Court of Appeals, State of Michigan

ORDER

Estate of Mira E Abay v DaimlerChrysler Insurance Co

Docket No. 283624

LC No. 2006-075016-CK

E. Thomas Fitzgerald
Presiding Judge

Michael J. Talbot

Douglas B. Shapiro
Judges

The Court orders that the captions in the August 13, 2009, opinions are AMENDED to correctly identify DaimlerChrysler Corporation, a/k/a Chrysler LLC, as an appellant, as shown on the claim of appeal. The majority opinion is additionally amended as follows:

The first sentence of the opinion is modified to: "Defendants DaimlerChrysler Insurance Company (DCIC) and DaimlerChrysler Corporation, a/k/a Chrysler LLC, appeal as of right the order denying their motion for summary disposition and granting summary disposition in plaintiff's favor in this action for a declaratory judgment regarding coverage under a DCIC insurance policy."

The first sentence of the fifth paragraph is modified to: "DCIC and DaimlerChrysler moved for summary disposition of plaintiff's complaint."

Footnote 3 is modified to: "Although Trent also moved for summary disposition, he is not a party to this appeal. Therefore, the use of the term defendants refers to DCIC and DaimlerChrysler."

Further instances of the word "defendant's" or "defendant" in the first two full paragraphs on page 3, the last paragraph starting on page 5, and the last paragraph starting on page 7 are modified to "defendants'" or "defendants."

The last sentence of the opinion is modified to "Defendants DCIC and DaimlerChrysler, being the prevailing parties, may tax costs pursuant to MCR 7.219."

In all other respects, the August 13, 2009, opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 15 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

MARIA C. ABAY, Personal Representative of the Estate of MIRA E. ABAY,

Plaintiff/Counter-Defendant-Appellee,

v

DAIMLERCHRYSLER INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff/Third-Party-Appellant,

and

DAIMLERCHRYSLER CORPORATION, a/k/a CHRYSLER LLC,

Defendant,

and

JAMES E. TRENT and KELLY ROSE BROOKS,

Defendants/Cross-Defendants,

and

AUTO CLUB GROUP INSURANCE COMPANY, d/b/a AAA MICHIGAN, and ALVIN JEROME TAYLOR,

Third-Parties.

UNPUBLISHED
August 13, 2009

No. 283624
Oakland Circuit Court
LC No. 2006-75016-ck

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant DaimlerChrysler Insurance Company (DCIC) appeals as of right the order denying its motion for summary disposition and granting summary disposition in plaintiff's favor in this action for a declaratory judgment regarding coverage under a DCIC insurance policy. We reverse.

This civil action arises from an automobile accident in which Mira E. Abay died from fatal injuries she suffered when a vehicle driven by defendant Kelly Rose Brooks collided with a vehicle driven by Abay. In the underlying action, plaintiff pleaded claims against Brooks and Deborah Jean Lee, the owner of the vehicle Brooks was driving. Plaintiff filed this declaratory judgment action seeking a declaration regarding the responsibilities of various insurers.

Lee owned a vehicle that she insured through AAA. Lee loaned her car to defendant Alvin Jerome Taylor, a friend with whom she lived. Taylor, who was uninsured, used the car with Lee's permission to drive to work. At lunch, Taylor ran an errand, and picked up Brooks on the way. The two returned to Taylor's place of employment. Brooks took Lee's car and drove it while intoxicated. Brooks was involved in the crash that led to Abay's death.[1]

Plaintiff first filed the negligence action against Brooks, Lee, and Taylor. Plaintiff accepted AAA's settlement offer of the $100,000 policy limit with regard to plaintiff's claims against Lee. The court entered a default against Brooks.

Plaintiff filed this declaratory judgment action against defendants DCIC, DaimlerChrysler Corporation, Brooks, and Brooks' father, James E. Trent (Trent). Brooks allegedly lived with Trent at the time of the accident. Trent, as a DaimlerChrysler retiree, leased a car from DaimlerChrysler,[2] and that car was insured by an insurance policy issued by DCIC. Plaintiff asserted that the insurance policy issued by DCIC covered Brooks because the language of the policy provided liability coverage for any automobile used by a family member of an insured and therefore extended to Brooks as a family member of her father.

DCIC moved for summary disposition of plaintiff's complaint.[3] It argued that Brooks was not insured under the DCIC policy. It noted that DaimlerChrysler is the named insured under the policy and therefore the endorsement under which plaintiff sought to include Brooks,

---

[1] A jury convicted Brooks of operating a motor vehicle was under the influence of intoxicants, causing death, MCL 257.625(4), and manslaughter with a motor vehicle, MCL 750.321. The trial court sentenced Brooks to a prison term of 86 months to 15 years.

[2] The DaimlerChrysler Company Car Programs Terms, Instructions and Conditions Manual provides with regard to cars leased under the Executive Lease Program that "all lease vehicles must be titled" to DaimlerChrysler Corporation. However, the evidence in the record reveals that the cars are titled to GELCO, which purchases the vehicles from DaimlerChrysler and then leases them back to DaimlerChrysler. DaimlerChrysler then leases the cars to its retirees under the DaimlerChrysler Company Car Program.

[3] Although defendants DaimlerChrysler and Trent also moved for summary disposition, only defendant DCIC is involved in this appeal and, therefore, use of the term defendant refers to DCIC.

as a family member of an individual insured, does not apply because "individual insured" refers to the "named insured."

Plaintiff opposed defendant's motion for summary disposition. She argued that the policy is a "fronting policy," and that its language is ambiguous and therefore must be construed in favor of coverage. Plaintiff filed a motion for summary disposition arguing that Brooks was a resident of her parents' home at the time of the accident and, therefore, an insured under the policy.

In response, DCIC and DaimlerChrysler conceded that the policy is a "fronting policy," but challenged plaintiff's assertion that it is illegal or against public policy. Defendant further asserted that there existed evidence indicating that Brooks was not living with her parents at the time of the accident.

Following a hearing on the matter, the trial court granted summary disposition in favor of plaintiff. The trial court found that a plain reading of the insurance policy precluded coverage because "under the terms of the policy 'you' only refers to the 'named insured' and that is [DaimlerChrysler]. There is no mention in the policy of any individual." The court concluded, however, that "there is a patent ambiguity in the language of the policy which contains both an 'individual named insured' endorsement and a listed named insured business entity as the sole 'named insured." The court construed this ambiguity "liberally in favor of the insured and strictly against the insurer" and concluded that "Endorsement No. 19 applies in this case and extends liability coverage to non-owned autos operated by Trent or his resident family members." The court concluded:

> Under the policy, a family member includes a blood relative of Trent who resides in his household. The Court finds that after applying all of the relevant factors that determine residence to the facts and evidence presented in this case, Defendant Brooks was a resident of the Trent household at the time of the accident. Therefore, the Court finds that Plaintiff is entitled to summary disposition because on December 10, 2003, Brooks was operating a non-owned automobile that was not available for her regular use and is a blood relative of Trent and was a resident relative of his household at the time of the accident.

I

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). Also, the construction of a contract, and whether contract language is ambiguous, are questions of law that this Court reviews de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498; 503; 741 NW2d 539 (2007); *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

II

The rules of contract interpretation are applied to the construction of insurance contracts. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007). Where the language of a contract is unambiguous, as determined by the plain and ordinary meanings of the words used, it reflects the parties' intent as a matter of law and must be construed as written.

Id. An ambiguity exists when the insurance contract is "capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). If the contract is ambiguous, its meaning must be determined by the fact finder. *Id*. at 469. The courts should not create an ambiguity where one does not exist. *Henderson, supra*. That the policy does not define a certain term does not render the policy ambiguous; the words used must be construed according to their plain meanings. *Id*.

The dispute at issue in this appeal involves the automobile insurance policy insuring vehicles leased by Trent from his former employer, DaimlerChrysler. The policy is a business auto coverage form. The policy provides in part, "Throughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations. The words 'we', 'us' and 'our' refer to the Company providing this insurance." The "named insured" shown on the declarations page is "DaimlerChrysler Corporation and/or Chrysler Corporation and its U.S. Subsidiaries."

Section II of the policy defines "Who is an insured." The definition of "insureds" includes: (a) "you" as defined by the policy; (b) with exceptions, "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow . . . ."; and (c) persons liable for the conduct of an insured. It appears from a reading of this provision that Trent falls within option (b) because he leased a car from DaimlerChrysler and thereby used with DaimlerChrysler's permission a covered vehicle DaimlerChrysler owned, hired, or borrowed. Thus, Trent was an insured under the policy.

Endorsement No. 19 of the policy, titled "individual named insured," modifies the business auto coverage form. It states:

> *If you are an individual*, the policy is changed as follows:
>
> A. Changes in Liability Coverage
>
> * * *
>
> 2. Personal Auto Coverage
>
> While any "auto" you own of the "private passenger type" is a covered "auto" under Liability Coverage:
>
> a. The following is added to Who Is An Insured:
>
> "Family members" are "insureds" for any covered "auto" you own of the "private passenger type" and any other "auto" described in Paragraph 2.b. of this endorsement.
>
> b. Any "auto" you don't own is a covered "auto" while being used by you or by any "family member" except:
>
> (1) Any "auto" owned by any "family members."
>
> (2) Any "auto" furnished or available for your or any "family member's" regular use.

> (3) Any "auto" used by you or by any of your "family members" while working in a business of selling, servicing, repairing or parking "autos."
>
> (4) Any "auto" other than an "auto" of the "private passenger type" used by you or any of your "family members" while working in any other business or occupation.

The endorsement defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household . . . ."

Plaintiff argues that, pursuant to these provisions, Brooks is an insured because she is a family member of an insured, Trent, and was using an automobile that was not owned by Trent and did not fall within one of the exceptions to such coverage. Defendants argue, however, that Brooks is not an insured under this endorsement because her father, Trent, was not the "named insured" and therefore she was not a family member of a "named insured."

Defendants are correct that the policy references to "you" are references to the named insured, which is stated as DaimlerChrysler. The endorsement specifically states that the changes provided within it apply "If *you* are an individual." The term "you" as used in the policy refers to the named insured: DaimlerChrysler. Thus, because the "you" in this policy is not an individual, the endorsement does not apply.

The trial court went beyond the plain language of the policy and noted the entangled relationship between DaimlerChrysler and DCIC and the fact that the policy refers to no individual insureds. It found "a patent ambiguity in the language of the policy which contains both an 'individual named insured' endorsement and a listed named insured business entity as the sole 'named insured.'" The court appears to have been troubled because of its interpretation of the policy as failing to provide any coverage to any individual. As a result of this it looked outside the policy language. However, the court failed to consider the fact that the policy defines who is insured, and that definition appears to include Trent himself or persons while using with DaimlerChrysler's permission a covered auto owned, hired or borrowed by DCC. The policy language describes unambiguously who is insured under the policy. The policy does not extend to Trent or his family members when such persons use an automobile not owned by DaimlerChrysler, as provided in the endorsement.[4] Therefore, coverage does not extend to Brooks under the circumstances of this case. This interpretation is based on the clear language of the policy. The court was required to apply the policy as written. It erred in creating an ambiguity where none exists and looking outside the policy language in determining its meaning.

The parties dispute the applicability of *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 384; 591 NW2d 325 (1998). Defendant argues that it is controlling, and plaintiff argues that it is factually distinguishable because the present case involves a privately leased

---

[4] It is important to emphasize that Brooks was not driving one of her father's vehicles that he leased under the DaimlerChrysler Company Car program.

vehicle. This distinction is not relevant, however, to the present case. What is relevant is the legal analysis provided by the Court with regard to the language of the insurance policy at issue.

