STATE OF MICHIGAN

COURT OF APPEALS

FARM BUREAU MUTUAL INSURANCE,

Plaintiff-Appellant,

v

WILLEM C. HENKE, WILLEM T. HENKE, TERRENCE REAGAN, and MARY ANN REAGAN,

Defendants-Appellees.

UNPUBLISHED
December 13, 2005

No. 262614
Ottawa Circuit Court
LC No. 04-048965-CK

Before: Whitbeck, C.J., and Bandstra, and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition in favor of defendants under MCR 2.116(C)(10). Plaintiff had sought a declaratory judgment that it had no duty to indemnify or defend the defendants in the underlying action. We reverse.

In the underlying action, Terrence and Mary Ann Reagan filed suit against Willem C. and Willem T. Henke for damages sustained when Willem T. Henke drove his truck in such a manner that a tank carrying ammonium nitrate fell off the truck and spilled. As a result, hundreds of gallons of ammonium nitrate migrated onto the Reagans' property. Plaintiff, the Henkes' insurer, filed a complaint seeking a declaratory judgment that it had no duty to indemnify or defend the Henkes in the underlying action because the damages arose out of the use or operation of a motor vehicle. The trial court disagreed and granted summary disposition in favor of defendants.

We review the grant or denial of a motion for summary disposition de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Further, the construction and interpretation of an insurance contract as well as the alleged ambiguity of the contract language are questions of law we review de novo. *Id.*

Plaintiff contends it has no duty to defend or indemnify the Henkes in the underlying action because the farmowner's policy contains a motor vehicle exclusion, which precludes coverage where damages arise out of the use or operation of a motor vehicle. We agree.

The insurer must provide a defense where the allegations of a third party even arguably come within the policy coverage. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452

Mich 440, 450-451; 550 NW2d 475 (1996). If the policy does not apply, however, there is no duty to defend. *Id.* at 450.

An insured's claims are lost if any exclusion in the insurance policy applies. *Hayley v Allstate Ins Co,* 262 Mich App 571, 574; 686 NW2d 273 (2005). Hence, exclusionary clauses in insurance policies shall be strictly construed in favor of the insured. *Id.* But, a court must enforce an insurance contract in accordance with its terms to avoid holding an insurance company liable for a risk it did not assume. *Henderson, supra* at 354. Therefore, where an exclusion in an insurance policy is clear and specific, the exclusion must be enforced. *Hayley, supra* at 574. Further, when reviewing an exclusionary clause, the court should read the contract as a whole to effectuate the overall intent of the parties. *Id.* at 575.

The motor vehicle exclusion found in Section II of the farmowner's policy states that the policy does not apply to "bodily injury or property damage arising out of the ownership, maintenance, use, operation, loading or unloading, or entrustment to any person of any aircraft, motor vehicle, or motorized land conveyance, including mopeds and trailers."

The phrase "arising out of" has been defined in several contexts. See *McKusick v Travelers Indemnity,* 246 Mich App 329, 340-341; 632 NW2d 525 (2003). In an insurance case, however, causation should be determined as follows:

> [W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. [*Kangas v Aetna Casualty & Surety Co,* 64 Mich App 1, 17; 235 NW2d 42 (1975).]

In *Pacific Employers Ins Co v Michigan Mutual Ins Co,* 452 Mich 218; 549 NW2d 872 (1996), a kindergarten student was struck by a car and injured shortly after the school bus driver dropped her off at the wrong bus stop. The applicable insurance policy contained a motor vehicle exclusion; therefore, it did not apply to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile. This Court defined "use" narrowly "to encompass only those injuries arising from the carrying of persons aboard the bus," and so affirmed the trial court's conclusion that the motor vehicle exclusion did not apply. *Id.* at 223.

Our Supreme Court, however, noted that the word "use" has a broader connotation than the words "operate" or "drive." *Id*. at 226 n 11 (citations omitted). The Court concluded that the bus driver had a duty both to carry passengers on the bus and to deliver each child at a predetermined bus stop and that the bus driver "used' the bus in carrying out those duties. *Id*. at 227. Consequently, when the driver dropped the student off at the wrong bus stop, the driver "misused" the bus and, as a result, the child sustained a foreseeably identifiable injury. *Id*. at 229-230. Thus, the Court held that the motor vehicle exclusion applied because the child's injury arose out of the use of the school bus.

In this case, Henke had a duty to drive the truck and to deliver the ammonium nitrate without causing harm to another's person or property. Further, Henke "used" the truck in carrying out those duties. When Henke drove off the driveway, the truck leaned, causing the tank of ammonium nitrate to spill. The resulting injury, the spilling and migration of ammonium nitrate, was a foreseeable result of Henke's misuse of the truck. Thus, the damages indeed arose out of the use or operation of the truck. Further, because the harm was closely connected with the use or operation of a motor vehicle, we conclude that the motor vehicle exclusion precludes coverage in this case. See *State Farm Fire & Casualty Co v Huyghe*, 144 Mich App 341; 375 NW2d 442 (1985).

We also reject the trial court's conclusion that ambiguity exists regarding the limited pollution coverage provided in section 10 of the farmowner's policy. Section 10b provides coverage for loss caused by the accidental application of farming chemicals; however, the coverage is limited to the accidental dispersal of farming chemicals that fall upon the person or property of others due to wind drift or unintentional overspray. Here, the ammonium nitrate did not enter the Reagan's property due to wind drift or unintentional overspray. Thus, the portion of section 10b, providing coverage for loss caused by the accidental application of farming chemicals does not apply.

Further, even though section 10b also provides coverage for bodily injury and property damage caused by sudden and accidental pollution, the injury or damage must be "attributable to the first 72 hours" of the pollution. Such coverage is excluded under the circumstances here. Moreover, section 10b is limited by the exclusions set forth in Section II of the policy, including the motor vehicle exclusion which is applicable for the reasons discussed earlier.

We hold that the motor vehicle exclusion precludes coverage under section 10b of the farmowners policy; consequently, plaintiff does not have a duty to indemnify or defend the Henkes in the underlying action.

We reverse.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey