

STATE OF MICHIGAN
COURT OF APPEALS

MARIA C. ABAY, Personal Representative of the
Estate of MIRA E. ABAY,

UNPUBLISHED
August 13, 2009

Plaintiff/Counter-Defendant-
Appellee,

v

No. 283624
Oakland Circuit Court
LC No. 2006-75016-ck

DAIMLERCHRYSLER INSURANCE
COMPANY,

Defendant/Counter-Plaintiff/Cross-
Plaintiff/Third-Party-Appellant,

and

DAIMLERCHRYSLER CORPORATION, a/k/a
CHRYSLER LLC,

Defendant,

and

JAMES E. TRENT and KELLY ROSE BROOKS,

Defendants/Cross-Defendants,

and

AUTO CLUB GROUP INSURANCE
COMPANY, d/b/a AAA MICHIGAN, and ALVIN
JEROME TAYLOR,

Third-Parties.

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully disagree with the majority's interpretation of the policy at issue in this case and would affirm the trial court's conclusion that "Endorsement No. 19 applies in this case and extends liability coverage to non-owned autos operated by Trent or his resident family members." I reach this conclusion because the policy's definition of "you" as the "named insured" when applied in this policy results in violations of the no-fault act. Rather than approving these violations, I believe this Court must reform the definition so that the policy complies with the no-fault act. Such a reformation of the policy language mandates the coverage in question.

This insurance coverage dispute stems from the December 10, 2003 accident that caused the death of Mira Abay. The other vehicle involved in the accident was driven by Kelly Brooks, daughter of James E. Trent. Neither Brooks nor Trent owned the vehicle Brooks was driving at the time of the accident. Abay's estate asserted that Brooks was entitled to "non-owned" vehicle liability coverage under Endorsement No. 19 to Trent's DaimlerChrysler Insurance Company (DCIC) policy which provides liability coverage to "you," defined as "the named insured" and also to any "person[s] related to you" while driving a non-owned vehicle.¹

The sole named insured in the policy is DaimlerChrysler Corporation (DCC). Since by definition DCC, an entity, cannot operate a vehicle and cannot have family members, DCIC maintains that although Endorsement No. 19 is part of the subject policy, the entire endorsement is nugatory. The majority opinion agrees. In my view, that position rests on an analysis that unmoors the endorsement in question from the policy and favors a piecemeal and disconnected approach to policy interpretation rather than one that treats the policy as a whole.

[A]n insurance contract should be read as a whole and meaning should be given to all terms. The policy application, declarations page of the policy, and the policy itself construed together constitute the contract. . . . An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. [*Royal Prop Group, LLC v Prime Ins Syndicate Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005) (internal citations omitted).]

The majority's conclusion that it can resolve this case simply by a "plain and ordinary reading" of the policy provision ignores the reality that this policy is anything but "plain and ordinary" and that both the policy and the relationship of the insurer and the insured are highly complex and out of the ordinary. When considering the entire policy, defining "you" to mean only DCC violates the PIP priority scheme mandated under the no-fault act, places the lessee—who by terms of the lease may not purchase any policy but this one—in violation of his duties under the

¹ The endorsement contains several exclusions, namely no coverage: if the non-owned vehicle is furnished or available for regular use by the insured or a family member; if the vehicle is being used while working in an auto-related business; or if the vehicle is not a private passenger vehicle being used in a business or occupation. These exclusions are not at issue in this case.

no-fault act and renders meaningless multiple policy provisions dealing with relations between the insured and the insurer as well as the entirety of Endorsement No. 19. These real conflicts with the no-fault act should not be ignored.

I. Additional Relevant Facts

Trent, a retired GM executive, leased two vehicles (the Trent vehicles) through the DaimlerChrysler Lease Car Program (the Car Program). This lease program and its insurance scheme involve multiple entities and opaque relationships. The fundamental reality, however, is that DCC is not only the sole named insured on the policy, but is also the de facto insurer of the vehicle.

The policy indicates that it was issued to DCC by DCIC, a property/casualty insurance company licensed to write auto insurance. However, DCIC does not charge or collect any premiums. Instead, it simply provides the license under which DCC acts as its own self-insurer. The DCIC policy is what is referred to as a “fronted” policy. Fronting is “[t]he use of an insurer to issue paper, i.e., an insurance policy, on behalf of a self-insured organization . . . without the intention of bearing any of the risk. The risk of loss is transferred back to the self-insured . . . with an indemnity or reinsurance agreement.”² Here, for example, although the liability limits set forth in the policy are \$5 million, the deductible against which the limits are set-off is also \$5 million. Under this arrangement, even though DCIC is the issuer of the policy, it bears no risk; all the risk is carried by DCC. DCIC performs no insurer functions. In effect, it merely “rents” its license to DCC which performs all of the insurer functions, including drafting and interpreting the policy, collecting premiums and deductibles from individuals participating in the Car Program, administering all policy claims, defending all policy-related lawsuits, paying for all policy-related losses, handling all policy claim appeals, and engaging all vendors who perform-related duties. The reality is that DCC is the insurer.

II. Policy Interpretations

As noted, the policy defines “you” as the “named insured” and, although this is a private vehicle policy rather than a commercial policy, the “named insured” is DCC, not its lessee. This results in a policy that unlawfully shifts the order of priority for insurers for PIP benefits, leaves all lessees in violation of the no-fault act, and renders multiple provisions either meaningless or nugatory.

A. Improper Priority Shifting

Michigan’s statutory PIP priority provisions reflect the Legislature’s decision to make a person’s personal insurance first in line to pay PIP benefits.³ The DCIC policy functions as the

² Glossary of Insurance & Risk Management Terms by Int’l Risk Mgmt Institute, Inc, located at www.irmi.com/online.insurance-glossary/terms/f/fronting.aspx.

³ Priority of PIP coverage for vehicle occupants is set forth in MCL 500.3114, and provides in subsection (1) that “a personal protection insurance policy . . . applies to accidental bodily injury
(continued...) ”

personal insurance of Car Program lessees who pay premiums in return for PIP coverage. Yet, allowing DCC to define itself, rather than its employee, as the “named insured” results in its avoidance of primary PIP responsibility and requires other insurers to pay benefits that they never contemplated assuming because they properly relied on the fact that the lessee owner was required to provide insurance that would be primary. This is at best an aberration that should be corrected rather than approved and may, in fact, be a calculated deception.

The DCIC policy provides for Michigan personal injury protection in Endorsement No. 10. This endorsement provides that personal injury protection benefits will be paid “to or for an insured who sustains bodily injury caused by an accident.” Of course DCC, the named insured, cannot sustain a bodily injury. The endorsement goes on to define “insured” as including a “family member” of the named insured, which again, has no meaning where the named insured is a business entity.

While the policy also defines a PIP “insured” as anyone else occupying the covered auto, it excludes from coverage “anyone entitled to Michigan no-fault benefits as a named insured under another policy.” This shifts the burden of PIP coverage from this policy to the policy on any other vehicle in the same household. For example, A is a DCC employee with a Car Program vehicle. B is A’s wife. Together, they own a second vehicle primarily for B’s use which they insure with company C. Under the DCIC policy, if A or B or any other resident relative is involved in an accident in the Car Program vehicle, they are excluded from PIP coverage under the Car Program policy because they are named insureds under the policy issued by company C for B’s car.⁴

The reality is that DCC never has to pay PIP benefits where there is a second policy in the household. The lessee cannot receive PIP benefits as a named insured under the policy as he is not a named insured. He cannot receive PIP benefits as a family member of the named insured as no one can be a family member of an entity. Finally, his rights under the policy to PIP coverage simply as an occupant do not apply if either he is a named insured or a family member of a named insured on any other policy on any other vehicle. When a lessee or any member of his family is injured while occupying the Car Program vehicle, the Car Program insurance company does not pay as the primary PIP provider if there is another insured car in the household.

Thus, although DCC purports to be providing the required no-fault insurance, its policy actually results in insurers who should be secondary under the no-fault act becoming primary and

(...continued)

to the person named in the policy, the person’s spouse and a relative of either domiciled in the same household.” MCL 500.3114(3) provides that where the motor vehicle is registered in the name of a person’s employer, the policy shall provide primary PIP coverage for the “employee, his or her spouse [and] a relative of either domiciled in the same household.”

⁴ Indeed, even if A were not a named insured under C’s policy on B’s car, the same result occurs, as B’s policy is a household policy, making A a family member, who is excluded under section (C)(7) of the DCC policy.

DCC never has to pay any claims under the policy for PIP benefits anytime the lessee or his family member owns and insures another vehicle. By making itself the sole named insured, DCC avoids its duty to provide PIP benefits required by law.

B. No-Fault Violations by the Lessee

Although DCC is the lessor, it is not the “owner” of the car for purposes of the no-fault act.⁵ Pursuant to MCL 500.3101 and this Court’s holding in *Ball v Chrysler Corp*, 225 Mich App 284, 290; 570 NW2d 481 (1997), it is Trent, as lessee, who is the owner. Accordingly, it is Trent who is required to provide no-fault insurance for the vehicle. Despite his statutory duty to obtain insurance that complied with the no-fault act, however, Trent was not free to choose his insurer or his coverage. Under the Car Program, he was required to purchase the instant policy and his lease payments to DCC included insurance coverage premiums for that coverage even though, as noted, DCC never paid any premiums to DCIC. Finally, even if Trent wanted to purchase insurance that provided him and his family with additional coverage, i.e. coverage that actually complied with the no-fault act, he was barred from doing so under the terms of the Car Program, which prohibited him from securing additional or alternative insurance from other auto insurers. Thus, although Trent is the owner for purposes of the no-fault act and is the person paying for the policy, he is not a named insured.

It is axiomatic that “insurance policies are subject to statutory regulation, and mandatory statutory provisions must be read into them.” *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 417-418; 668 NW2d 199 (2003); *Auto-Owners Ins Co v Martin*, __ Mich App __; __ NW2d __ (Docket No. 281482, issued June 16, 2009) slip op at 4. MCL 500.3101(1) provides, “The owner or registrant of a motor vehicle required to be registered in this state shall maintain security of payment of benefits under personal protection insurance, personal property insurance, and residual liability insurance.” In *State Farm Mut Automobile Inc Co v Enterprise Leasing Co*, 452 Mich 25, 27; 549 NW2d 345 (1996), our Supreme Court held that “[v]ehicle owners . . . are required to provide *primary* coverage for their vehicles and all permissive users of their vehicles (emphasis added).” Therefore, the Car Program, by barring the purchase of any other policy, forces its lessees to violate the no-fault act in the context of PIP coverage.⁶ It may similarly run afoul of the act’s requirement of primary residual liability coverage since the policy provides that DCC’s employees are excluded from such coverage if they “own” the vehicle, which *Ball, supra*, holds that they do.⁷

⁵ DCC is also not the titleholder of the Car Program vehicles. DCC sells the car program vehicles to Gelco Corporation, d/b/a GE Capital Fleet Services, who then leases the vehicles back to DCC. DCC then leases these vehicles to individual employees or retirees.

⁶ The policy also directly contradicts the specific representations made by DCC to the Secretary of State that it will, as a “self-insurer” of these non-commercial, privately owned vehicles, comply with all provisions of the Michigan no-fault act.

⁷ In the instant case, that issue does not arise as Trent was a retiree, rather than an employee.

C. Meaningless Provisions and Nugatory Endorsement

The policy's definition of "you" also renders many other provisions meaningless, particularly since the policy defines "we" and "our" as "the Company providing this insurance," creating the absurd result that both "you" and "we" are the same entity under the policy. The anomaly of the insured and insurer being the same wreaks havoc with the entire policy and belies any notion that the policy can simply be read as "plain language." The policy is replete with provisions that are meaningless, ambiguous or confusing given the identity of "you" and "we." For example, the policy provides:

"you must give us or our authorized representative prompt notice" of an accident or loss;

"you must make no payment without our consent;"

"[you must] immediately send us copies of any request, demand . . .;"

[you must] cooperate with us in the investigation, settlement or defense of the claim or suit;" and

[you must] authorize us to obtain medical records or other pertinent information . . . [and] submit to an examination."

These are but a few examples, as the terms "you," "your," "we," and "our" appear repeatedly throughout the policy. And these provisions cannot be rationally understood unless "you" is interpreted to mean the lessee. Indeed, it is difficult to imagine that DCC would excuse the lessee from any of these duties and would voluntarily provide coverage if the lessee violated them. Thus, for purposes of these provisions, DCC would presumably take the position that "you" means the lessee, while it now asserts that "you" does not mean the lessee insofar as it would make DCC the primary PIP or residual bodily injury insurer for the lessee.

Finally, the majority concludes that an entire endorsement, i.e. Endorsement No. 19, that DCC, both as insured and as the de facto insurer, chose to include in the policy, can simply be read out of existence. A "plain language" approach would suggest that if, as DCIC suggests, the endorsement was intended never to apply and to be completely nugatory, then it simply would not have been included in the policy. This is even more so given that the endorsement is captioned by the phrase "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." Under a "plain language" approach to drafting, the endorsement now claimed to be nugatory would never have been included at all, or at least would have been captioned by the phrase "THIS ENDORSEMENT DOES NOT CHANGE THE POLICY AND DOES NOT APPLY. DO NOT BOTHER TO READ IT."

D. *Pavolich*

The majority relies on *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378; 591 NW2d 325 (1998). However, that case presented very different facts and policy provisions than the ones involved in the present case. In *Pavolich*, the insurer was the Michigan Township Participating Plan and the vehicle insured was a township vehicle used for township

purposes. It did not involve a privately leased vehicle for personal use. The named insured was the Township of Linden (the township), not the lessor of the vehicle. No premiums were paid by employees; all premiums were paid by the township and the sole policy provision that was affected was a non-mandatory coverage.⁸

The *Pavolich* policy differed from the instant policy in numerous ways and avoided many, if not all, of the concerns set forth in this opinion. First, the insured and the insurer were distinct and wholly separate entities. Second, the township policy provided for proper PIP priorities under the no-fault act. Third, the vehicle in *Pavolich* was only driven by township employees on township business. Fourth, the policy in *Pavolich* was a true commercial policy and not a hybrid commercial and personal property. Fifth, the township employees in *Pavolich* did not pay any premiums and could not have been under the impression that the policy provided them with coverage when in any other vehicle.

In addition, when the *Pavolich* Court found that the policy definition rendered the uninsured motorist provision surplusage, it examined cases from other jurisdictions for guidance on whether that required interpretation of the policy beyond that language.⁹ The Court cited several cases in which other states approved the view that the provision was surplusage and so declined to reform the contract. However, many of these same states have concluded that, where an entire endorsement, rather than an isolated provision, would be rendered surplusage, the contract must be reformed. See *Greenbaum v Travelers Ins Co*, 705 F Supp 1138, 1142 (ED Va, 1989) (“the court must give meaning and effect to the individual named insured endorsement as an integral part of the agreement between the parties. Having appended the endorsement to the policy, Travelers cannot be allowed to now argue it is meaningless.”); *Apgar v Commercial Union Ins Co*, 683 A2d 497 (Me, 1996); *Home Folks Mobile Homes, Inc v Meridian Mut Ins Co*, 744 SW2d 749, 750 (Ky App, 1987) (Holding that an “ambiguity [is] created by the inclusion of the endorsement in the policy which by its own terms would never have any effect.”); *Purcell v Allstate Ins Co*, 310 SE2d 530, 533 (Ga App, 1983) (Concluding that there was no reason to include an “individual named insured” endorsement if the intent of the policy was to cover only a business auto and not extend any personal coverage); *Kissoondath v Safeco Ins Co*, unpublished opinion of the Minnesota Court of Appeals, issued November 19, 1996 (Docket No. CX-96-1462) (Holding that where a policy lists a company as the named insured, but the policy speaks to the named insured as an individual and includes an endorsement for an individual named insured, “the policy is facially ambiguous” and is construed against the insurance company to provide coverage).

⁸ The majority correctly notes that the non-owned vehicle coverage at issue here is also a non-mandatory coverage. However, since we are to read the policy as a whole, we cannot simply ignore the fact that applying that definition voids coverages that are mandatory.

⁹ The Court also noted that if the township was paying premiums for illusory coverage, it could sue the insurer. Thus, in *Pavolich*, there was at least a mechanism by which the illusory coverage could be challenged and the insurer required to at least refund premiums. In the instant case, DCC has designed the policy so that there is no actual “named insured” that would have an interest contrary to the insurer.

E. Conclusion

For these reasons, I conclude that in this factual context, the policy definition of “you” violates the no-fault act and must be rewritten so as to conform with that act. Specifically, under this policy, “you” must be defined as “Daimler Chrysler Corporation and/or the person to whom DCCC leases the vehicle.” Thus, I would affirm the trial court’s conclusion that endorsement 19 provides coverage to Trent and his “family member[s]” as defined in the policy.

IV. Resident of Household

The finding that Endorsement No. 19 provides for non-owned auto liability coverage to Trent’s “family member[s]” is not dispositive of this case as the endorsement’s definition of “family member” requires that the family member also be a “resident of your household.” The trial court granted summary disposition to plaintiff on this issue finding as a matter of law that Brooks was a resident of Trent’s household. Because the majority concluded that Trent was not an insured, it did not address whether the trial court erred in this conclusion. In light of the majority’s reversal on the scope of the policy and its entry of judgment for defendant, I also do not reach this issue.

/s/ Douglas B. Shapiro