

STATE OF MICHIGAN
COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

UNPUBLISHED
March 30, 2010

Plaintiff-Counter-
Defendant/Appellee,

v

No. 285265
Allegan Circuit Court
LC No. 07-041581-NI

CHRISTOPHER SNEDEN,

Defendant,

and

TABER MCCOMISKEY, Guardian for JULIE M.
MCCOMISKEY, TABER MCCOMISKEY,
Personal Representative of the ESTATE of
TAYLEN MCCOMISKEY, and TABER
MCCOMISKEY,

Defendants-Counter-
Plaintiffs/Appellants.

Before: BECKERING, P.J., and WILDER and DAVIS, JJ.

PER CURIAM.

In this declaratory judgment action involving an automobile liability insurance coverage dispute, defendant/counter-plaintiff Taber McComiskey, in his personal and representative capacities, appeals by leave granted from the circuit court's final judgment, and from its order denying his motion for summary disposition, and granting plaintiff/counter-defendant Progressive Michigan Insurance Company's (Progressive's) motion for summary disposition. We reverse.

In September 2006, a milk truck being driven by defendant Christopher Sneden rear-ended a vehicle being driven by Julie McComiskey, Taber McComiskey's wife. Taber and Julie McComiskey were injured, and Julie McComiskey's passenger, Taylen McComiskey, their son, was fatally injured. At the time of the accident, Sneden was driving the milk truck as part of his work for a milk hauling service.

The parties do not dispute that Sneden was at fault in the accident. The parties also agree that the milk truck weighed over 12,000 pounds, and that the car driven by Julie McComiskey weighed under 10,000 pounds. Progressive insured Sneden's personal vehicle at the time of the accident, including liability coverage.

Before Progressive filed this declaratory judgment action, Taber McComiskey filed an action against Sneden to recover for injuries to him and his wife, and for the death of their son (who was 16 months old when he was killed in the accident). In that personal injury action, the insurer of the owner of the vehicle (the milk hauling service) paid its policy limits.

The Progressive policy's relevant part is part I, covering "liability to others." Part I contains the insuring agreement, the heart of the liability insurance portion of the policy. The insuring agreement states:

[W]e will pay damages . . . for bodily injury and property damage for which an insured person becomes legally responsible because of an accident arising out of the:

1. ownership, maintenance, or use of a vehicle; or
2. use of any trailer while attached to a:
 - a. covered vehicle; or
 - b. non-owned vehicle operated by an insured person. [Bolding of words defined in the policy omitted.]

While there is no dispute that Sneden is legally responsible to pay damages to the McComiskeys, Progressive asserts that Sneden is not an insured person under its policy with respect to this accident. Under the Progressive policy, an insured person includes, in relevant part: "you *with respect to an accident arising out of the maintenance or use of any vehicle* with the express or implied permission of the owner of the vehicle." (Bolding of words defined in the policy omitted; italics added.) And the policy, in its Michigan Motor Vehicle Policy Endorsement, defines "vehicle" as follows:

"Vehicle" and "vehicles" mean a land motor vehicle:

- a. of the private passenger, pickup body, or sedan delivery type;
- b. designed for operation principally upon public roads;
- c. with at least four wheels; and
- d. *with a gross vehicle weight rating of 12,000 pounds or less*, according to the manufacturers specifications.

However, "vehicle" and "vehicles" do not include step-vans, parcel delivery vans, or cargo cutaway vans or other vans with cabs separate from the cargo area. [Bolding indicating defined terms omitted; italics added.]

The McComiskeys moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that Sneden was covered under the Progressive policy because the policy language, “arising out of the ownership, maintenance or use of a vehicle,” did *not* state that the vehicle involved had to be driven “by the insured,” and because this accident arose out of the use of the McComiskey vehicle, which qualified as a vehicle because it weighed under 10,000 pounds.

