

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU MUTUAL INSURANCE
COMPANY OF MICHIGAN,

UNPUBLISHED
July 9, 2013

Plaintiff-Appellant,

V

LAURIE BOWERS, CARL BOWERS, JULIE
BOWERS and NICHOLAS BOWERS,

No. 311811
Gratiot Circuit Court
LC No. 11-11662-CK

Defendants-Appellees.

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Nicholas Bowers sustained personal injury in a boating accident. Farm Bureau Mutual Insurance Company of Michigan, which insured the boat, brought this action seeking a declaratory judgment that it bears no duty to defend or indemnify in Nicholas's lawsuit seeking damages for his personal injuries.

Nicholas's parents, Laurie and Carl Bowers, own the boat involved in the accident. Nicholas's wife, Julie Bowers, was piloting the boat at the time of the accident. The Farm Bureau policy includes in the definition of "insured" any person "legally responsible" for watercraft owned by an insured. Under the policy's personal liability form, an "insured" is excluded from coverage for bodily injury. The question presented is whether Nicholas's and Julie's permissive use of the boat rendered them "legally responsible" for the watercraft, thereby qualifying them as "insureds" under the Farm Bureau policy and simultaneously rendering Nicholas ineligible for bodily injury coverage. The circuit court summarily decided this action in the favor of the collective Bowers. Because there remains a question of fact, we reverse that judgment and remand for continued proceedings.

I. FACTS AND PROCEEDINGS

Carl and Laurie Bowers own a 2003 Starcraft fishing boat equipped with a 90 horsepower motor. The Bowers regularly allowed their son and daughter-in-law, Nicholas and Julie Bowers,

to use the boat.¹ In late July 2011, Nicholas borrowed the boat from his parents, intending to use it for several weeks. On August 1, 2011, Nicholas, Julie and their children took the boat to go “tubing” at a lake. While Nicholas and one of the children rode in a tube, Julie piloted the boat. When Julie pulled the boat close to Nicholas and the child to retrieve them from the water, the wake from a nearby craft pushed the Bowers’ boat into Nicholas. The propeller severed Nicholas’s arm near the elbow.

Nicholas sued Julie and the Bowers asserting claims of negligence and owner’s liability pursuant to MCL 324.80207 (“The owner of a personal watercraft is liable for any injury occasioned by the negligent operation of the personal watercraft . . .”). Farm Bureau defended Julie and the Bowers pursuant to a reservation of rights.² Farm Bureau then brought this action seeking a declaration that under the policy, it has no duty to defend or indemnify Julie or the Bowers.

The Farm Bureau policy identifies itself as a “Country Estate Policy.” The named insureds on the policy are Laurie and Carl Bowers. The policy covers a home in Bannister, non-farm structures, personal property, and the 2003 Starcraft.

Section II sets forth the policy’s “personal and farm liability coverage form.” This form includes coverage for “bodily injury and property damage liability.” The “insuring agreement” governing bodily injury coverage states:

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:

1. pay up to the applicable Limit of Insurance shown in the Declarations for the damages for which the insured is *legally liable*[.] [Bold omitted, italics added].

Thus, bodily injury coverage is triggered under the policy when an insured becomes “legally liable” for an occurrence.

Paragraph 22(a) of the policy’s definition section defines an “insured” as the named insureds, resident relatives, and others. Paragraph 22 further provides:

Under Section II, each of the following is also an insured:

* * *

¹ For convenience and to avoid confusion, we refer to Carl and Laurie Bowers as “the Bowers,” and we use Julie and Nicholas Bowers’ first names.

² It appears from the record that Nicholas’s suit was put on hold pending the resolution of this coverage dispute.

(3) Any person or organization

(a) *legally responsible* for animals or watercraft owned by an insured . . . but only in so far as:

i. the insurance under this Coverage Form applies to occurrences involving animals or watercraft.

ii. that person's or organization's custody or use of the animals or watercraft does not involve business; and

iii. that person or organization has the custody or use of the animals or watercraft with the owner's permission. [Bold omitted, italics added].

This definition of "insured" is sometimes referred to as an omnibus clause.³ In the Bowers' policy, the omnibus clause provides bodily injury coverage to injured third parties caused by a person with "the custody or use" of the boat.

Under the heading "Exclusions," ¶ 14 of the policy provides, "This insurance does not apply to . . . bodily injury to you or any insured within the meaning of insured as defined[.]" (Bold omitted.)

Farm Bureau moved for summary disposition under MCR 2.116(C)(10), asserting that because Julie and Nicholas were "legally responsible" for the watercraft at the time of the accident, the policy excludes them from coverage for bodily injury. According to Farm Bureau, Nicholas and Julie were bailees of the boat on the day the accident occurred, rendering them "legally responsible" for the boat. Julie, Nicholas and the Bowers also filed a motion for summary disposition under MCR 2.116(C)(10), contending that the term "legally responsible" is ambiguous, and that Nicholas is not an "insured" under the policy.

The circuit court ruled that because Julie was the captain of the boat at the time of the accident, Nicholas was not legally responsible for the boat. Based on this ruling the trial court denied Farm Bureau's motion for summary disposition and granted summary disposition in favor of Julie and the Bowers. Farm Bureau now appeals.

³ "An omnibus clause extends liability coverage to a person or organization legally responsible for the use of the named insured's vehicle." *Celina Mut Ins Co v Aetna Life & Cas Co*, 434 Mich 288, 297; 454 NW2d 93 (1990). "The public policy of the 'omnibus' clause is to protect the public for loss caused by [a] negligent, permissive driver." 8 Couch, Insurance, 3d § 111:7, p 111-15.

II. ANALYSIS

A. STANDARD OF REVIEW AND GOVERNING LEGAL PRINCIPLES

We review de novo the circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

"Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). This Court applies to insurance policies the same construction principles that govern any other type of contract, and thus begins by considering the language of the parties' agreement to determine their intent. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005).

"First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity." [*Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007), quoting *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).]

"A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Royal Prop Group, LLC*, 267 Mich App at 715.

B. "LEGALLY RESPONSIBLE"

Farm Bureau contends that as a matter of law, Nicholas qualified as "legally responsible" for the watercraft. The term "legally responsible" is not defined in the policy. The Bowers assert that the term refers to a factual determination of legal liability, while Farm Bureau insists that it covers any duty of care on the part of a permissive user of the boat which may be imposed as a matter of law.

"When the meaning of a term is not obvious from the policy language, the 'commonly used meaning' controls." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 113-114; 595 NW2d 832 (1999). "[T]he proper approach is to read the phrase as a whole," and "to give contextual meaning to the phrase to determine what the phrase conveys to those familiar with our language and its contemporary usage." *Henderson*, 460 Mich at 356. In construing an insurance

policy we look to the entire contract and “giv[e] meaning to all its terms.” *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997).

In *Nationwide Mut Ins Co v Nolan*, 10 SW3d 129, 132 (Ky, 1999), the Kentucky Supreme Court, construing nearly identical policy language, observed that the phrase “legally responsible” may be interpreted as either “legally obligated” or as subject to a duty of care. The Court held that “this policy language does not transform a permissive user into ‘an insured’ unless there is a factual finding of liability on the part of the permissive user.” *Id.* Our Supreme Court has acknowledged that the term “legally responsible” shares the same meaning as the term “liability.” Both refer to “the state or quality of being liable.” *Bailey v Oakwood Hosp & Med Ctr*, 472 Mich 685, 696; 698 NW2d 374 (2005). Thus, the commonly used meaning of the term “legally responsible” embraces liability imposed or arising according to law.

As the operator of the boat at the time of the accident, Julie bore a legal responsibility to operate the watercraft in a reasonable manner. MCL 324.80145 provides in relevant part: “A person operating or propelling a vessel upon the waters of this state shall operate it in a careful and prudent manner and at such a rate of speed so as not to endanger unreasonably the life or property of any person.” As a matter of law, Julie qualifies as an “insured” under the policy and is excluded from bodily injury coverage.

Nicholas was not operating the boat at the time of the accident. Accordingly, he bore no statutory or common law duty of care to operate the boat in a reasonable or prudent manner. See *Binno v Binno*, 489 Mich 876; 796 NW2d 49 (2011) (reversing an unpublished Court of Appeals opinion that had improperly assumed that certain individuals who were passengers on a boat were operating the boat as contemplated by the statutes). Nevertheless, Farm Bureau posits, as a bailee, Nicholas bore “legal responsibility” for the boat when the accident occurred. Consequently, Farm Bureau contends, the policy also precludes Nicholas from receipt of bodily injury coverage.

A bailment requires “the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished.” *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 479-480; 413 NW2d 472 (1987). To constitute “delivery” of the property, “there must be a full transfer to the bailee so as to exclude the possession of the owner and all other persons and to give the bailee sole custody and control thereof.” *Orton v Markward & Karafilis Inc*, 83 Mich App 548, 551; 269 NW2d 219 (1978) (citation omitted). Further, “[a]s a general rule, the creation of a bailment requires the possession and control over the subject matter pass from the bailor to the bailee.” *Id.* (citation omitted). Whether the facts of a particular situation create a bailment generally constitutes a jury question. *Goldman*, 162 Mich App at 480.⁴

⁴ Generally a bailee’s duties run to the property under bailment. “[T]he bailee’s possession of the property and duties relating to it result from the contract relation between the parties.” *Hutchins v Vinkemulder*, 187 Mich 676, 682; 154 NW 80 (1915).

We are unable to conclude that, as a matter of law, the arrangement between Julie, Nicholas and the Bowers constituted a bailment. Nicholas and Julie borrowed the boat from the Bowers pursuant to an informal, unwritten agreement. The record lacks evidence concerning whether the parties intended a “full transfer” of possession and control over the boat such that the Bowers were divested of any right to co-possess the boat or to exert control over how and when it was used. Accordingly, the circuit court did not err by refusing to grant summary disposition to Farm Bureau on the ground that a bailment relationship existed as a matter of law.

But even if Nicholas could be construed as a “bailee” when he and Julie first took possession of the boat, we conclude that whether Nicholas was “legally responsible” under the policy presents a question of fact. The policy language provides that Nicholas is an “insured” if he bears “legal responsibility” for the watercraft. But the same definition states that “legal responsibility” is limited to those persons having “custody or use” of the watercraft (a person “legally responsible” for the watercraft qualifies as an insured “but only in so far as” the person “has the custody or use of the watercraft with the owner’s permission”).

Absent an occurrence, the personal liability coverage form has no application. Alternatively stated, “legal responsibility” does not arise in a vacuum, but flows from bodily injury caused by an occurrence. Construed as a whole, the policy identifies Nicholas as an insured to the extent that he had custody or use of the watercraft at the time of the occurrence. Whether Nicholas had custody or use of the watercraft at the time of the occurrence must be determined by the finder of fact.⁵

We affirm the circuit court’s denial of summary disposition to Farm Bureau, and reverse the grant of summary disposition to Julie and the Bowers. We remand this matter for proceedings consistent with this opinion and assess no costs as neither party has prevailed in full. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

⁵ The case upon which Farm Bureau primarily relies, *Security Nat’l Ins Co v Sequoyah Marina, Inc*, 246 F2d 830, 832 (CA 10, 1957), supports the necessity of analyzing “legal responsibility” in the context of an occurrence:

The first question presented is whether Lowrance was “legally responsible” for the boat at the time of the explosion. *We think “responsible” as here used means under a duty to use or operate the boat . . . properly and liable and answerable for a failure to do so.* [Emphasis added].