Pavolich was employed as a police officer with the Village of Lake Linden ("Village"). He stopped to question a suspect and when he reached into the suspect's vehicle, the suspect attempted to drive away with Pavolich caught on the vehicle. The suspect's insurance company paid the policy limits under his insurance policy and Pavolich made a claim for underinsurance benefits under the Village's contract with Michigan Township Participating Plan. This underinsurance plan identified the Village as the named insured and indicated that damages would be paid to an "insured," which was defined as:

> a. You or any family member.
>
> b. Any other person occupying "your covered auto."
>
> c. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in a. or b. above. [*Id.* at 381.]

The policy also indicated that "you" and "your" meant the person or organization identified as the named insured. *See id.* Pavolich argued that he as an employee of the Village, the named insured, was covered under the Village's policy as "you" and "your" were ambiguously defined and a plain interpretation of the policy language rendered portions of the policy meaningless as it meant that no one was entitled to underinsurance benefits as the Village had no family members and could not sustain bodily injury.

In rendering its decision, this Court noted that no reported decision of the Court had addressed the issue presented before it. *See Pavolich, supra* at 380-381. The Court cited the following portion of its decision in *Royce v Citizens Insurance Company*, 219 Mich App 537, 542-543; 557 NW2d 144 91996), for guidance in reviewing and interpreting insurance policies:

> When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all terms contained within the policy. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. However, if the contract is unambiguous, the trial court must enforce it as written.

Based upon these contract principles, the *Pavolich* court held that a plain and ordinary reading of the policy before it barred coverage for employees of the Village as the policy language "you" specifically referred only to the Village and not to its employees. *Id.* at 328.

The *Pavolich* court found that the policy before it was a sloppy and inartfully drafted standard form not tailored to the Village's needs, and it contained surplusage as it provided coverage to the Village and its family members when the Village could not have family members

or sustain bodily injury. *Id.* at 383. The Court also noted that this portion of the policy was rendered meaningless if the plain interpretation was used. *Id.* at 388. Nevertheless, the Court held that surplusage did not equate to ambiguity and in reviewing the word "you," along with the rest of the policy language taken in its entirety, the court found that

> there is only one interpretation that can be made when looking at the language as written. Any casual reader, giving ordinary and plain meanings to the language as written, would realize that the insured "YOU" does not refer to individual employees, but refers only to the village itself. Where the policy language describes unambiguously who is insured under the policy, there is no basis for finding an ambiguity. Because the policy is clear as written, we are bound by the specific language, and will not construe the policy to cover defendant simply to avoid a finding that there is surplus language in the contract. [*Id.* at 388-389.]

In making this decision, the court reviewed, discussed and relied upon the majority view of jurisdictions that a policy like the one before it was "not ambiguous and should be construed as written, even if certain provisions are rendered meaningless by a plain reading of the language." *Id.* at 384-388.

Plaintiff argues that the policy should be declared contrary to public policy if Endorsement No. 19 does not apply. However,

> The no-fault act does not require residual liability insurance covering all vehicles a person may drive. Residual liability insurance is required for residual tort liability arising out of the ownership, maintenance or use of the vehicle in respect to which a policy is required to be maintained and in effect. *An insurer is not required by the no-fault act to provide portable coverage when the owner drives another insured vehicle.* * * * Residual liability coverage, to be sure, must be in force with respect to the vehicle for which it is purchased and without regard to whether the owner or some other driver uses it. *It does not follow that the act requires residual liability coverage when the owner uses a vehicle owned by someone else.* [*State Farm Mut Auto Ins Co v Ruuska*, 412 Mich 321, 342-343, 344; 314 NW2d 184 (1982) (Emphasis added).]

Because residual liability coverage for another vehicle is optional, "*the extent of an insurer's obligation is governed by the terms of the insurance policy.*" *Geller v Farmers Ins Exchange,* 253 Mich App 664, 667; 659 NW2d 646 (2002) [Emphasis added].

III

Given our conclusion that the DCIC insurance policy does not extend to Trent or his family members when such persons use an automobile not owned by DaimlerChrysler, we need not address plaintiff's argument that she was a resident of the household where her parents resided at the time of the accident.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. Jurisdiction is not retained. Defendant DCIC, being the prevailing party, may tax

costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot