STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

ANTHONY STEVEN BRENNAN,

Defendant/Cross-Defendant-Appellee,

and

CORPORATE AUTO RESOURCE SPECIALISTS, a/k/a KEN TOMPOR AUTO BROKER and LEASING LTD.,

Defendant-Appellee,

and

ALLMERICA FINANCIAL CORPORATION and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs-Appellees,

and

PAUL SCHOENEMANN,

Intervening Plaintiff-Appellee.

UNPUBLISHED
December 19, 2006

No. 270736
Oakland Circuit Court
LC No. 04-062577-CK

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Plaintiff/counter-defendant, Amerisure, Inc., appeals as of right from an order denying its request for a declaratory judgment in its favor. We reverse and remand for entry of judgment consistent with this opinion.

Amerisure challenges the circuit court's orders granting summary disposition against it, which the circuit court decided based in part on the parties' insurance contracts and in part on collateral estoppel. This Court reviews de novo the grant or denial of a motion for summary disposition. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). A trial court may grant a motion under MCR 2.116(C)(7) when a party is barred from raising a claim because of the effect of a prior judgment, such as by collateral estoppel. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). In considering a motion under MCR 2.116(C)(7), "the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party." *Id.*

Summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A motion under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.* The court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

"The interpretation of an insurance contract is a question of law that we review de novo." *Twichel v MIC General Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004). The applicability of collateral estoppel also presents a question of law, subject to de novo review. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

Amerisure first argues that the circuit court erred in ruling that it is required to defend and indemnify Corporate Auto Retail Specialists, a/k/a Ken Tompor Auto Broker and Leasing Ltd. ("CARS"), according to the terms of Amerisure's insurance policy. The circuit court denied Amerisure's motion for summary disposition and expressly ordered that Amerisure is required to defend and indemnify CARS in the underlying action because "CARS was using the Viper at issue with permission." The circuit court subsequently ordered Amerisure to defend and indemnify CARS. The issues on appeal are (1) whether CARS qualifies as an "insured" under the terms of Amerisure's or Allmerica Financial Corporation's and Citizens Insurance Company of America's policies and is therefore entitled to indemnity in the underlying action, and (2) whether Amerisure or Allmerica and Citizens have a duty to defend CARS in the underlying action.

A. General Standards of Law

Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage. *Auto-Owners, Inc v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997). In *Heath v State Farm Mut Auto Ins Co*, 255 Mich App 217, 218; 659 NW2d 698 (2002), this Court set forth the following principles regarding the interpretation of insurance contracts:

> An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained within the policy. If the insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. If a term is not defined in the policy, it is to be interpreted in accordance with its commonly used meaning. Clear and unambiguous language may not be rewritten under the guise of interpretation. [Citations omitted.]

"If, after reading the entire contract, the language can reasonably be understood in different ways—one providing and the other excluding coverage—the ambiguity is to be liberally construed against the insurer." *Farm Bureau Mut Ins Co of Michigan v Moore*, 190 Mich App 115, 118; 475 NW2d 375 (1991).

B. Whether Amerisure or Allmerica and Citizens are Required to Indemnify CARS

In this case, Amerisure issued a commercial general liability (CGL) insurance policy listing "Chrysler Corporation" as the named insured and providing a policy period of April 1, 1995, through April 1, 2001. Section II(A) of Amerisure's CGL policy provides that it will "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'." Section II(A)(1)(b) of Amerisure's policy defines an "insured" to include "anyone else while using with your permission a covered 'auto' you own, hire or borrow . . . ."

Here, the circuit court held that CARS qualified as an insured because CARS had permission to "use" the Viper. This conclusion is supported by ample evidence, including the deposition testimony of Dana Comaianni and Kenneth Tompor, which demonstrates that Chrysler loaned CARS the Viper for use at a show and CARS was to keep the Viper at its shop over the weekend in order to clean it before returning it to Chrysler the following Monday. This testimony is evidence that CARS was "using" the Viper with Chrysler's permission in that CARS had used the Viper at a show and desired to wash and detail the Viper as a final and logical stage of that "use."

The circuit court erred, however, by treating Chrysler's permission to "use" the Viper in one capacity (i.e., for the show and to wash or detail the Viper) as dispositive of the insurance coverage issue. A circuit court must first determine whether there was permission to use the vehicle, and if so, whether at the time of the accident, the vehicle was being used within the scope of that permission. Otherwise, a party securing permission to "use" the vehicle for one purpose would be afforded coverage regardless of whether the accident occurred during an activity beyond the permissible uses. As stated, Amerisure's CGL policy defines an "insured" to include "anyone else *while using with your permission* a covered 'auto' you own, hire or borrow . . . ." (Emphasis added.) The words "while using" require that the accident occur during the course of a permissible use. It is insufficient that a party had secured permission to use the vehicle for purposes wholly unrelated to the accident. This conclusion is supported by *Zurich-American Ins v Amerisure Ins Co,* 215 Mich App 526; 547 NW2d 52 (1996), where this Court

examined policy language nearly identical to Amerisure's policy in the instant matter. This Court, in deciding whether an exclusion applied, examined the manner in which the vehicle was being used "at the time of the accident." *Id.* at 533.

The circuit court's erroneous analysis is of import because it ignored or overlooked that Section II(A)(1)(b)(3) of Amerisure's policy excepts from the definition of "insured" "someone using a covered 'auto' while he or she is working in a business of selling, servicing, repairing or parking 'autos' unless that business is yours." Even if CARS had permission to "use" the Viper as part of its loan agreement with Chrysler, the permitted "use" ceased to exist when Anthony Brennan took the Viper from the shop for his own personal use, as acknowledged by the circuit court. Further, in light of the "working in a business" exception to the definition of an "insured," there is simply no factual development that would afford coverage to CARS as an "insured." If the circuit court was correct in ruling that CARS qualified as an "insured" because it had permission to "use" the Viper for the show and to clean the vehicle before returning it to Chrysler, then the exception applies because CARS's permitted use was limited to when it is "working in a business of . . . servicing . . . 'autos.' " Accordingly, CARS is not an "insured" under the terms of Amerisure's policy.

CARS argues that it was not "servicing" the Viper, but rather, was washing it as a courtesy to Chrysler. "Servicing" is not defined by Amerisure's insurance policy. Where a term is not defined by the policy, it is appropriate to establish a meaning of the term using dictionary definitions. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000). *Random House Webster's College Dictionary* (1997) defines "servicing" as "an act of helpful activity," and "the performance of any duties or work for another." Tompor testified that CARS had "porters" on staff, including Brennan, who "detailed cars, got them ready for our clients, general cleanup in the shop." Brennan and Tompor testified that Brennan detailed the Viper so that it could be sent back to Chrysler the next business day. Based on the facts of this case, CARS's argument is without merit.

To the extent that any of the parties argue that the doctrine of collateral estoppel compelled the circuit court to find that Brennan did not have permission to drive the vehicle, such is without merit. Indeed, the circuit court erred to the extent that it ruled that collateral estoppel compelled a finding that Brennan was not using the vehicle with permission.

Collateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 667 NW2d 843 (2004). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.' " *Id.*, quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). Here, there is no evidence that a final judgment was entered in the underlying action. To the contrary, Amerisure asserts that "the Court in the underlying case issued an order staying the case pending the outcome of the Declaratory Judgment action." However, regardless of this error, the evidence supports the circuit court's ruling that Brennan did not use the vehicle with permission. The deposition testimony of

Comaianni and Tompor and the fact that CARS reported the vehicle stolen supports the court's ruling.

Amerisure also argues that Allmerica and Citizens are required to indemnify CARS. Allmerica issued a commercial insurance policy through Citizens, one of its subsidiaries, listing CARS as the named insured and providing a coverage period from June 21, 1999, through June 21, 2000 (the "Allmerica/Citizens policy"). Section II(A) of the Allmerica/Citizens policy, similar to Amerisure's CGL policy, provides liability coverage to an "insured" for damages "caused by an 'accident' and resulting from 'garage operations' other than the ownership, maintenance or use of covered 'autos.' " Section II(A)(1)(a)(2) of the Allmerica/Citizens policy defines an insured to include "anyone else while using with your permission a covered 'auto' you own, hire or borrow . . . ." Section II(A)(1)(a)(2)(c) of the Allmerica/Citizens policy also excepts from the definition of an "insured" "someone using a covered 'auto' while he or she is working in a business of selling servicing, repairing, parking or storing 'autos' unless that business is your "garage operations." Finally, Section V(B)(5)(a) of the Allmerica/Citizens policy includes an "other insurance" provision that states "[f]or 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." Based on this policy language, for the same reasons applicable to Amerisure, Allmerica and Citizens are not required to indemnify CARS.

C. Whether Amerisure or Allmerica and Citizens are Required to Defend CARS

The last issue is whether Amerisure or Allmerica and Citizens are required to defend CARS. An insurer's duty to defend is broader than its duty to indemnify. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 637; 687 NW2d 300 (2004). To determine whether an insurer has a duty to defend its insured, a court must consider the language of the insurance policy and construe its terms to find the scope of the coverage of the policy. *Id.* "The duty of an insurance company to defend its insured is dependent upon the allegations in the complaint filed by a third party against the insured . . . ." *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 506; 362 NW2d 767 (1984). However, the insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137-138; 610 NW2d 272 (2000). The duty to defend extends to those cases where the allegations in the complaint filed against the insured even arguably come within the policy coverage. *Id.* at 137. Furthermore, if there is any doubt regarding whether a complaint alleges liability that is covered under the policy, the doubt must be resolved in the insured's favor. *Id.* at 138.

In the underlying action, intervening plaintiff Paul Schoenemann pleaded vicarious liability, owner's liability and negligent entrustment against CARS. Schoenemann's vicarious liability claim is apparently still pending in the underlying action. The insurer owes the duty to defend until such time as the insurer has confined the claims against the insured to those theories that the policy would not cover. *American Bumper and Mfg Co v Hartford Fire Ins Co*, 207 Mich App 60, 67; 523 NW2d 841 (1994). "Until that point, the allegations must be regarded as coming arguably within the liability policy, thus resulting in a duty to defend." *Id.* Because CARS arguably was an insured entitled to liability coverage until the date of this opinion, Amerisure and Allmerica and Citizens were required to defend CARS through the date of this

opinion, with Amerisure being the primary insurer and Allmerica and Citizens being excess insurers.

Reversed and remanded for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra