STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BERTRAND, Personal Representative of the Estate of RANDALL LYNN BERTRAND, and PHILLIP BOOKER, by his Next Friend JACQUELYN CIUFO,

Plaintiffs-Appellants/Cross-Appellees,

and

GREGORY MOGA, D/B/A HUNGRY HOWIE'S STORE #10,

Plaintiff/Cross-Appellee,

v

PACIFIC EMPLOYERS INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 16, 2001

No. 219724
Washtenaw Circuit Court
LC No. 94-003143-CK

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

Plaintiffs Bertrand and Booker appeal as of right from a declaratory judgment entered by the trial court declaring that an exclusionary clause in an insurance policy held by plaintiff Moga was applicable, thereby relieving defendant from the duty to indemnify plaintiff Moga for any liability in the underlying negligence actions brought by Bertrand and Booker. The trial court also held that defendant had a duty to defend plaintiff Moga from the time of the filing of the complaints in the underlying negligence actions until the court's judgment in the declaratory judgment action. Defendant cross-appeals as of right. We affirm in part, and reverse in part.

This is the second time this case has come before us. The underlying facts were set forth in our previous opinion:

> This case arises out of an automobile-pedestrian accident in Ypsilanti, where Joseph Shock, while using his father's automobile to deliver pizzas, struck plaintiffs Bertrand and Booker, killing Bertrand and severely injuring Booker. Following the accident, Bertrand's estate and Booker, by his next friend, filed separate actions against both plaintiff Moga and Shock. After service of the complaints, plaintiff Moga made written demand upon defendant, its commercial general liability insurer, to defend and indemnify it in the underlying actions. Defendant refused, however, claiming that the event giving rise to plaintiff Moga's alleged liability fell within a policy exclusion relating to automobile use. Particularly, defendant contended that the claim arose out of the use of an automobile by an employee of Moga, while the employee was acting within the scope of his employment, an event specifically excluded from coverage. A factual dispute exists whether Shock was acting within the scope of his employment at the time of the accident.
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> Following a bench trial on the issue of coverage, the trial court ordered defendant to pay any damages which plaintiff Moga becomes obligated to pay . . . . The trial court premised its decision on its conclusion that the applicable exclusionary provision was ambiguous, and therefore, the trial court construed the policy against defendant, the drafter of the policy, and in favor of plaintiff Moga. [*Bertrand v Pacific Employers Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 1997 (Docket No. 190551), pp 1-2 (hereinafter *Bertrand I*).]

Despite the absence of a specific statement by the trial court to this effect, the earlier panel of this Court determined "that the trial court's decision turned on its conclusion that the term 'employee' was ambiguous." *Id.* at 2. This Court concluded that the term "employee" was not ambiguous, *id.*, and reversed and remanded the "case to the trial court with instructions that it apply the common and plain meaning of the term 'employee,' restated herein, and the language of the exclusionary provision containing the term 'use,' as written, to the facts of the case." *Id.* at 4.

Bertrand and Booker first argue that they were denied their right to a jury trial in the declaratory judgment action pursuant to MCR 2.605. We need not address the issue of whether plaintiffs were entitled to a jury trial because Bertrand and Booker waived the right to challenge the trial court's order denying a jury trial. Plaintiffs' failure to cross-appeal this issue in their earlier appeal precludes our review of the matter. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

Next, Bertrand and Booker argue that the trial court erred in finding that Shock was an "employee" of plaintiff Moga for purposes of the insurance policy. We disagree. As previously noted, an earlier panel of this Court remanded the "case to the trial court with instructions that it apply the common and plain meaning of the term 'employee,' restated herein." *Bertrand I, supra* at 4. The common and plain meaning referenced was set forth as follows:

> The plain and ordinary meaning of the term "employee" is discernible from several sources. The *American Heritage Dictionary, Second College Edition,*

defines the term "employee" as "[a] person who works for another in return for financial or other compensation." Black's Law Dictionary, (6th ed), p 525, says that an employee is "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control or direct the employee in the material details of how the work is to be performed." Further, we find particularly persuasive the decision of the Court of Appeals for the Seventh Circuit in *American Casualty Co v Wypior*, 365 F2d 164, 166-67; (CA 7, 1966), where it stated:

> When the word "employee" appears in a contract of insurance and it is not defined in the policy, it must be construed in a manner most likely to correspond to the intention of the parties to the contract. The intention fairly attributable to the insurer and the insured, from an objective standpoint and in the absence of a contrary indication, *should therefore reflect the ordinary meaning of the word as it is understood by persons generally and should highlight the characteristics which the law most often attributes to employment.* [Emphasis added in original.]

The "ordinary meaning of the word as it is understood by persons generally" is captured best in the dictionary definitions reproduced above. Further, through a survey of cases dealing with vicarious liability and worker's compensation, we find that the characteristics which Michigan courts most often attribute to employment are as follows: whether the employer has control over the worker's duties; whether the employer compensates the worker; whether the employer possesses a right to hire, fire, and discipline the worker; and whether the performance of the worker's duties are [sic] an integral part of the employer's business toward the accomplishment of a common goal. See *Williams v Cleveland Cliffs Iron Co*, 190 Mich App 624, 627; 476 NW2d 414 (1991). [*Bertrand I*, supra at 3-4.]

The evidence adduced below established that Shock was working only for Hungry Howie's at the time of the accident. Shock testified that he would hold the cash received from customers until the end of the night, at which time Shock would pay Moga the amount of the pizzas minus a certain hourly rate and a certain delivery rate. There were no withholdings for social security taxes, federal income taxes, state income taxes, medicare, and unemployment taxes, and Shock had no sick time, vacation time, personal leave, pension benefits, health care benefits, overtime pay, worker's compensation benefits, and unemployment benefits. Moga trained Shock on how to go to a customer's door, how to be courteous, and generally how to deliver pizzas. Shock testified that in addition to delivering pizzas (which he did solely with the use of his father's car), he took phone orders, cleaned the restaurant, made dough, and was otherwise involved in the operation of the business. Moga testified that he taught Shock how to cut pizzas, box pizzas, and how to apply butter, garlic, and other toppings. He further testified that he hired Shock and would have fired him if Shock had refused to do his job.

We believe this evidence established that Shock worked for Moga "in return for financial compensation." The evidence showed that: (1) Moga controlled and directed the details of Shock's duties; (2) Shock was paid by Moga; (3) Moga had the right to hire, fire, and discipline Shock; and (4) Shock's duties were an integral part of Moga's business, and that performance of those duties was essential to the accomplishment of the business' common goal. Additionally, although Shock did not have withholdings taken from his wages, there was no evidence that Shock acted as an independent contractor. Accordingly, we conclude that the trial court did not err in finding that Shock was an employee.

On cross-appeal, defendant argues that the trial court erred in its determination that defendant had a duty to defend plaintiff Moga from the time of the filing of the complaints in the underlying negligence actions until the court's judgment in the declaratory judgment action. We agree. While defendant had a duty to defend, this duty commenced with the filing of the second amended complaints.

Because there was a factual dispute as to whether Shock was an employee, and, therefore a dispute as to whether there was coverage under the policy, defendant was obligated to defend Moga until there was a resolution of the factual dispute through the trial and decision in the declaratory judgment action. However, the initial complaints in the underlying negligence actions did allege facts clearly falling outside the coverage of the policy. It was not until the second amended complaints were filed, in which it was alleged that Shock was a non-employee agent of Moga, that the underlying negligence actions were arguably brought within the coverage of the policy. Accordingly, the duty to defend arose with the filing of the second amended complaints, which was approximately two years after the original complaints were filed. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 139-140; 610 NW2d 272 (2000).

Defendant is unsure whether it was also ordered by the trial court to pay the costs incurred in the declaratory judgment action. If so, defendant argues that there was allegedly no legal basis for such an award.

The trial court's opinion and order entered on December 2, 1998, does not address the issue of attorney fees and costs incurred in the declaratory judgment action. However, pursuant to an opinion and order dated March 18, 1997, the trial court awarded Moga attorney fees because of defendant's wrongful refusal to defend in the underlying actions, and as consequential damages for defendant's breach of its contractual obligation to provide coverage and a defense.

This Court's reversal and remand in *Bertrand I* effectively vacated the March 18, 1997 order regarding attorney fees, which was based on the court's erroneous finding that defendant was obligated to indemnify plaintiff in the underlying negligence actions. Therefore, there is currently no order awarding attorney fees in the declaratory judgment action.

In the interest of preserving judicial resources, we note that Moga is not entitled to attorney fees. Having concluded that defendant was under no duty to indemnify Moga because the exclusionary clause was applicable and that the duty to defend was limited, it cannot be said that defendant's actions in the declaratory judgment case were improper or frivolous giving rise to an award of an attorney fee under MCR 2.114.

In conclusion, we affirm the trial court's declaratory judgment ruling declaring that an exclusionary clause in the insurance policy was applicable because Shock was an "employee" of Moga. Additionally, we affirm the trial court's ruling that defendant had a duty to defend. However, we reverse the trial court's ruling that the duty to defend commenced at the time Bertrand and Booker filed their initial complaints in the underlying negligence actions. We remand for a determination of the defense costs incurred by Moga from the date of filing the second amended complaints until the trial court's determination that the exclusionary clause was applicable. Defendant is not responsible for any costs or attorney fees incurred by plaintiffs in the declaratory judgment action. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin