

STATE OF MICHIGAN
COURT OF APPEALS

MARIE HUNT, Personal Representative for the
ESTATE OF EUGENE HUNT,

UNPUBLISHED
October 5, 2004

Plaintiff/Counter-Defendant-
Appellee,

v

No. 246366
Bay Circuit Court
LC No. 96-003280-NI

ROGER DRIELICK, ROGER DRIELICK
TRUCKING, COREY DRIELICK,

Defendants/Counter-
Plaintiffs/Cross-Plaintiffs/Third-
Party Plaintiffs,

GREAT LAKES CARRIERS CORP and GREAT
LAKES LOGISTICS & SERVICES INC,

Defendants/Cross-Defendants,

MERMAID TRANSPORTATION INC,

Defendant,

SARGENT TRUCKING INC,

Defendant/Cross-Plaintiff,

THOMAS LUCZAK and NOREEN LUCZAK,

Third-Party Defendants/Counter-
Defendants,

and

EMPIRE FIRE & MARINE INS CO,

Garnishee-Appellant.

THOMAS LUCZAK and NOREEN LUCZAK,

Plaintiffs-Appellees,

v

ROGER DRIELICK, ROGER DRIELICK
TRUCKING, COREY DRIELICK, GREAT
LAKES CARRIERS CORP, GREAT LAKES
LOGISTICS & SERVICES INC, MERMAID
TRANSPORTATION INC, and SARGENT
TRUCKING INC,

Defendants,

and

EMPIRE FIRE & MARINE INS CO,

Garnishee-Appellant.

No. 246367
Bay Circuit Court
LC No. 96-003328-NI

JAMES BRANDON HUBER,

Plaintiff-Appellee,

v

ROGER DRIELICK, ROGER DRIELICK
TRUCKING, COREY DRIELICK, GREAT LAKES
CARRIER CORP, GREAT LAKES LOGISTICS &
SERVICES INC, MERMAID TRANSPORTATION
INC, and SARGENT TRUCKING INC,

Defendants,

and

EMPIRE FIRE & MARINE INS CO,

Garnishee-Appellant.

No. 246368
Bay Circuit Court
LC No. 97-003238-NI

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Garnishee-appellant Empire Fire and Marine Insurance Co. (“Empire”) appeals as of right from three writs of garnishment sought by Great Lakes Carrier Corp. (“Great Lakes”) and Sargent Trucking, Inc. (“Sargent”), and payable to plaintiffs Marie Hunt, Thomas and Noreen Luczak (the “Luczaks”), and James Brandon Huber, to collect on consent judgments entered in Docket Nos. 246366, 246367, and 246368. The writs of garnishment continued after a hearing on Empire’s motion to quash. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Following a multi-vehicle accident in which defendant Corey Drielick was driving a Drielick Trucking semi truck bobtail,¹ Ms. Hunt filed suit on behalf of her deceased husband, Eugene, on March 21, 1996, and the Luczaks and Mr. Huber filed suit on or after March 28, 1996.² At the time of the accident, Corey was heading to the Great Lakes yard to pick up a load to transport and was about a half mile away from his destination.

Defendant Roger Drielick contacted the insurance carrier for his trucking company, Empire, regarding the lawsuits. Empire had issued a non-trucking use, or bobtail, policy to Drielick Trucking. The policy covered damages and liability when the semi truck was not engaged in the business of hauling a trailer or under lease to a carrier. Empire denied coverage and refused to defend, based on the policy’s business use exclusion, claiming that the truck was under lease to or being used in the business of Great Lakes at the time of the accident, and under the named driver exclusion. The policy excluded Corey as a covered driver.

Following settlement negotiations, all plaintiffs settled with Great Lakes and Sargent and entered into a covenant to dismiss the suit against Great Lakes and Sargent and/or their insurance carriers. The settlement agreements did not release the Drielicks and expressly indicated that all plaintiffs and defendants were free to proceed against Empire. As a result of the settlement negotiations, plaintiffs also entered into consent judgments with the Drielicks. Thereafter, the parties agreed to an “Assignment, Trust and Indemnification Agreement.” The Drielicks, to avoid the collection and execution of the consent judgments against them, assigned their right to collect on their insurance claims to plaintiffs, as well as Great Lakes and Sargent. In turn, Great Lakes and Sargent agreed to attempt to collect the consent judgments and to intervene in any collection action filed by plaintiffs.

¹ Bobtail means to travel without a trailer. *Zurich Ins Co v Rombough*, 384 Mich 228, 230; 180 NW2d 775 (1970). Drielick Trucking is owned by Corey’s brother, defendant Roger Drielick.

² The trial court consolidated these cases. This Court also consolidated the cases on appeal on March 5, 2003.

As a result of this agreement and the assignments therein, the attorney for Great Lakes filed writs of garnishment, with plaintiffs' consent, against Empire for the amounts of the consent judgments. Plaintiffs agreed to share in the proceeds with Great Lakes and Sargent in exchange for their collection efforts. Empire filed a motion to quash the writs, arguing that Great Lakes and Sargent lacked standing to seek the writs and that it properly denied coverage, based on the policy exclusions. The trial court denied the motion, finding that Empire improperly denied coverage under its policy. The court specifically found that Empire's named driver exclusion did not comport with MCL 500.3009(2), and that its business use exclusion was ambiguous.³ The trial court then issued three judgments against Empire, and in favor of plaintiffs, in order to execute the consent judgments. This appeal followed.

II. Policy Exclusions

Empire challenges the writs of garnishment, arguing that it properly denied coverage, based on the exclusions in its bobtail policy. "Generally, a garnishee-defendant is barred from challenging the validity of the judgment entered in the original action. However, an insurer may raise an exclusionary clause as a defense in a garnishment proceeding if that issue has been preserved."⁴ Although an insurance carrier fails to defend in the original action, those defenses raised in its initial letter denying coverage are deemed preserved.⁵ As Empire's letter declining to defend the Drielicks in the original action relied on the business use and named driver exclusions, Empire was entitled to defend against the garnishments on those grounds.

A. Business Use Exclusion

The Empire policy issued to Drielick Trucking is a bobtail policy, intended only to cover liability when the truck is not towing a trailer or leased to a carrier. Consistent with this purpose, the policy specifically excludes coverage when the truck is carrying property in any business or is under lease to a carrier.

The trial court found this exclusion ambiguous, as its applicability under the circumstances was questionable. However, the Michigan Supreme Court has held that a factual question regarding the applicability of the plain language of an insurance policy "to specific circumstances does not render the policy language ambiguous."⁶ As the language of the business use exclusion is unambiguous, we must enforce the contract as written.⁷

³ It appears from the record that the trial court agreed with the appellees that the agreement amounted to a valid assignment and that the writs were properly sought. However, the trial court did not specifically make this finding.

⁴ *In re Smith Estate*, 226 Mich App 285, 288; 574 NW2d 388 (1997), citing *Havens v Roberts*, 139 Mich App 64, 67; 360 NW2d 183 (1984).

⁵ *Id.* at 290.

⁶ *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 570; 596 NW2d 915 (1999). The Sixth Circuit Court of Appeals found an identical exclusion in another Empire bobtail policy was
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Although the language of the business use exclusion is clear, whether this accident was a covered event is not. The record evidence reveals an orally revoked written lease agreement with Sargent. There was no written lease agreement with Great Lakes.⁸ Great Lakes claimed that it never approved the placement of its placards on the Drielicks' truck. Corey Drielick admitted that the Drielicks transported for another person during the period that they transported for Great Lakes, which is inconsistent with a lease agreement.⁹ Furthermore, the truck was traveling bobtail at the time of the accident, creating a question of fact whether the truck was being used for a business purpose at that time. A writ of garnishment, however, may not direct a garnishee to pay an obligation unless allowed by statute or court rule.¹⁰ The party seeking the writ must have reason to believe that the garnishee has control over the defendant's property, is indebted to the defendant, or is required to make periodic payments to the defendant.¹¹ Accordingly, we reverse and remand to allow the trial court to take evidence regarding the propriety of the writs of garnishment against Empire, based on the business use exclusion in the policy.

B. Named Driver Exclusion

Empire also denied coverage based on a named driver exclusion endorsement signed by Roger that excluded Corey from the policy's coverage. Pursuant to MCL 500.3009, an insurer may exclude coverage for the liability of a named driver as follows:

If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured.^[12]

Empire may be correct that there was an endorsement that actually notified Roger that Corey was a named excluded driver. However, this Court “has explicitly held that § 3009(2)

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unambiguous. *Empire Fire & Marine Ins Co v Brantley Trucking Inc*, 220 F3d 679, 681 (CA 6, 2000). “The language of the ‘Business Use’ exclusion is plain. That ‘contractual language may, on occasion, pose difficult factual applications . . .’ and that the parties disagree as to coverage, does not create ambiguity.” *Id.*, quoting *Hartford Ins Co v Occidental Fire & Casualty Co*, 908 F2d 235, 239 (CA 7, 1990). See *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004) (decisions of the United States Supreme Court are binding on this state's courts, while the decisions of lower federal courts are merely persuasive).

⁷ *Nikkel, supra* at 566.

⁸ According to 49 FCR 376.11(a), any such agreement must be writing.

⁹ See 49 CFR 367.11(c) (a lease is a for a specified period of time).

¹⁰ MCR 3.101(E)(3)(d).

¹¹ MCR 3.101(D)(3).

¹² MCL 500.3009(2).

presents ‘no room for judicial construction or interpretation.’”¹³ Empire must strictly comply with the statute by including the specified warning on the required documents. Substantial compliance is not sufficient. The language of the statute is clear and “sets out the Legislature’s approved method of excluding a person from a policy’s coverage, and must be deemed the only way in which such an exclusion may be accomplished.”¹⁴

The endorsement that listed Corey as an excluded driver did not contain the language required in MCL 500.3009(2). Furthermore, Empire failed to include the required warning on all required documents. The face of the policy does reference the attached excluded driver endorsement, but fails to include the required warning. Empire presented only the front of the certificate of insurance into evidence at the hearing and we are bound by the record evidence. This document made no reference to the named driver exclusion. As Empire completely failed to meet the statutory requirements to exclude a named driver from coverage, this exclusion is invalid.

Empire also contends that the writs of garnishment amount to a de facto contribution to the settlement agreements reached between plaintiffs and Great Lakes and Sargent and that it is not contractually obligated to pay prejudgment interest on the consent judgments. However, we decline to review these issues as the trial court has yet to determine whether the writs of garnishment were proper based on the business use exclusion in the Empire policy, and therefore, may be rendered moot.

Affirmed in part, reversed in part, and remanded to allow the trial court to take evidence regarding the propriety of entering the writs of garnishment against defendant based on the business use exclusion in the policy. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

¹³ *Verbison v Auto Club Ins Assn*, 201 Mich App 635, 640; 506 NW2d 920 (1993), quoting *Allstate Ins Co v DAIIE*, 142 Mich App 436, 442; 369 NW2d 908 (1985).

¹⁴ *DAIIE v Felder*, 94 Mich App 40, 44; 287 NW2d 364 (1979).