STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BERTRAND, Personal Representative of the ESTATE OF RANDALL LYNN BERTRAND, PHILLIP BOOKER by his next friend JACQUELYN CIUFO, and GREGORY MOGA d/b/a HUNGRY HOWIE'S STORE #10,

Plaintiffs-Appellees,

v

PACIFIC EMPLOYERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 190551
Washtenaw Circuit Court
LC No. 94-003143-CK

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from a declaratory judgment in which the trial court ordered defendant to defend and indemnify plaintiff Gregory Moga d/b/a Hungry Howie's Store #10 in underlying tort suits initiated by plaintiffs Bertrand and Booker. We reverse and remand.

This case arises out of an automobile-pedestrian accident in Ypsilanti, where Joseph Shock, while using his father's automobile to deliver pizzas, struck plaintiffs Bertrand and Booker, killing Bertrand and severely injuring Booker. Following the accident, Bertrand's estate and Booker, by his next friend, filed separate actions against both plaintiff Moga and Shock. After service of the complaints, plaintiff Moga made written demand upon defendant, its commercial general liability insurer, to defend and indemnify it in the underlying actions. Defendant refused, however, claiming that the event giving rise to plaintiff Moga's alleged liability fell within a policy exclusion relating to automobile use. Particularly, defendant contended that the claim arose out of the use of an automobile by an employee of Moga, while the employee was acting within the scope of his employment, an event specifically excluded from coverage. A factual dispute exists whether Shock was acting within the scope of his employment at the time of the accident.

Following a bench trial on the issue of coverage, the trial court ordered defendant to pay any damages which plaintiff Moga becomes obligated to pay as a result of adverse verdicts in the underlying tort actions. The trial court premised its decision on its conclusion that the applicable exclusionary provision was ambiguous, and therefore, the trial court construed the policy against defendant, the drafter of the policy, and in favor of plaintiff Moga.

Defendant first argues that plaintiffs Bertrand and Booker lacked standing to initiate the instant declaratory relief action. However, assuming the existence of a case or controversy within the subject matter of the court, the determination to make a declaration of rights is ordinarily entrusted to the discretion of the trial court. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993).

Although plaintiffs Bertrand and Booker initiated the instant action, plaintiff Moga was joined in seeking the declaration of the parties' rights. It is incontestable that plaintiff Moga had standing to litigate the question of coverage with respect to the insurance policy. See *Group Ins Co v Morelli*, 111 Mich App 510, 515; 314 Mich App 672 (1981) ("[O]ur literature abounds with case law where the insured or the insurer has sought a declaratory action to determine the issues of coverage."). A question remains, however, whether plaintiffs Bertrand and Booker should have been allowed to remain in the action.

MCR 2.605(1) requires that an "actual controversy" exist between the parties to a declaratory relief action; however, our Supreme Court has stated that "it is essential in an action for declaratory judgment that all parties having an apparent or possible interest in the subject matter be joined so that they may be guided and bound by the judgment." *Hayes*, *supra* at 66. Further, the Court in *Hayes* noted that the purpose of the rule providing for declaratory relief is to afford parties the opportunity to avoid multiple litigation. *Id.*, 64-65. Therefore, the declaratory judgment rule is to be "liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to people." *Id*. Further, the Court noted that "the declaratory remedy is an especially appropriate vehicle for resolving insurance coverage disputes." *Id*. Given the liberal construction of the court rule and the collateral estoppel implications relied upon by the trial court in making its decision, we cannot say that the trial court abused its discretion in allowing plaintiffs Bertrand and Booker to remain in the action.

Defendant next argues that the trial court erred in declaring that defendant must indemnify plaintiff Moga for damages which might be awarded in the underlying tort suits. We agree. Our review of a declaratory judgment is de novo. *Englund v State Farm Mutual Ins Co*, 190 Mich App 120, 121; 475 NW2d 369 (1991).

The applicable insurance policy provides that defendant will indemnify the insured for damages he becomes legally obligated to pay for bodily injury or property damage. However, under an exclusion to the policy, there is no coverage for

> "[b]odily 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.

Under the policy, an employee acting within the scope of his employment is an insured.

Generally, the insured bears the burden of proving coverage, while the insurer must prove that an exclusion to the coverage is applicable. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 424-425; 531 NW2d 168 (1995) (Boyle, J., concurring). In the instant case, however, defendant conceded at trial, and again on appeal, that the accident fell within the terms of the insuring agreement. Therefore, plaintiffs' burden was discharged, and we must only determine whether the trial court erred in concluding that defendant failed to satisfy its burden of establishing the applicability of the coverage exclusion.

Although the trial court did not explicitly state that it premised its decision on its conclusion that the term "employee," as used in the policy, was ambiguous, it cites *Arrigo's Fleet Service Inc, v Aetna Life & Casualty Co*, 54 Mich App 482; 421 NW2d 206 (1974), and *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 (1991), where this Court and our Supreme Court, respectively, discussed at length the concept of ambiguity in insurance policy interpretation. Therefore, we agree with defendant that the trial court's decision turned on its conclusion that the term "employee" was ambiguous.

An insurance contract is ambiguous if, after reading the entire contract, its language can be reasonably understood in differing ways. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991). Any ambiguity must be construed against the insurer, who is the drafter of the contract. *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996). While defendant acknowledges that the policy fails to define the term "employee," it argues that the term has a common and plain meaning that Michigan courts have had little difficulty applying. We agree.

In *Kral v Patrico's Transit Mixing Co*, 181 Mich App 226, 230-231; 448 NW2d 790 (1989), a panel of this Court stated that two tests are generally applied to determine whether a particular worker is an employee: the control test, in cases involving vicarious liability, and the economic reality test, in cases involving worker's compensation. However, the contractual language of an insurance policy is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Bianchi, supra* at 75 n 1. The plain and ordinary meaning of the term "employee" is discernible from several sources. The *American Heritage Dictionary, Second College Edition*, defines the term "employee" as "[a] person who works for another in return for financial or other compensation." Black's Law Dictionary, (6th ed), p 525, says that an employee is "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control or direct the employee in the material details of how the work is to be performed." Further, we find particularly persuasive the decision of the Court of Appeals for the Seventh Circuit in *American Casualty Co v Wypior*, 365 F2d 164, 166-67; (CA 7, 1966), where it stated:

> When the word "employee" appears in a contract of insurance and it is not defined in the policy, it must be construed in a manner most likely to correspond to the

> intention of the parties to the contract. The intention fairly attributable to the insurer and the insured, from an objective standpoint and in the absence of a contrary indication, *should therefore reflect the ordinary meaning of the word as it is understood by persons generally and should highlight the characteristics which the law most often attributes to employment*. [Emphasis added.]

The "ordinary meaning of the word as it is understood by persons generally" is captured best in the dictionary definitions reproduced above. Further, through a survey of cases dealing with vicarious liability and worker's compensation, we find that the characteristics which Michigan courts most often attribute to employment are as follows: whether the employer has control over the worker's duties; whether the employer compensates the worker; whether the employer possesses a right to hire, fire, and discipline the worker; and whether the performance of the worker's duties are an integral part of the employer's business toward the accomplishment of a common goal. See *Williams v Cleveland Cliffs Iron Co*, 190 Mich App 624, 627; 476 NW2d 414 (1991).

Although there is a factual dispute whether Shock was an employee of plaintiff Moga at the time of the accident, we find that, in light of the common and plain meaning of the term "employee," the trial court erred in construing the policy against defendant. Accordingly, the trial court should have made a definitive finding with respect to Shock's employment status in light of the clear policy language.

Defendant also argues that the trial court erred in concluding that the term "use," as used in the instant insurance policy, is ambiguous as a matter of law. Again, we agree. In *Clarke, supra* at 473-474, our Supreme Court declared that insurance policy language prohibiting liability for personal injuries "arising out of the ownership, maintenance, operation, use, loading or unloading of . . . any motor vehicle" is clear and unambiguous. Because the policy language in *Clarke* is materially identical to the policy language in the instant case, we find that the instant policy language is also unambiguous. Again, the trial court should have made definitive findings of fact regarding whether Moga "used" the automobile, as contemplated by the insurance policy, and applied the unambiguous policy language to that finding of fact.

Defendant also argues that the trial court erred in determining that Pacific had a duty to defend plaintiff Moga in the underlying action. An insurer's duty to defend is broader than its duty to indemnify in that it arises in instances in which coverage is even arguable, though the claim may be groundless or frivolous. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). However, if the policy does not apply, there is no duty to defend. *Protective Nat'l Ins Co v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991). Because the trial court ruled as a matter of law that defendant must indemnify Moga, and the trial court premised that ruling on its erroneous finding of ambiguity in the insurance policy, the trial court erred to the extent that it ordered defendant to pay the cost of plaintiff Moga's defense in the underlying tort suits.

In sum, we remand this case to the trial court with instructions that it apply the common and plain meaning of the term "employee," restated herein, and the language of the exclusionary provision containing the term "use," as written, to the facts of the case. The trial court should consider the

evidence and make a definitive finding regarding Shock's employment status with plaintiff Moga at the time of the accident. Moreover, the trial court should also consider defendant's alternative theory that plaintiff Moga, in its own right, "used" Shock's vehicle, thereby placing the accident within the exclusionary provision of the policy.

Reversed and remanded. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Janet T. Neff