STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellant,

v

AMERICAN MANUFACTURER'S MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 19, 1998

No. 194307
Macomb Circuit Court
LC No. 94-002512 CK

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

In this declaratory action, plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was a primary insurer of a 1989 Lincoln Town Car that was leased by Dick Scott Leasing to Anthony Giorgio, chief executive officer of Allstate Fastener Corporation (AFC), and Jack McCullagh, a stockholder in a Florida subsidiary of AFC. The vehicle lease was dated November 17, 1988, was entitled "Commercial Use Only," was for fifty months, stated that the lessees' principal place of business was AFC's address, and provided that the lessees intended that more than fifty percent of the vehicle's use would be in the lessees' business.

On March 2, 1990, the Lincoln was involved in an accident while an AFC employee was driving Giorgio to the airport, injuring David and Andrea Sertage. The Sertages brought suit against AFC, Giorgio, McCullagh, Dick Scott Leasing and the driver of the vehicle. Plaintiff defended against the Sertage suit and paid a $980,000 settlement.

Plaintiff brought this declaratory action seeking a determination that defendant was liable for its pro-rata share of the settlement because it was also a primary insurer of the Lincoln. Both parties moved for summary disposition. After the court denied the parties' initial motions because further development of the record was needed, both parties renewed their motions. The circuit court granted

defendant's motion on the basis that the Lincoln was "leased" and not "owned," and under the terms of defendant's policy, defendant was thus an excess insurer of the Lincoln. This appeal ensued.

I

Plaintiff's policy was issued to Giorgio and McCullough, individually, and the policy specifically listed the Lincoln. Defendant's commercial policy provided business coverage insurance, including business automobile insurance coverage, and listed as named insureds Giorgio, his wife, AFC, and certain AFC subsidiaries. The Lincoln was not specifically listed on the vehicle schedule of defendant's fleet policy.

Defendant's policy included a list of descriptions of covered autos with a numerical designation symbol next to each description. The designation symbol is used on the declarations page to describe which automobiles are covered under the various coverages afforded under the policy:

SECTION I - COVERED AUTOS

ITEM TWO of the Declarations shows the autos that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos." The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos."

A. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

SYMBOL		DESCRIPTION
1	=	ANY "AUTO"
2	=	OWNED "AUTOS" ONLY. Only those autos you own . . .
3	=	OWNED PRIVATE PASSENGER "AUTOS" ONLY. . . .
4	=	OWNED "AUTOS" OTHER THAN PRIVATE PASSENGER "AUTOS" ONLY. . . .
5	=	OWNED "AUTOS" SUBJECT TO NO-FAULT. . . .
6	=	OWNED "AUTOS" SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW. . . .
7	=	SPECIFICALLY DESCRIBED "AUTOS". . . .
8	=	HIRED "AUTOS" ONLY. Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your employees or partners or members of their households.

9 = NONOWNED "AUTOS" ONLY. Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your employees or partners or members of their households but only while used in your business or your personal affairs.

Defendant's policy contained a $1,000,000 limit on liability coverage for "any 'auto.'" Both parties concede that the Lincoln was a covered auto under defendant's policy because it came under the description of "any 'auto.'"

Both policies had "Other Insurance" provisions. Defendant's policy, Section IV, stated in pertinent part:

5. OTHER INSURANCE

a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. . . .

* * *

c. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the coverage Forms and policies covering on the same basis.

Plaintiff policy's "Other Insurance" provision provided in pertinent part:

The Company shall not be liable under Section Two for a greater proportion of any loss than the applicable limit of liability stated in the Declarations bears to the total applicable limit of liability of all collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or a non-owned automobile shall be excess insurance over any other collectible insurance.

II

Plaintiff argues that ambiguity in defendant's insurance policy and the statutory definitions of owner in MCL 500.3101(2)(g)(i); MSA 24.13101(2)(g)(i), MCL 257.37(a); MSA 9.1837(a), and MCL 257.401(2); MSA 9.2101(2), establish that Giorgio was an owner of the Lincoln for the purpose of defendant's policy. Plaintiff contends that defendant was therefore a primary insurer of the Lincoln.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996). The trial court must consider the documentary evidence submitted by the parties and determine whether the kind of

record which might be developed would leave open an issue upon which reasonable minds could differ. *Id*. We review a summary disposition determination de novo. *Id.* at 540.

An insurance policy is much the same as any other contract; it is an agreement between the parties. *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 530; 547 NW2d 52 (1996). When presented with a dispute, a court must determine what the parties' agreement is and enforce it. *Id.* at 531. An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy. *Id.* A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. *Royce, supra* at 542-543.

In reading the insurance policy as a whole and giving meaning to all its terms, the policy plainly states that only covered autos that are owned by the insured are afforded primary coverage. The policy explicitly provides that "any 'auto'" is covered by the policy. Under the Description of Covered Autos Designation Symbols, there are nine different descriptions of covered autos. Those nine descriptions include autos that are owned, leased, hired, rented and nonowned. Thus, stating that "any 'auto'" is covered for liability under the policy indicates that owned, leased, hired, rented and nonowned autos are all covered. However, the policy also explicitly indicates that once it is established that an auto is covered under the policy, whether the auto receives primary or excess coverage depends on whether the insured owns the auto. Although plaintiff claims that the policy does not define own or lease, the Description of Covered Auto Designation Symbols differentiates between autos that the insured owns and autos that the insured leases. Therefore, we conclude that the policy's language, taken as a whole, is not ambiguous. Pursuant to the terms of the policy, Giorgio leased the Lincoln and did not own it. Hence, defendant's insurance policy provided coverage "excess over any other collectible insurance." Because plaintiff was a primary insurer of the Lincoln and paid a settlement within its policy limits, defendant was not required to reimburse plaintiff for half of that settlement.

Plaintiff also argues that the statutory definitions of owner in MCL 500.3101(2)(g)(i); MSA 24.13101(2)(g)(i), MCL 257.37(a); MSA 9.1837(a), and MCL 257.401(2); MSA 9.2101(2), require a determination that Giorgio was an owner of the Lincoln for purposes of defendant's insurance policy. Plaintiff contends that if Giorgio is not deemed an owner of the Lincoln, then public policy would be contravened because a situation could arise where a leased vehicle would be uninsured for purposes of civil liability.

However, as indicated above, defendant's policy explicitly provides a distinction between an owner and a lessee of an auto for purposes of determining coverage. Moreover, this is not a situation where the Lincoln would be uninsured if Giorgio is not deemed an owner.[1] Rather, the Lincoln was unquestionably insured by plaintiff and defendant, with plaintiff providing primary and defendant providing excess coverage. The trial court properly granted defendant's motion for summary disposition because there was no genuine issue of material fact that defendant provided excess, rather than primary insurance coverage.

Affirmed.

/s/ Judge Bandstra
/s/ Judge Smolenski

[1] Plaintiff's argument assumes that failure to define Giorgio as an owner of the Lincoln leaves a potential for the Lincoln to be uninsured because neither the lessor nor the lessee would be responsible for insuring the vehicle. However, there is no question that the lessee in this case is responsible for insuring the vehicle, as is indicated by the fact that Giorgio and McCullagh did insure the vehicle. Moreover, there is no question that Giorgio and McCullagh are civilly liable for the negligence of their employee while driving the leased car. Rather, the question is merely whether defendant's policy provided primary or excess coverage.