STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED November 9, 2010
V	No. 293167 Wayne Circuit Court
CITIZENS INSURANCE COMPANY OF AMERICA, Defendant/Counter-Plaintiff-Appellee.	LC No. 07-712890-CZ

Before: SERVITTO, P.J. and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

In this insurance dispute, plaintiff Progressive Michigan Insurance Company ("Progressive") appeals as of right from the trial court's order granting summary disposition in favor of defendant Citizens Insurance Company of America, Inc. ("Citizens"), and denying Progressive's cross motion for summary disposition. While the trial court correctly ruled that the economic realities test should be used to determine whether Jason Judy was an employee of First Flight Freight Services ("First Flight") at the time of the accident, the trial court erred in determining that Judy was not an employee of First Flight under that test, we reverse.

This action arises from a pedestrian/motor vehicle accident at Detroit Metropolitan Airport in August 2006. While walking near a cargo hangar, David Baum was struck by a delivery truck driven by Judy and owned by First Flight. The delivery truck was insured by Citizens. At the time of the accident, Judy owned his own truck that was insured by Progressive. Normally when performing work for First Flight Judy used the truck he owned. But Judy's truck was out of service on the date of the accident.

Baum filed a personal injury action against Judy and First Flight. Progressive thereafter filed this declaratory judgment action against Citizens to determine which insurer was liable to defend and indemnify the defendants in Baum's underlying action. Citizens conceded liability for third-party liability coverage for the statutory minimum amount of $20,000, because Judy was a permissive user of First Flight's vehicle at the time of the accident, but argued that a trucker's exclusion in its policy precluded liability for any additional coverage. Progressive did not dispute that its policy provided coverage for the accident, but maintained that its coverage

was secondary when other primary coverage existed, and argued that Citizens' policy provided primary coverage up to the policy limits, not just the $20,000 statutory minimum. The parties filed cross motions for summary disposition in which they argued that the question of coverage under Citizens' policy depended on whether Judy was an employee of First Flight at the time of the accident. The trial court applied the economic realities test to determine whether Judy was an employee and concluded that he was an independent contractor rather than First Flight's employee at the time of the accident. Accordingly, it granted Citizens' motion for summary disposition and denied Progressive's cross motion. Progressive now appeals.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Both parties moved for summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). The interpretation of an insurance policy involves a question of law, which this Court reviews de novo. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 713-714; 706 NW2d 426 (2005).

Citizens insured the First Flight delivery truck that Judy was driving at the time of the action. The Citizens policy provides, in pertinent part:

> 1. Who Is An Insured
>
> The following are "insureds":
>
> a. You for any covered "auto".
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow . . . .
>
> * * *
>
> However, none of the following is an "insured":
>
> a. Any "trucker" or his or her agents or "employees," other than you and your "employees":
>
> (1) If the "trucker" is subject to motor carrier insurance requirements and meets them by a means other than "auto" liability insurance.
>
> (2) If the "trucker" is not insured for hired "autos" under an "auto" liability insurance form that insures on a primary basis the owners of the "autos" and their agents and "employees" while the "autos" are being used exclusively in the "truckers" business and pursuant to operating rights granted to the "trucker" by a public authority.

Under this definition, a "trucker" is excluded from the definition of an "insured," but truckers who are First Flight employees are not subject to the "trucker" exclusion. The crux of this case concerns whether Judy was First flight's employee at the time of the accident.

When interpreting an insurance contract, this Court reads it as a whole and accords its terms their plain and ordinary meaning. *State Farm Mut Auto Ins Co v Descheemaeker*, 178 Mich App 729, 731; 444 NW2d 153 (1989). Courts will enforce an insurance contract as written if no ambiguity exists. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). In this case, Citizens' policy does not define the term "employee." But the failure to define a term does not necessarily make an insurance policy ambiguous. Instead, courts will apply the plain and ordinary meaning of any undefined terms. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).

The guidelines for enforcing exclusionary clauses are summarized in *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998):

> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume.

When reviewing an exclusionary clause, this Court must read the contract as a whole to effectuate the overall intent of the parties. *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218, 224; 549 NW2d 872 (1996). Where the language is clear and unambiguous, the insurance policy must be enforced as written. *Century Surety Co*, 230 Mich App at 82-83.

We disagree with Progressive's argument that the term "employee" in Citizens' policy should be construed in accordance with the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., and *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005). In *Reed*, 473 Mich at 527, the Court observed that the common-law economic realities test had previously been used to determine whether a worker was an employee or an independent contractor. See *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 571-572; 592 NW2d 360 (1999). However, the Court determined that the economic realities test was no longer applicable in light of the adoption of statutory criteria for determining whether a worker was an employee or an independent contractor for purposes of the WDCA.[1] Because this case does not involve an application of the WDCA, we conclude that neither the statutory definition of "employee" in that act, nor the Supreme Court's analysis in *Reed*, which was based on an application of the WDCA definition, control the outcome of this case.

Progressive's reliance on *State Farm Mut Auto Ins Co v Roe (On Rehearing)*, 226 Mich App 258; 573 NW2d 628 (1997), as support for its argument that the WDCA test should be used to determine Judy's status as an employee is also misplaced. That case involved an injured party who worked for an insured and an exclusion that was drafted with reference to the WDCA. The

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[1] See MCL 418.161(1).

policy exclusion in this case is not based on the WDCA and this case does not involve an injured worker.

Instead, this case is more in line with *Meridian Mut Ins Co v Wypij,* 226 Mich App 276, 279-281; 573 NW2d 320 (1997), in which this Court held that it was appropriate to apply the economic realities test to an exclusion applicable to "employees" in a commercial general liability policy. In *Hoste,* 459 Mich at 568 n 6, the Supreme Court set forth the factors that make up the economic realities test:

> The factors of the "economic reality" test as described in *McKissic* [*v Bodine,* 42 Mich App 203; 201 NW2d 333 (1972),] are:
>
> "First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?
>
> "Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?
>
> "Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expense?
>
> "Fourth, does the employee furnish his own equipment and materials?
>
> "Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?
>
> "Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?
>
> "Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.
>
> "Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute."

The application of these factors to this case establishes that Judy was an employee of First Flight at the time of the accident. The first factor is inapplicable because Judy was a temporary employee for that day under the specific circumstances of this case. With regard to the second factor, clearly, First Flight's assignment of work to Judy on the date of the incident was for the benefit of First Flight in order to complete their delivery obligations for that day. When Judy informed First Flight that he would not be able to make deliveries that day using his own truck, First Flight invited him to come to work and use one of its trucks. The facts indicate that the deliveries to be performed that day by Judy were an integral part of First Flight's business operations and did contribute to the accomplishment of completing that day's tasks.

In analyzing factor three, First Flight could have attempted to maintain Judy's independent contractor status when engaging Judy on the date of the incident by continuing to

abide the terms of the independent contractor lease agreement and then charging Judy for his use of First Flight's equipment. Instead, First Flight chose to pay Judy a driver's wage in a reduced commission form. The reduced payment is to compensate Judy for his time driving and not to further an independent contractor endeavor. When Judy was operating his own vehicle he received approximately 60% of the fees charged. When operating First Flight's vehicle, he received only 40% of the fees charged. As such, Judy's wages for that day would be to pay his personal living expenses like any other salary, and not to cover costs associated with his own vehicle.

With regard to the fourth factor, much is made of the fact that Judy had his own vehicle, which he was solely responsible for maintaining and insuring, and that he generally worked as an independent contractor under a compensation schedule for which he received an enhanced commission to subsidize operating and incidental expenses associated with the use of his own vehicle But it is undisputed that at the time of the accident Judy and First Flight were operating outside the terms of Judy's normal lease agreement—Judy was indeed driving First Flight's vehicle, which First Flight was obligated to maintain and insure. First Flight reduced Judy's pay or commission to 40% of what was billed that day because Judy did not supply his own vehicle.

In terms of factor five, under the parties' customary operating manner, Judy, as a commissioned driver for First Flight was not permitted to maintain his own business if he compete with First Flight and he was required to provide exclusive services for First Flight's customers. On the date of the incident, however, the circumstances were even more stringent because Judy was driving First Flight's truck and he was indeed engaged that day by First Flight under a verbal contract for hire.

The sixth factor is not determinative in this case because First Flight regularly used both employees and commissioned drivers on a regular basis to accomplish work objectives. We do point out, however, that First Flight uses both employees and independent contractors and therefore the determination of a worker's status on a given day is relative to the ownership of the equipment he is using. On the date in question, there is no doubt that Judy was driving First Flight's vehicle.

With regard to factor seven, First Flight's owner, Fred Willis, admitted that he allowed Judy to work that day on a contract for hire, exclusively for First Flight, because Judy's truck was unavailable. First Flight assigned a truck to Judy, gave him his delivery orders that day, and directed him to make a delivery or pickup at the Northwest Airlines hangar. On assignment of a First Flight vehicle to Judy, First Flight gave him specific delivery orders, and he was to complete those deliveries as assigned under First Flight's supervision and direction.

In sum, the trial court erred in finding that the issue of control favored Citizens. First Flight controlled Judy's duties on the day of the accident after it offered him work that day. First Flight assigned a vehicle to Judy and gave him delivery orders. On the day of the accident, Judy was operating with First Flight's equipment and at its directions, and First Flight controlled Judy's job duties that day. Because Judy was a contracted day employee outside the scope of his agreement, and because First Flight's "employees" are not subject to the trucker exclusion on which Citizens relies to avoid coverage under its policy, the trial court erred in granting summary disposition in favor of Citizens. Finally, because we conclude that the factors of the economic realities test establish that Judy was a First Flight employee at the time of the accident, Citizen's

policy is primary and Progressive's policy is excess. We therefore reverse the trial court's order granting Citizen's motion and denying Progressive's cross motion.

In light of our determination that the trucker exclusion is not applicable, it is unnecessary to address Progressive's alternative argument that the trucker exclusion is invalid as a matter of law.

Reversed. Progressive, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio