

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

V

MONIQUE ANGELISE AIKENS, ANDREW  
AIKENS and JEAN L. AIKENS,

Defendants,

and

JOAN ROSALES PALACIO,

Defendant-Appellant.

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UNPUBLISHED

November 15, 2002

No. 234086

Ingham Circuit Court

LC No. 99-090491-CK

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

In this declaratory judgment action, defendant Joan Rosales Palacio appeals as of right a circuit court order granting summary disposition in favor of plaintiff. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On January 14, 1997, at approximately 11:30 a.m. Monique Angelise Aikens, while operating an automobile owned by her mother, Jean Aikens, was involved in an automobile accident with defendant Joan Rosales Palacio. At the time of the accident, the Aikens' vehicle was uninsured. However, at approximately 2:30 p.m. on January 14, 1997, Monique's father, Andrew Aikens, purchased automobile insurance on the vehicle from plaintiff, Auto-Owners Insurance Company.

Joan Rosales Palacio has filed a personal injury lawsuit arising out of the accident in which she has obtained a default judgment against Monique Aikens in the sum of \$325,000. In an amended complaint, plaintiff named Jean Aikens as a codefendant alleging liability under the ownership liability statute, MCL 257.401.

In the present declaratory judgment action, plaintiff Auto-Owners Insurance Company asserts that it owes no liability coverage for the accident on two grounds: (1) that pursuant to the doctrine of rescission, the insurance policy issued after the automobile accident was null and

void because it was issued based on a material misrepresentation, and (2) assuming that the policy was in effect at the time of the accident, it provided no coverage because Monique was an excluded driver for the reason that at the time of the accident Monique did not have a reasonable belief that she was entitled to use the vehicle as is required by the policy. The circuit court granted plaintiff summary disposition based on the second ground. We affirm. In doing so, we express no opinion regarding the rescission defense asserted by plaintiff.

The automobile liability insurance policy at issue clearly and unambiguously excludes from its coverage persons using the vehicle without a reasonable belief that they are entitled to do so. Specifically, the policy language provides:

**Exclusions**

A. We do not provide Liability Coverages to any person:

\* \* \*

8. Using a vehicle without a reasonable belief that that person is entitled to do so.

The unrebutted testimony of Monique Aikens submitted in support of plaintiff's motion established that Monique Aikens did not have a belief that she had permission to use the vehicle at the time of the accident:

Q. And then was [the vehicle] taken away again after that or was it taken away before that?

A. It was taken after Christmas, like a couple weeks.

Q. Okay. Sometime in the spring or summer?

A. Then it was taken away maybe just before the accident, not too long before the accident had happened, and that's when I got into the accident.

Q. Okay. So they took it away a week or so after Christmas for two weeks and gave it back to you?

A. Yes, if I remember correctly.

Q. And then you had permission to drive it?

A. Really *I didn't have permission to drive it because she had took the keys from me, but she didn't know I had an extra set of keys to the car.* [Emphasis added.]

At the hearing on plaintiff's motion for summary disposition, the Honorable Lawrence M. Glazer focused on the policy language and repeatedly questioned defendant's counsel regarding what evidence, if any, existed to rebut Monique's unequivocal deposition testimony that she did not believe she had permission to drive the vehicle:

*The Court:* Doesn't the language of the policy require that Monique have a reasonable belief that she's entitled to use the vehicle, not just a reasonable belief that it's insured?

*Mr. Nolan:* And that's a question for the trier of fact. It's not expressed permission, which is the standard that goes to the owner liability statute. It's a reasonable belief.

\* \* \*

*The Court:* I want to ask Mr. Nolan a question before I make a final decision on this. First of all, let me tell you, I agree with you, and I don't think anyone disagrees that the issue today is different than the issue I decided in the underlying case. The issue today on summary disposition is is there any evidence from which a reasonable trier of fact could conclude that Monique had a reasonable belief that she had permission to drive the car. And that's different from the issue that I had decided last time, which was based on all the evidence available to me objectively, did she have permission to drive the car.

Before I make a decision on today's issue, I want to give you one more chance, Mr. Nolan, to tell me what evidence you would use that's in the record to counter her admission in her deposition that she did not have permission?

\* \* \*

*The Court:* All right, thank you. I'm looking but I have not been able to find any piece of evidence which would support a reasonable belief in the mind of Monique that she had permission to drive that car at the time of the accident. I'll reiterate, I agree it is a different issue than the one I decided earlier in the underlying case, but on summary disposition, this is your opportunity to cite any conflicting evidence, and I have seen none.

I'm not talking about a duty to defend. That's not at issue today. I'm not talking about rescission. That's not an issue today. The only thing I'm deciding is what I understand to be put at issue by the motion, and that is whether a trier of fact could find that Monique had a reasonable belief that she was entitled to sue that vehicle at the time of the accident, and based on the state of the record, I cannot make such a finding.

On appeal, defendant Palacio argues that an issue of fact exists regarding whether Monique Aikens had a reasonable belief that she had permission to drive the vehicle at the time of the accident. However, once again defendant fails to cite any evidence that would establish a genuine issue of material fact on the issue. It is well established that a motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim or a defense. Further,

A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts the time of the motion showing a

genuine issue for trial. [*Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).]

In the present case, defendant failed to satisfy her burden of establishing a genuine issue of material fact on the issue whether Monique Aikens had a reasonable belief that she had permission to use the vehicle at the time of the accident. MCR 2.116(G)(4); *Maiden, supra*.

In her supplemental authority, defendant relies on this Court's reversal in the underlying personal injury action of the circuit court's grant of summary disposition in favor of Jean Aikens. Defendant argues that our Court's decision in *Palacio v Aikens*, unpublished opinion per curiam of the Court of Appeals, issued May 7, 2002 (Docket No. 228165), "is dispositive" of the issue raised in the present case. Although not articulated by defendant, the legal ground relied on may be collateral estoppel. However, because the issues and parties in the two cases are different, the doctrine of collateral estoppel is inapplicable. *McMichael v McMichael*, 271 Mich App 723, 727; 552 NW2d 788; *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995).

In the present declaratory judgment action, plaintiff Auto-Owners is a named party and the issue is the exclusionary policy language, not the terms of the ownership liability statute. As noted by the circuit court, the issues in the two cases are different. Specifically, irrespective whether Monique's mother may have given Monique permission to drive, liability coverage is excluded under the policy unless Monique had a belief that she had permission to drive the vehicle and her belief was reasonable. Here, the un rebutted deposition testimony of Monique was that she did not believe that she had permission to drive the vehicle on the day of the accident. For this reason, the circuit court correctly granted summary disposition in favor of plaintiff.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter