In the Missouri Court of Appeals
Eastern District

DIVISION ONE

RUTH MENDENHALL,	)	
	)	No. ED96681
Appellant,	)	
	)	Appeal from the Circuit Court
v.	)	of St. Louis County
	)	09SL-CC05239
PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD	)	Honorable Maura B. McShane
	)	
	)	Filed: December 13, 2011
Respondent.	)	

Introduction

Ruth Mendenhall appeals the trial court's grant of summary judgment in favor of Property and Casualty Insurance Company of Hartford (Hartford) on Mrs. Mendenhall's claim for equitable garnishment of Hartford's policy for an incident resulting in the death of her husband, Len Mendenhall. We would reverse for the reasons discussed below. However, given the general interest and importance of the question presented, we transfer this case to the Missouri Supreme Court pursuant to Rule 83.02.

Background

In May 2006, Mr. Mendenhall interviewed for an employment position with the Family Center of Farmington, Inc. (the Family Center), a retail farm equipment store. The Family Center chose not to hire Mr. Mendenhall at that time. However, Gary

Fraley, who had interviewed Mr. Mendenhall for the Family Center, informed Jay Walker, the owner of the Family Center, that Mr. Mendenhall would be good for a position. Mr. Walker hired Mr. Mendenhall shortly thereafter to work for him personally at his cattle farm, called 4-J Farms (the Farm), co-owned by Mr. Walker's wife, Dawn Walker. Mr. Mendenhall worked at the Farm on an as-needed basis, generally hauling hay.

From time to time, Mr. Walker asked Mr. Mendenhall to perform various tasks for the Family Center, though Mr. Mendenhall was paid by the Farm at all times. When Mr. Mendenhall hauled materials for Mr. Walker or the Family Center, he sometimes used a truck and trailer owned by the Family Center. This truck and trailer was covered under a business automobile liability policy (the Hartford Policy), provided by Hartford, issued to the Family Center.

On March 8, 2007, Mr. Mendenhall undertook a project for Mr. Walker in which he hauled rock using the truck and trailer in order to create a driveway at the Farm. At one point, Mr. Mendenhall was standing outside the truck and trailer, using the controls in order to dump a load of rock. As Mr. Mendenhall raised the trailer, it tipped over onto him, causing his death.

Mrs. Mendenhall subsequently filed a wrongful death suit against the Family Center and the Walkers, through which she obtained a judgment against Mr. Walker in the amount of $840,000.[1] Before the judgment, Mr. Walker and Mrs. Mendenhall had

[1] Prior to judgment, Mrs. Mendenhall had dismissed her claim against Mrs. Walker and settled her claim against the Family Center for $50,000. Farm Mutual Insurance Company of St. Francois County provided a general liability policy for the Farm, and had hired counsel to defend Mr. Walker in the wrongful death suit. Mr. Walker had also tendered the claims to Hartford, alleging he was covered under the Hartford Policy. Hartford had agreed to share certain costs with Farm Mutual for Mr. Walker's defense, but Hartford reserved the right to deny coverage for any judgment or settlement.

entered an agreement pursuant to Section 537.065, RSMo. (2000), which provided that any judgment against Mr. Walker would be executed only against the proceeds of the Hartford Policy. Hartford denied any obligation to indemnify Mr. Walker for claims resulting from Mr. Mendenhall's death.

Mrs. Mendenhall initiated an action for equitable garnishment, seeking to apply the proceeds of the Hartford Policy to satisfy the $840,000 judgment against Mr. Walker. Hartford moved for summary judgment, claiming among other things that Mr. Mendenhall was expressly excluded from coverage under the Hartford Policy because he was an employee of Mr. Walker. Mr. Walker moved for summary judgment claiming that Mr. Mendenhall fell under the exception to the employee exclusion in the policy, because he was a "temporary worker" rather than an employee, as defined by the policy. The trial court granted Hartford's motion for summary judgment, finding that Mr. Mendenhall did not meet the definition for "temporary worker" because he was not "furnished to" Mr. Walker by an employment service or similar organization. This appeal follows.

Standard of Review

We review a trial court's grant of summary judgment de novo. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The propriety of summary judgment is purely an issue of law. Id. The precise issue here, the meaning of language in an insurance contract, is also an issue of law that we review de novo. Burns v. Smith, 303 S.W.3d 505, 509 (Mo. banc 2010).

Discussion

The sole question on appeal is whether at the time of his death Mr. Mendenhall was a "temporary worker," as defined by the Hartford Policy, or an "employee," as determined by the trial court. The Hartford Policy contains an exclusion from liability coverage for employees of the insured. The relevant portion of the definition of "employee" specifies that the term includes a "leased worker," but does not include a "temporary worker." These two terms are also defined in the Hartford Policy:

> "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker." . . .
> "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

The parties do not dispute that Mr. Mendenhall worked for Mr. Walker to meet seasonal or short-term workload conditions. The question here is whether Mr. Mendenhall was "furnished to" Mr. Walker, as contemplated by the definition of temporary worker in the Hartford Policy.

The word "furnish" is not defined in the policy, therefore we give the term its plain and ordinary meaning. Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505, 508 (Mo. banc 1997). For this, we consult standard English language dictionaries. Id. If there are any ambiguities in the meaning of the policy, we resolve them in favor of the insured. Burns, 303 S.W.3d at 509. Moreover, we "strictly construe[] exclusionary clauses against the drafter." Id. (citing Aetna Cas. & Sur. Co. v. Haas, 422 S.W.2d 316, 321 (Mo. banc 1968)).

The Missouri Supreme Court has already considered the meaning of the same phrase at issue here, "furnish to," from an identical definition of temporary worker. See Gavan v. Bituminous Cas. Corp., 242 S.W.3d 718, 720-21 (Mo. banc 2008). The court stated that the plain and ordinary meaning of the word "furnish" is "[t]o provide or supply with what is needed, useful or desirable." Id. at 721 (citing Webster's Third New International Dictionary 923 (1986)). The court, considering whether an employee could furnish himself to the employer and still qualify as a temporary worker, held that the ordinary definition of "furnish" is unambiguous in that the term necessarily requires the involvement of a third party in providing or supplying the worker.[2] Id. To read it otherwise, the court said, would render the term "furnish" meaningless. Id. (overruling Am. Family Mut. Ins. Co. v. As One, Inc., 189 S.W.3d 194 (Mo. App. S.D. 2006) (holding temporary worker could furnish himself)).

The present case now requires us to examine the nature of that third party's role in furnishing the worker. Must the third party be in the business of supplying workers, such as a temporary employment agency, or may certain actions by another entity or individual constitute furnishing a worker? This question has not yet been addressed in Missouri.[3]

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[2] This conclusion is consistent with the majority of courts that have addressed the issue of whether a third party is required. See, e.g., Northland Cas. Co. v. Meeks, 540 F.3d 869, 875 (8th Cir. 2008); Carl's Italian Rest. v. Truck Ins. Exch., 183 P.3d 636, 639 (Colo. Ct. App. 2007); Monticello Ins. Co. v. Dion, 836 N.E.2d 1112, 1115 (Mass. App. Ct. 2005); Rhiner v. Red Shield Ins. Co., 208 P.3d 1043, 1046 (Or. App. 2009).

[3] Hartford argues that the majority of other jurisdictions conclude that the third party must be an employment agency; but this is incorrect as only a handful of courts have addressed this precise issue of the type of third party required, and among them, they are split in their conclusions.

Courts in Florida, New York, and West Virginia, have found the term "furnish to" ambiguous with respect to the type of third party required. Bituminous Cas. Corp. v. Mike Ross, Inc., 413 F. Supp. 2d 740, 744-45 (N.D. W. Va. 2006) (denying summary judgment); Nat'l Indem. Co. of S. v. Landscape Mgmt. Co., Inc., 963 So. 2d 361, 363 (Fla. Dist. Ct. App. 2007); Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co., 853 N.Y.S.2d 870, 873 (N.Y. Sup. Ct. 2008), aff'd, 61 A.3d 655 (N.Y. App. Div. 2009). In Florida and New York, courts considering factual scenarios in which the worker had been referred by an employee or friend of the employer construed the term against the insurer and held that any third party could "furnish"

Mrs. Mendenhall argues that in this distinct respect, the Hartford Policy language is ambiguous. We agree.

An ambiguity exists when a phrase is "reasonably open to different constructions." Burns, 303 S.W.3d at 509. Hartford argues the term "furnish" is unambiguous by definition because a party that has not hired or employed the worker cannot be in a position to provide or supply that worker to another employer. Therefore, Hartford argues, no other party could qualify as a "furnisher" of workers except for an employment agency or the like, and because the Family Center did not employ Mr. Mendenhall, it could not have furnished him to Mr. Walker. We disagree.

As Hartford urges, "furnish" could mean that the third party who provides the worker must have some measure of control over the employment of that person in order to pass it on, such as employing the worker, paying the worker's wages while he or she is temporarily employed, or formally taking responsibility for the worker's job placement. In that case, the term "furnish" would imply an agency of some sort in the business of supplying workers, but even then it would not be necessary that the third party be an official service providing the worker. On the other hand, Mrs. Mendenhall argues, as some other jurisdictions have held, that "furnish" could mean the simple act of recommending or referring a worker, in which case other types of third parties could

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the worker to the employer. Nat'l Indem. Co., 963 So. 2d at 364 (worker furnished by another employee); Nick's Brick Oven Pizza, 853 N.Y.S.2d at 872-73 (worker furnished by referral from friend of employer).

Only courts in Connecticut and Kentucky have found that the unambiguous meaning of the phrase "furnished to" requires that the worker be furnished to the employer from an employment agency or a similar service. Burlington Ins. Co. v. De Vesta, 511 F. Supp. 2d 231, 233 (D. Conn. 2007) (citing Nationwide Mut. Ins. Co. v. Allen, 850 A.2d 1047, 1057 (Conn. Ct. App. 2004)); Brown v. Ind. Ins. Co., 184 S.W.3d 528, 538 (Ky. 2005). In Brown, the two workers at issue had been hired at either the request or recommendation of a third party, but neither had been provided by a temporary help service. Brown, 184 S.W.3d at 538. Analyzing the situation in the context of Kentucky's workers' compensation statutes, the court found that the workers had not been "furnished to" the employer. Id. (distinguishing contrary holding in Ayers v. C & D Gen. Contractors, 237 F. Supp. 2d 764, 769 (W.D. Ky. 2002); reasoning Ayers court had not considered question in workers' compensation context)).

fulfill this function.[4] Thus, the term on its face is open to differing and contrary definitions.

Additionally, the Hartford Policy's definition of "leased worker," which is similar in structure to the temporary worker definition, does specify a particular third party. The definition specifically states that a "leased worker" is a person "leased to you by a labor leasing firm . . ." (emphasis added). In contrast, the definition of "temporary worker" does not include a similar qualifying phrase. Hartford argues that a qualifying phrase is unnecessary because of the clear definition of "furnish," yet other courts have found a difference in the level of specificity between the two definitions, having significance. See Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co., 853 N.Y.S.2d 870, 873-74 (N.Y. Sup. Ct. 2008); Carl's Italian Rest. v. Truck Ins. Exch., 183 P.3d 636, 640 (Colo. Ct. App. 2007) (stating "[t]he 'leased worker' provision requires that the worker be furnished by a particular type of third party, while the 'temporary worker' provision requires involvement of any type of third party"). These differing views only further indicate an ambiguity in the interpretation of "furnish" with respect to third parties.

Here, Mr. Mendenhall interviewed with the Family Center for a position, and an employee of the Family Center informed Mr. Walker that Mr. Mendenhall would be ideal to hire. Mr. Walker chose to hire Mr. Mendenhall for his own farm operations after the Family Center declined to hire Mr. Mendenhall. Mr. Walker did not interview Mr. Mendenhall separately, but hired him on the basis of the Family Center's conclusion. Mr. Walker stated he would not have hired Mr. Mendenhall but for the Family Center's vetting and recommendation. Also, it is not clear from the record whether any

[4] Similarly, Gavan's dissenting judges interpret the majority opinion to require a third-party "referral." Judge Teitelman writes, "the majority concludes that Gavan is not a temporary worker solely because he was not *referred* to the employer by a third party." Gavan, 242 S.W.3d at 722. (emphasis added)

employment service exists for the placement of farm workers, or that Mr. Mendenhall could have sought the services of such a place for a temporary farm labor position.

We follow without reservation the Missouri Supreme Court's holding in Gavan that the term "furnish to" unambiguously requires the involvement of a third party.[5] Beyond this clear requirement of third-party involvement, "furnish to" in the policy at issue does not specify whether the intended act of furnishing necessarily limits the pool of third parties who may perform it. In this respect, the definition of "temporary worker" is ambiguous. Therefore, we construe the policy against the insurer. We find that the Family Center, a third party to the employment transaction here, furnished Mr. Mendenhall to Mr. Walker for employment, through its interview and referral of Mr. Mendenhall. Thus, Mr. Mendenhall was Mr. Walker's "temporary employee," and fell within the policy's exception to its liability exclusion. Point granted.

Conclusion

We find that the Hartford Policy's definition of "temporary worker" is ambiguous in that the term "furnish" does not explicitly indicate what kinds of third-party actions qualify as "furnishing," or thereby limit which third parties may be "furnishers." Construing the term against the insurer, we find that because the Family Center interviewed Mr. Mendenhall and provided this information relevant to hiring to Mr. Walker, which Mr. Walker would not otherwise have had, this sufficed as furnishing by a third party. We would conclude that the trial court erred in granting summary judgment in favor of Hartford, and we would reverse and remand for further proceedings consistent

[5] We also note the Supreme Court's consideration of Missouri workers' compensation statutes in determining that "furnish" required involvement of a third party in order to avoid an injured employee's double recovery. Gavan, 242 S.W.3d at 721-22. Because Mr. Mendenhall was employed in farm labor at the time of his death, he was not covered by workers' compensation. Section 287.090.1(1), RSMo. (2008).

with this opinion. However, given the general interest and importance of the question, we order this case transferred to the Missouri Supreme Court, pursuant to Rule 83.02.

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Gary M. Gaertner, Jr., Judge

Clifford H. Ahrens, PJ, concurs.
Roy L. Richter, J, concurs.