STATE OF MICHIGAN

COURT OF APPEALS

LAKE STATES INSURANCE COMPANY,

Plaintiff-Appellee,

v

JADA JACIOLA BLAIR, a Minor, by her Next Friend, JENNIFER GREGORY and JENNIFER GREGORY, Individually,

Defendants-Appellants,

and

SPADS PIZZA, INC.,

Defendant.

UNPUBLISHED
December 7, 1999

No. 209955
Genesee Circuit Court
LC No. 97-053700 CZ

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Summary disposition was granted in favor of plaintiff in this declaratory judgment action. Defendants appeal as of right, and we affirm.

Defendant Jennifer Gregory (hereinafter "Gregory") allegedly slipped and fell during the course of her employment at defendant Spads Pizza, Inc. (hereinafter "Spads"). At the time of the fall, Gregory was twenty-four and a half weeks pregnant. As a result of the slip and fall, Gregory gave birth to defendant Jada Jaciola Blair (hereinafter "Blair") prematurely. A negligence action was filed by Gregory and Blair against Spads. This underlying action sought the recovery of damages for injuries sustained by Blair as a result of the premature birth, which was allegedly caused by Spads' negligence. Gregory also requested damages for emotional anxiety, lost wages due to her own "disability" as well as the disability to Blair, and expenses incurred for Blair until the child reached the age of eighteen. Plaintiff, as Spads' insurer, initially undertook the defense of Spads, but later filed this declaratory action seeking a judgment that plaintiff had no duty to defend or pay on any judgment rendered in the

underlying negligence action. Plaintiff's motion for summary disposition was granted pursuant to MCR 2.116(C)(9).

Defendants first argue that summary disposition was improper because the exclusion relied upon by plaintiff is inapplicable, ambiguous, and obscure. We disagree. A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). The trial court's order provided that summary disposition was granted pursuant to MCR 2.116(C)(9), failure to state a valid defense. Review of a motion for summary disposition brought pursuant to MCR 2.116(C)(9) is limited to the pleadings. MCR 2.116(G)(5). Here, the trial court looked beyond the pleadings and relied on documentary evidence regarding Gregory's worker's compensation proceeding as well as the insurance policy. Accordingly, we will address defendant's motion as if it had been granted pursuant to MCR 2.116(C)(10). *Hughes v PMG Building, Inc*, 227 Mich App 1, 4 n 2; 574 NW2d 691 (1997). The defective filing of a motion for summary disposition based on one subpart of the court rule when summary disposition was appropriate under another subpart is not fatal. *Gibson, supra*. Appellate review is permissible as long as the record permits review under the correct subpart. *Id.* The documentary evidence regarding Gregory's worker's compensation proceeding and the insurance policy was preserved in the lower court record, thereby permitting appellate review of this issue. The documentary evidence included a notice of compensation payments indicating that Gregory received payments for an injury, specifically a bruise to her side and womb area.

The insurance policy executed between plaintiff and Spads provided that there would be no coverage for:

> e. "Bodily injury" to:
>
> (1) An employee of the insured arising out of and in the course of employment by the insured; or
>
> (2) The spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

Interpretation of an insurance contract presents a question of law which is reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). The terms of an insurance contract are to be enforced, and we will not hold an insurance company liable for a risk that it did not assume. *Nabozny v Pioneer State Mutual Ins Co*, 233 Mich App 206, 210; 591 NW2d 685 (1998). An ambiguity which is not present in an insurance contract cannot be created by a court. However, where an ambiguity does exist, the contract is to be construed in favor of the insured. *Id.* The failure to define a relevant term in a policy does not render it ambiguous. Rather, the terms of the contract are to be interpreted in accordance with their commonly used meanings. *Id.* at 210-211.

Defendants argue that the exclusion does not apply because an injury was not suffered by an employee. That is, recovery was not requested for an "injury" to Gregory, but rather, recovery was limited to the injuries sustained by Blair, the minor child. Defendants' argument is merely an exercise in

semantics which will not create a factual issue precluding summary disposition. *Macomb Co Prosecutor v Murphy*, 233 Mich App 372, 383; 592 NW2d 745 (1999). In the present case, the term "bodily injury" is not defined in the insurance policy. However, "bodily" is defined as "of or pertaining to the body," *Random House Webster's College Dictionary* (1997), p 147, while "injury" is defined as "harm or damage done or sustained, esp. bodily harm." *Random House Webster's College Dictionary* (1997), p 672. As a result of the slip and fall, Gregory was unable to work and delivered prematurely. Defendants' characterization of the fall as an "event" which did not constitute an injury to Gregory is without merit. *Murphy, supra*. Technical and strained constructions of the terms of a policy are to be avoided. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). Accordingly, the trial court did not err in granting summary disposition based on the clear exclusionary language of the policy.

Defendants next argue that the exclusion relied upon by plaintiff is void and unenforceable because it violates public policy and the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. We disagree. In the absence of a statutory prohibition of this bodily injury exclusion in insurance contracts, we cannot find such an exclusionary clause to be violative of public policy such that it is void and unenforceable. *Farm Bureau Mutual Ins Co v Moore*, 190 Mich App 115, 119; 475 NW2d 375 (1991). Defendants argue that ELCRA statutorily prohibits the exclusionary language at issue. However, the ELCRA prohibits discriminatory conduct by employers, not insurance companies. MCL 37.2201(a); MSA 3.548(201)(a); *Meagher v Wayne State University*, 222 Mich App 700, 728; 565 NW2d 401 (1997). Accordingly, the trial court did not err in granting summary disposition in favor of plaintiff.

Affirmed.

/s/ Harold Hood