The McComiskeys also filed a counter-complaint against Progressive, for breach of contract, declaratory relief, and penalty interest. The McComiskeys argued, among other things, that they are entitled to relief as third-party beneficiaries of the insurance contract. Progressive filed an answer to the counterclaim, with affirmative defenses, which included that the McComiskeys lacked standing and legal capacity to bring the counterclaims.

Progressive also answered the motion for summary disposition, and made, in its brief, a countermotion for summary disposition, under MCR 2.116(I)(2). Progressive argued that Sneden was not an insured person with respect to this accident, because he was not driving a vehicle as defined in the policy.

The circuit court denied the McComiskeys’ motions, and granted Progressive’s motion. It agreed with Progressive that because the milk truck did not qualify as a vehicle under the policy definition, Sneden was not an insured person as defined in the policy, with respect to this accident.

The McComiskeys later filed a motion for summary disposition under MCR 2.116(C)(9), in which the McComiskeys sought, in part, a ruling on the standing and legal capacity defenses asserted by Progressive. The McComiskeys argued that they did have standing, and legal capacity to sue, as evidenced by Progressive naming them as defendants. The circuit court entered an order that, among other things, held that the McComiskeys’ motion for summary disposition regarding standing and legal capacity was moot, because there was no insurance coverage.

The McComiskeys filed a claim of appeal. Progressive filed with this Court a motion to dismiss for lack of appellate jurisdiction, based on the alleged untimeliness of the claim of appeal. This Court denied the motion to dismiss, treated the claim of appeal as an application for leave to appeal, and granted it. *Progressive Michigan Ins Co v Sneden*, unpublished order of the Court of Appeals, entered October 24, 2008 (docket no. 285265).

The McComiskeys argue that the trial court erred in granting summary disposition, and in interpreting the insurance policy. We agree.

We review summary dispositions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Absent disputed facts, an unambiguous written contract’s interpretation is a question of law, reviewed de novo. See *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

A motion for summary disposition under subrule (C)(8) tests the legal sufficiency of the pleadings alone, without consideration of evidence. MCR 2.116(G)(5); *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a

motion made under MCR 2.116(C)(10). *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). Here, the parties relied on documentary evidence, so we proceed under the standards applicable to a motion under subrule (C)(10).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Med Ctr*, 277 Mich App at 56. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.*

Michigan courts enforce contracts, according to their terms, in order to uphold the parties' liberty of contract. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). "Like any other contract, an insurance policy is an agreement between the parties." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). Insurance contracts are subject to the same rules of interpretation that apply to other kinds of contracts. *Rory*, 473 Mich at 461. This Court examines written contract language and gives the words their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). An unambiguous contractual provision reflects the parties intent as a matter of law, and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Michigan courts honor parties' bargains, and do not rewrite them. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811, 816 (2008).

It is undisputed that the McComiskey's vehicle, which was under 12,000 pounds, fits the policy's definition of a vehicle. As such, we conclude that a "vehicle" as defined by the policy was involved in the accident, because the policy does not by its plain language *require that the involved vehicle be driven by its insured*. We respect our limited role in disputes involving unambiguous written contracts. *Quality Products & Concepts Co*, 469 Mich at 375. That is, we are not authorized to rewrite the parties' insurance contract, *McDonald*, 480 Mich at 197, to avoid a result required by the contract that nevertheless the parties may not have anticipated.

It is true, as Progressive argues, that the policy must be read as a whole, as it is a plain-English policy. *Henderson v State Farm Fire & Cas Ins Co*, 460 Mich 348, 356; 596 NW2d 190 (1999), states:

Utilization of plain English in insurance policies and other legal instruments has been on occasion required, but in all cases encouraged, in recent years. This change requires courts to utilize less rigid methods of interpretation than the old densely written policies demand. With this in mind, when faced with plain English phrases in an insurance contract, any attempt to define each element, or word, of the phrase, as the Court of Appeals did, will almost invariably result in an inaccurate understanding of the phrase. Rather, the proper approach is to read the phrase as a whole, giving the phrase its commonly used meaning. This requires a court to give contextual meaning to the phrase, to determine what the phrase conveys to those familiar with our language and its contemporary usage. [Footnotes and citation omitted.]

It is also true that the insuring agreement uses the word vehicle, and defines it. It is obviously correct, and mandatory, to read the policy in light of that definition. *Cavalier Mfg Co v Employers Ins of Wasau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997) (if a policy contains definitions, they must be used for interpreting the policy). But again, the sentence at issue in the insuring agreement would have to be re-written, to add a *whole new phrase*, to reach the result proposed by Progressive. The added phrase would make the insuring agreement read as follows: “We will pay damages . . . for bodily injury and property damage for which an insured person becomes legally responsible because of an accident arising out of the ownership, maintenance, or use of a vehicle *by an insured person . . .*” (Italicized language added.) Again, it is impossible for this Court to re-write the parties’ bargain, *MacDonald*, 480 Mich at 197, to relieve Progressive of a risk it expressly assumed, cf. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). The McComiskeys are entitled to summary disposition, because Sneden is an insured person with respect to this accident.¹

The McComiskeys also argue that the trial court erred in failing to strike Progressive’s affirmative defense asserting that the McComiskeys lack standing. We agree.

This Court reviews summary dispositions de novo. *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Whether a party has standing is a question of law, which this Court reviews de novo. *Nat’l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004); *Lee v Macomb Co Bd of Comm’rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

Standing refers to the right of a party to invoke the power of the court to adjudicate a claimed injury in fact. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). “Standing is the legal term used to denote the existence of a party’s interest in the outcome of the litigation,” and “when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue . . .” *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (internal quotations omitted).

In other words, standing is the right to appear in a particular proceeding. *Solomon v Lewis*, 184 Mich App 819, 822; 459 NW2d 505, 506 (1990), vacated on other grounds 437 Mich 983; 468 NW2d 228 (1991).² To have standing, a party must have a legally protected interest. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007). That legally protected interest must also be in jeopardy of being adversely affected. *Health Central v Comm’r of Ins*, 152 Mich App 336, 347-348; 393 NW2d 625 (1986).

¹ Because Progressive does not argue on appeal that coverage is precluded by the exclusion in the policy for liability arising out of use of a vehicle for a fee, we need not, and do not, decide that issue.

² In *Solomon*, the Michigan Supreme Court vacated the judgment of this Court, and remanded to the circuit court to allow it to rule on the standing issue in the first instance.

Here, the McComiskeys have an undeniable injury in fact. Mr. and Mrs. McComiskey had to witness the death of their 16-month-old son after the accident, which no one disputes was caused by Sneden. Mr. and Mrs. McComiskey suffered their own personal injuries as well. Moreover, Progressive named the McComiskeys as defendants in its declaratory judgment action, thereby conceding that they have standing to dispute whether there is coverage under Progressive's policy. Statements of fact contained in pleadings may constitute admissions for purposes of MRE 801(d)(2). *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63; 454 NW2d 188 (1990). Progressive's naming of the McComiskeys as defendants in its action is, at the least, analogous to a statement of fact that they have an interest in the outcome of the case.

Also, the McComiskeys have an even greater interest in pursuing coverage from Progressive than Sneden may have. The McComiskeys seek substantial damages for the death of their son, and for their own personal injuries. They may obtain more from Progressive, since coverage exists, than they would obtain directly from Sneden (Sneden's assets may not be substantial). Thus, the McComiskeys have a strong interest in counteracting the suit by Progressive, and pursuing their counterclaim.

In addition, *Hayes* strongly supports the McComiskeys' argument. In *Hayes*, Susan Keillor was killed in an accident involving Scott Koppelberger and his vehicle. *Hayes*, 442 Mich at 58. Koppelberger had been drinking at a party hosted by Daniel Hayes. *Id.* William Keillor, Susan's widower, sued Koppelberger, Daniel Hayes, and others. *Id.* Hayes tendered the defense of the action to Allstate, Hayes's father's homeowner insurer. *Id.*

Next, Allstate brought a declaratory judgment action against Hayes, William Keillor, and others. *Hayes*, 442 Mich at 58. Allstate sought a declaration that no coverage existed for Daniel Hayes's alleged actions. *Id.* Keillor answered the complaint by admitting Allstate's allegation that an actual controversy existed among the parties, and asked for a declaration that coverage existed. *Id.* at 59. Hayes did not respond to the complaint, or to a cross-claim by Keillor against him. *Id.* Hayes signed an affidavit stating that he understood the ramifications of not contesting coverage, but that he had chosen not to do so. *Id.* Based on the affidavit, a default judgment was entered against Hayes. *Id.*

Allstate then moved for summary disposition, in part on the basis of the default against Hayes. *Hayes*, 442 Mich at 59. The circuit court granted Allstate's motion, finding no coverage on the basis of an exclusion for criminal activity (Koppelberger was under age), and a motor vehicle exclusion. *Id.* at 60. Keillor appealed to the Court of Appeals, which held that Keillor did not have standing in an action for declaratory judgment to contest the policy coverage, because Keillor was not a third-party beneficiary of the policy. *Id.* at 60-61. Keillor appealed to the Supreme Court, which held that once Allstate began its action for declaratory judgment and alleged that an actual controversy existed between itself and its insured and Keillor, the trial court could declare the rights and duties of all interested parties before it. *Id.* at 61.

So, *Hayes* stands for the proposition that in a declaratory judgment action by a liability insurer, in which the insurer names as a defendant the person injured in the underlying accident, a default judgment against the insured does not deprive the injured person of standing to contest coverage. *Hayes*, 442 Mich at 61. *Hayes* is on point on this issue. It is sufficiently analogous to this case to warrant that we follow its holding here. *Id.* Thus, the McComiskeys have standing to bring their counterclaim, and to contest the issue of insurance coverage. The circuit court

erred in failing to grant summary disposition as to Progressive's affirmative defense of lack of standing.

The McComiskeys also argue that the circuit court erred in failing to strike Progressive's affirmative defense asserting that the McComiskeys lack legal capacity to bring their counterclaims. Again, we agree.

As noted above, we review summary dispositions de novo. *Morden v Grand Traverse Co*, 275 Mich App 325, 331; 738 NW2d 278 (2007). Legal capacity to sue and be sued is a legal doctrine, therefore it may be decided as a question of law. See *Page v Beach*, 134 Mich 51, 55; 95 NW 981, 982 (1903).

The McComiskeys have legal capacity, because Progressive named them as defendants in its declaratory judgment action, thereby conceding that they had capacity to *be* sued. Progressive cites no authority indicating that the McComiskeys would have capacity to *be* sued, but not capacity to *sue* (to counterclaim).³ Under *Hayes*, 442 Mich at 61, which is phrased in broad terms, unless there is a practical distinction between standing and legal capacity (and no such distinction is urged by Progressive on appeal), the McComiskeys have legal capacity to defend against Progressive's suit, and to bring their counterclaim. *Hayes*, 442 Mich at 59-61.

Finally, there is no indication that Taber McComiskey's appointment as guardian for his wife, or his appointment as personal representative for the estate of his deceased son, was defective. For these reasons, we hold that the circuit court erred in failing to grant the McComiskeys' motion for summary disposition regarding Progressive's affirmative defense of lack of standing.

Reversed and remanded for entry of an order of summary disposition in the McComiskeys' favor. Defendants/appellants (the McComiskeys), being the prevailing parties, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis

³ Moreover, a declaratory judgment defendant is typically an injured party (or a party with a developing claim), so when a declaratory judgment plaintiff sues a declaratory judgment defendant, it is an indication that the declaratory judgment plaintiff wants to lessen or eliminate its liability to the declaratory judgment defendant. Thus, being named a declaratory judgment defendant is akin to an admission by the declaratory judgment plaintiff that the declaratory judgment defendant has legal capacity to sue and be sued.