for this assertion in the record.

As discussed, Hart did not participate in any loading or unloading. However, even if she did, the injury was apparently caused by a rope breaking, and the only person involved in the rope – and therefore the only person who could possibly have done anything to cause to the injury – was an employee. Therefore, even if Hart had participated in loading or unloading, her injury was ostensibly the result of an employee loading or unloading an auto. In other words, the alleged proximate cause of Hart's injury was the result of the actions of an employee, rather than a non-employee. The trial court erred in granting summary disposition in favor of Progressive on the basis of the policy exclusion for injuries "resulting from anyone who is not [Super Kicker's] employee loading or unloading an auto.

Progressive cross-appeals and argues that, in the alternative, the trial court erred in finding a genuine question of fact as to whether Hart was an employee, for the purpose of applying several other policy exclusions applicable to employees. We disagree.

Hart's activities at the rodeo were at her and her mother's insistence. Super Kicker's owners essentially permitted their family members to come along and engage in various rodeo-related activities more as a favor than anything else. Indeed, the testimony showed that Super Kicker did not need, and in fact did not even truly want, Hart and Hart's mother involved. Hart testified that she would have helped irrespective of any compensation, and the testimony was uniform that whatever Hart did was strictly optional on her part. At most, she was told where she might be useful. As the trial court succinctly noted, given that there was no evidence that discipline was ever contemplated, it is "murky at best" whether Super Kicker *could* have disciplined Hart in any way "for poor performance or some violation of some obligation that they think she should undertake in helping with the rodeo." The evidence suggests that Super Kicker permitted Hart to work at the rodeo because of a sense of obligation to her, rather than pursuant to any sort of "contract of hire."

However, Super Kicker did give money to Hart through her mother after at least some of the rodeos for the purposes of defraying their expenses in coming to the rodeos. The amount was inconsistent, as was the fact of payment at all, and no tax documentation was ever executed. In contrast, Hart was formally employed as a waitress at a local bar during the same time period. Nevertheless, we agree with the trial court that there is at least a question for the trier of fact as to whether Hart was an employee, given that money *did* change hands based, in some way, on Hart's assistance at the rodeo. We cannot agree with Progressive that the evidence that Hart was "employed" is sufficient to warrant summary disposition. The trial court correctly declined to grant summary disposition as to any matter dependent on whether Hart was an "employee" of Super Kicker.

The trial court's grant of summary disposition in favor of ACE is affirmed, the trial court's grant of summary disposition in favor of Progressive is reversed, and the matter is remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis