STATE OF MICHIGAN

COURT OF APPEALS

INSURANCE COMPANY OF NORTH AMERICA, INC.,

Plaintiff-Appellant,

v

NATALIE MAXINE NEUMAN, Personal Representative of the Estate of THOMAS LOUIS NEUMAN, Deceased, and LEARJET, INC.,

Defendants-Appellees,

and

JETSTREAM, INC., and BARD AIR, INC.,

Defendants.

UNPUBLISHED
January 14, 1997

No. 180612

Wayne Circuit Court
LC No. 94-421709 CZ

Before: Saad, P.J., and Holbrook, Jr., and G.S. Buth,* JJ.

PER CURIAM.

In this declaratory judgment action regarding insurance coverage following a plane crash, the trial court granted defendants' cross-motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right and we reverse.

Thomas Neuman was an inexperienced pilot who was not an employee of Jetstream at the time of the accident, but was hoping to be hired. Before he could be hired or begin training, it was necessary to "build time" by flying with Jetstream's training pilots, who would evaluate him. At the time of the crash, Neuman was "building time"; he did not compensate Jetstream for this opportunity.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff, an insurer, filed this declaratory judgment action as a result of events occurring in an underlying lawsuit brought against plaintiff's insureds, defendants Jetstream, Inc. (Jetstream), and Bard Air, Inc. (Bard). In the underlying wrongful death action, Natalie Neuman, personal representative of the estate of Thomas Neuman, brought suit alleging, among other things, that the airplane in which Thomas Neuman was killed had been negligently manufactured by Learjet, operated by Jetstream, and owned by Bard.

Plaintiff brought this action seeking a declaration that the maximum policy limit available to its insureds, defendants Jetstream and Bard in the underlying suit, was $100,000. Plaintiff moved for summary disposition to resolve the issue. Defendant Learjet filed a cross-motion requesting a declaration that the coverage limit was $5,000,000. The trial court granted Learjet's cross-motion, typing the following order directly onto the motion praecipe:

> As a result of the request to admit, this Court's prior orders and this Court's understanding of Endorsement No. 1 and No. 5, this Court finds that the airplane was not cargo carrying and [Neuman] was a passenger for hire. Therefore, $5,000,000 is available for any verdict or settlement.

This appeal followed.

Plaintiff first argues on appeal that, in resolving the parties' summary disposition motions, the trial court erred in giving collateral estoppel effect to the findings of the court in the underlying wrongful death action that Neuman was not an employee of Jetstream or Bard, and that Jetstream and Bard's insurance policy provided coverage "to the extent that Jetstream and Bard are held liable to Learjet on its pending cross-claim for contribution and indemnity." Consideration of this issue need not detain us long. As a general rule, collateral estoppel applies where the same parties or their privies had a full and fair opportunity to litigate a question of fact which was essential to a valid and final judgment, and mutuality of estoppel exists. *Nummer v Dep't of Treasury,* 448 Mich 534, 542; 533 NW2d 250 (1995). Given that none of the elements of collateral estoppel are present in this case, we find that the trial court erred in giving preclusive effect to the findings of the court in the underlying action. Cf., *Lichon v American Universal Ins Co,* 435 Mich 408, 427-428 & n 16; 459 NW2d 288 (1990) (indemnitor-indemnitee exception to mutuality requirement may apply where indemnitor seeks to assert *defensively* an indemnitee's *favorable* judgment in an earlier action).

Moreover, plaintiff is not estopped from asserting that its policy limit is $100,000 because of admissions made by Jetstream and Bard in the underlying action. Specifically, in the wrongful death action, Neuman's estate requested that Jetstream and Bard admit that their insurance policy provided $5,000,000 in coverage, that Jetstream and Bard's insurer had not asserted any policy defenses or reservation of rights, and that the $5,000,000 coverage limit was undepleted. Jetstream and Bard failed to respond to the requests, leading to their admission pursuant to MCR 2.312(B)(1). Even if these admissions in the underlying action could be attributed to plaintiff, MCR 2.312(D)(2) expressly provides that an admission arising from a failure to respond "is for the purpose of the pending action only and is not an admission for another purpose, nor may it be used against a party in another

proceeding." Thus, these admissions cannot be used in the present case to support an estoppel argument.

Plaintiff next argues that the trial court erred in finding that the policy maximum was $5,000,000. We agree. According to the policy declarations sheet, Coverage B of the policy provides $5,000,000 of coverage for each occurrence of bodily injury, including passenger and property damage liability. Coverage B also refers directly to Endorsement #5, a ten-paragraph document entitled "Extended Coverage Endorsement." The first paragraph of Endorsement #5 refers specifically to an airplane with FAA registration number N38BC (not the plane involved in the crash), and provides various limitations on coverage for that aircraft. The second paragraph of that endorsement provides:

> 2. The Limit of Liability as respects Coverage B shall be as follows:
>
> A. As respects Passenger Carrying for Hire, the Limit of Liability shall be as stated on the Declarations Page of this policy, $5,000,000. Each Occurrence.
>
> B. As respects Cargo Carrying, the Limit of Liability shall be $5,000,000. Each Occurrence subject to $100,000. Each Passenger on one (1) non-revenue seat.

In interpreting an insurance policy, this Court must attempt to effect the intent of the parties by first reviewing the policy language. When the language is clear and unambiguous on its face and does not offend public policy, this Court must apply the terms as written. *Auto Club Group Insurance Co v Marzonie*, 447 Mich 624, 630-631; 527 NW2d 760 (1994). An ambiguity exists if the words of the policy may reasonably be understood in different ways. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). However, a policy is not ambiguous simply because it does not define a term. Instead, absent a policy definition, terms are given their common meaning.

Defendants argue that, because N38BC is the only plane designated by an asterisk, it is the only plane to which the Endorsement #5 limitation of liability applies. Reading the policy as a whole, we find this to be an unreasonable interpretation of the contract. Instead, the asterisk is a reference to ¶ 1 of Endorsement #5, which places special restrictions on plane N38BC.[1] To interpret the remaining provisions of Endorsement #5 as applying only to plane N38BC would create an ambiguity where none existed. For example, the language of ¶ 2 of Endorsement #1 indicates that N38BC has no passenger capacity, yet Endorsement #5 refers to "Passenger Carrying for Hire" and "Expenses incurred for search and rescue of passengers and crew." In addition, Endorsement #5 provides for differing limits of liability for Coverage B in ¶¶ 1 and 2. Accordingly, we find that Endorsement #5, exclusive of ¶ 1, unambiguously applies to the plane involved in this accident.

Second, plaintiff disputes the trial court's finding that "the airplane was not cargo carrying and [Neuman] was a passenger for hire." We agree with plaintiff that this finding was clearly erroneous. Paragraph 2A of Endorsement #5 limits liability,"[a]s respects Passenger Carrying for Hire" to $5,000,000 each occurrence. Paragraph 2B limits liability, "[a]s respects Cargo Carrying," to

$5,000,000 each occurrence subject to $100,000 each passenger on one non-revenue seat.[2] The portions of the policy submitted to this Court do not define the terms "Passenger Carrying for Hire," "Cargo Carrying," or "non-revenue seat." Thus, these terms must be given their common meaning. *Marzonie*, *supra* at 630-631. With respect to ¶ 2A, a genuine issue of fact does not exist regarding whether the plane was "Passenger Carrying for Hire" at the time of the accident. Although Jetstream may have received some benefit from allowing Neuman to join flights while "building time," it cannot reasonably be said that Neuman "hired" Jetstream's plane or that any such benefit amounted to a "contribution" to Jetstream's operation. Instead, the relationship between Neuman and Jetstream was essentially gratuitous and any benefit to Jetstream was merely incidental. Nor was there a contractual agreement between Neuman and Jetstream to establish "passenger for hire" status. Thus, ¶ 2A is inapplicable under these facts.

Instead, we conclude that ¶ 2B applies in this matter. Read reasonably as one complete sentence, we find no ambiguity: When a covered aircraft is configured to carry cargo, the limit of liability is $5,000,000 each occurrence subject to $100,000 each passenger on one non-revenue seat. It is undisputed here that the plane was configured to carry cargo, but was not carrying cargo at the time of the accident. Defendants argue that ¶ 2B applies only when the plane is actually carrying cargo. This interpretation is unreasonable given that, for purposes of insurance liability coverage, there is nothing to distinguish a cargo laden flight from an empty flight on its way to pick up cargo or an empty return flight. Furthermore, under defendants' interpretation, neither ¶ A nor ¶ B would apply to a plane which, although not carrying passengers, was also not carrying cargo. Such an unreasonable interpretation is to be avoided.

Accordingly, we conclude that the trial court erred in granting defendants' motion for summary disposition. Plaintiff was entitled to summary disposition pursuant to MCR 2.116(C)(10) as a matter of law.

Reversed and remanded for entry of a declaratory judgment in favor of plaintiff.

/s/ Henry W. Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth

[1] Apparently, there is a typographical error in the policy here. The asterisk appears next to plane N38*CB*, but paragraph 1 of Endorsement #5 refers to plane N38*BC*. However, neither party cites this discrepancy as a basis for appeal.

[2] We note that some readers of Endorsement #5 may have been misled to believe that the decimal points used in the monetary figures were grammatical periods, creating several short nonsensical sentences, rather than one complete sentence.