STATE OF MICHIGAN

COURT OF APPEALS

MARTIN WILLIAM PARKER,

Plaintiff-Appellant,

v

STATE FARM FIRE & CASUALTY COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 21, 1997

No. 177778
Wayne County Circuit Court
LC No. 93-310310-CK

Before: Jansen, P.J., and Hoekstra and D. Langford-Morris,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a July 22, 1994, order of the Wayne Circuit Court denying plaintiff's motion for summary disposition and dismissing this declaratory judgment action. We affirm.

This case arises from a motorcycle/van accident which occurred on August 14, 1991, at approximately 11:40 p.m. in the City of Hamburg. Plaintiff Martin Parker was riding his 1973 Honda motorcycle westbound on M-36 near the intersection of Chilson Road. William Gargin, who was driving a 1983 Ford van, drove out of a parking lot and collided with plaintiff. Plaintiff was seriously injured as a result of the accident.

The van had been purchased by Seyed Sam from Brian Deuitch before the collision for $2,000. However, Sam had not recorded or transferred the new title before the accident. Sam was the owner and president of K.T. Opportunity, Inc. (K.T.). Gargin was an independent contractor working under contract to K.T. at the time of the accident. K.T. was a business engaged in the sales of Kirby cleaning equipment. At the time of the accident, defendant State Farm Fire & Casualty Company (State Farm) provided multiple insurance policies to K.T. and Sam. However, the van was insured with Automobile Club Insurance Association (ACIA) under Sam's name only.

Plaintiff brought this suit seeking damages for the injuries he received in the accident. On February 1, 1993, plaintiff and Sam entered into a settlement agreement. Pursuant to the terms of the

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

settlement agreement, plaintiff was to receive $175,000. Plaintiff did receive $100,000 from ACIA, the insurer of the van. However, plaintiff reserved the right to pursue to remaining $75,000 by filing a declaratory judgment action against State Farm. Plaintiff alleges that State Farm is obligated to compensate him for the remaining $75,000 under the terms of several insurance policies.

On March 15, 1994, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that there was no genuine issue of any material fact and that he was entitled to judgment as a matter of law. At the hearing, the trial court admitted confusion concerning the language of the policies. The trial court ultimately denied plaintiff's motion for summary disposition, found that there was no coverage under any of the policies, and dismissed the case.

On appeal, plaintiff raises five issues. He argues that defendant is required to provide coverage under the terms of an umbrella liability policy, that defendant is required to provide coverage under the terms of a special form 3 business policy, that defendant is required to provide coverage under the terms of the automobile policies, that defendant is liable for the negligent acts of Gargin, and that public policy mandates that the insurance contracts be enforced.

In this case, we must scrutinize the various insurance policies and determine whether any of the policies could provide coverage under the facts of this case. When interpreting insurance policies, we follow the well-established rules of construction enunciated by our Supreme Court:

> 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. Accordingly, the court must look at the contract as a whole and give meaning to all terms. Further, "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." This Court cannot create ambiguity where none exists. [*Auto-Owners Ins Co v Churchman,* 440 Mich 560, 566-567; 489 NW2d 431 (1992).]

We first consider the umbrella liability policy issued by defendant to K.T. Even assuming that coverage exists (that Sam was acting as an officer when he permitted an independent contractor to use his own van to act in furtherance of K.T.), the umbrella, or excess, nature of the policy precludes coverage. The insurance policy contains the following relevant portions:

> **COVERAGE L - BUSINESS LIABILITY**
>
> If you are legally obligated to pay damages for:
>
> 1. bodily injury;
>
> 2. personal injury . . .

to which this insurance applies, we will pay your net loss minus the retained limit. Our payment will not exceed the amounts shown in the Declarations for Coverage L - Business Liability.

"Retained limit" is defined in the policy as:

15. retained limit means the greater of:

a. the sum of:

(1) the amount of the underlying insurance applying to any claim or suit; and

(2) the amount of any other underlying insurance collectible by the insured; or

b. the amount shown in the Declarations for Retained Limit.

"Underlying insurance" is also defined in the policy as:

17. underlying insurance means the insurance in the Declarations as such.

The declarations page states that coverage amounts for automobile liability and bodily injury as "$500,000/$500,000." The underlying insurance amount would be $500,000 according to the declarations page.

Here, plaintiff collected $100,000 from ACIA, and the net loss was $75,000. Under the terms of the policy, defendant would be obligated to pay the net loss ($75,000) minus the retained limit. Since the retained limit ($500,000) is greater than the net loss, there is nothing for defendant to pay out. Such an excess policy, not being otherwise invalid or against public policy, must be enforced as written. See *St. Paul Fire & Marine Ins Co v American Home Assurance Co,* 444 Mich 560; 514 NW2d 113 (1994); *Morbark Industries, Inc v Western Employers Ins Co,* 170 Mich App 603; 429 NW2d 213 (1988). Therefore, the umbrella policy is not applicable and plaintiff cannot collect under the umbrella policy.

Next, plaintiff argues that defendant is required to provide coverage under the terms of a business policy providing that the insured is liable for negligent acts involving a vehicle not owned by the insured. The "Designation of Insured" portion of the policy provides:

1. If you are designated in the Declarations as:

a. an individual, you and your spouse are insureds but only with respect to the conduct of a business of which you are the sole owner.

With respect to coverage, the policy provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury, property damage, personal injury** or **advertising injury** to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplemental Payments. This insurance applies only:
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> * * *
>
> 2. to **personal injury** caused by an **occurrence** committed in the **coverage territory** during the policy period. The **occurrence** must arise out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

Although we agree with plaintiff that there is a material factual dispute with regard to whether the incident involved the use of the van in both Sam's and Gargin's business, we find that the following exclusion precludes coverage under this insurance policy:

> Under Coverage L, this insurance does not apply:
>
> * * *
>
> 7. to **bodily injury** or **property damage** arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or rented or loaned to any insured . . . .
>
> This exclusion does not apply to :
>
> * * *
>
> e. **bodily injury** or **property damage** arising out of the use of any non-owned auto in your business by any person other than you . . . .

Further, a non-owned auto is defined as "any auto that you do not own, lease, hire or borrow which is used in connection with your business."

Under this exclusion, if Sam owns the van, or leased, hired or borrowed it, then no coverage exists. Sam purchased the van before the collision for $2,000. The prior owner signed the title over to Sam and gave Sam possession of the van and the title. Sam never applied for or received a new title in his name, however, he did insure the van with ACIA. The insurance policy showed the owner and named insured as Seyed Sam. Transfer of title will signify the transfer of ownership. *Goins v Greenfiled Jeep Eagle,* 449 Mich 1, 13-14; 534 NW2d 467 (1995). Title transfers when there has been an execution of either the application for title or the certificate of title. MCL 257.233(5); MSA 9.1933(5). This, in fact, did not happen at the time of the collision, therefore, Deuitch, a non-owner under the policy, would still be considered the owner of the van. *Goins, supra*, pp 12-14. Moreover,

the van was being leased, hired, or borrowed by Sam to Gargin, an independent contractor, at the time of the collision.

Accordingly, we conclude that the business policy does not provide coverage under the terms of its exclusion.

Next, plaintiff argues that defendant is required to provide coverage under the terms of five separate automobile policies, each of which provided coverage for a "non-owned" car.

Under these auto policies, K.T. is the insured. The policies contain a specific restrictive definition of an insured for purposes of liability of a non-owned car. The policies provide:

> **Coverage for the Use of Other Cars**
>
> The liability coverages extend to the use, by an *insured,* of a *newly acquired car,* a *temporary substitute car* or a *non-owned car.*
>
> * * *
>
> When we refer to a *non-owned car, insured* means:
>
> 1. the first *person* named in the declarations;
> 2. his or her *spouse;*
> 3. their *relatives;* and
> 4. any *person* or organization which does not own or hire the car but is liable for its use by one of the above *persons.*

Because K.T. is a corporation, it may only be an insured for purposes of the non-owned car liability if K.T. does not own or hire the car and is liable for its use by the first person named in the declaration, his or her spouse, or their relatives. The record is clear that K.T. does not own the van. Therefore, the auto insurance policies cannot apply to provide coverage because K.T. is not an insured of a non-owned car within the meaning of the policies.

Accordingly, there is no coverage provided by any of the automobile policies in this case.

Next, plaintiff argues that defendant is legally liable for the negligent acts of Gargin by the terms of the independent contractor agreement, the doctrine of retained control, and the owner's liability statute, MCL 257.401; MSA 9.2101.

We cannot agree with plaintiff's contention in this regard. There is no liability on defendant's behalf under any of the insurance policies. We have already determined that the insurance policies, by their terms, do not provide coverage in this case. Because the insureds on the policies are not legally

liable for the negligent acts of Gargin, defendant is not liable to provide any coverage. Therefore, whether Gargin was an employee or independent contractor of K.T. is irrelevant. Similarly, for the reason that the insurance policies do nor provide coverage by their terms, the owner's liability statute, MCL 257.401; MSA 9.2101 is also not relevant because whether K.T. is liable or not, defendant is not obligated to provide coverage under any of the insurance policies.

Finally, plaintiff argues that public policy mandates that insurance contracts be enforced where the contract clearly contemplates covering all business activities. We do not agree with plaintiff's argument. The insurance policies are not ambiguous. Where the language in the insurance policy is clear, the court is bound by the specific language set forth in the policy. *Heniser v Frankenmuth Mutual Ins Co,* 449 Mich 155, 160; 534 NW2d 502 (1995). Terms in an insurance policy must be given their plain meaning and the court cannot create an ambiguity where none exists. *Id.,* p 161. Further, an insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy. *Id.* Also, clear and specific exclusions must be given effect because an insurance company cannot be held liable for a risk it did not assume. *Churchman, supra,* p 567.

The language of the policies simply do not provide for coverage in this case by their clear and specific terms. We find no ambiguity in the policies, and there is no case law or statutes indicating that the insurance policies are somehow in contravention of public policy. Because the policies clearly indicate that they will not provide coverage in this case, we cannot agree with plaintiff's contention that Sam reasonably expected that the policies would provide coverage regarding the collision involving his van.

Accordingly, we find that the trial court did not err in granting summary disposition in favor of defendant in this case. The insurance policies at issue do not provide coverage by their clear and unambiguous terms.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Denise Langford-Morris