No-Fault Insurance: A Policy Limitation Fixing A Maximum Recovery For Bodily Injury To One Person Applies To Both The Actual Damages Suffered By That Person And To Derivative Damages Suffered By That Person's Family Members

State Farm Auto Ins v Descheemaeker
Decided June 13, 1989
Publication granted July 24, 1989
Per curiam: Cynar, Shepherd, and Marilyn Kelly

Defendant sustained serious physical injuries after he was involved in a car accident caused by plaintiff's insured. Defendant filed suit against the insured seeking in excess of $25,000 for his bodily injuries. Defendant's wife and children also joined suit seeking derivative damages in excess of $25,000 for loss of consortium, society and companionship. The insured's policy contained a limit of $25,000 for "each person" and a $50,000 limit for "each accident." Plaintiff filed a declaratory judgment action seeking a determination that defendants were entitled to recover only $25,000. The trial court ruled in favor of plaintiff and defendants appealed.

HELD: Affirmed. After reading the insurance contract as a whole, the Court of Appeals held that defendants were not entitled to recover the derivative damages for loss of consortium, society and companionship. The Court declined to award defendants these damages for two reasons. First, the Court found that the derivative damages lacked any physical manifestation and therefore did not constitute a "bodily injury." Second, the Court found that the $50,000 "each accident" limitation applies only when two or more persons "in the same accident" are entitled to recover damages for bodily injury. The Court concluded that the trial court properly granted summary disposition in favor of plaintiff.

No-Fault Insurance: Plaintiff Is Not Precluded As A Matter Of Law From Claiming No-Fault Benefits When Death Was Caused By A Portable Propane Tank Located In A Parked Motor Van

Engwis v *Michigan Mutual Ins Co*
Docket No. 109858
Decided November 6, 1989
Authored: ALLEN, Murphy, and Neff

William Engwis was asphyxiated when the flame on the portable heater in his van went out and propane gas filled the vehicle. His estate sued Michigan Mutual claiming entitlement to no-fault insurance benefits. Both the defendant and plaintiff moved for summary disposition. The trial court granted Michigan Mutual's motion on the basis that Engwis' death did not result from the use of the vehicle as a motor vehicle, a necessary finding under MCL 500.3105; MSA 24.13105. Plaintiff appealed.

HELD: Reversed. Finding that the decedent was occupying a motor vehicle at the time his death occurred, the Court went on to conclude that there was a sufficient causal nexus between the use of the motor vehicle and the injury sustained. The fact that the heater which caused Mr. Engwis' death was a portable heater, rather than a built-in heater, was not deemed relevant to the Court. The Court said it knew of no Michigan decision requiring that the instrumentality causing injury be a built-in part of the vehicle. The determining factor, according to the Court, was whether the injury was foreseeably identified with the normal use of the vehicle. In the instant case, the Court found it foreseeable that Mr. Engwis would use a recreational vehicle for overnight sleeping, and that a portable heater/stove would be purchased and used.

419 NW2d 439 (1988). In any event, our review of this record compels us to agree with the trial court's finding in refusing to grant an award or impose sanctions that there was a "balance of unreasonableness" as to both parties.

Affirmed.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v DESCHEEMAEKER

Docket No. 106536. Submitted February 9, 1989, at Detroit. Decided June 13, 1989.

John Descheemaeker was injured in an automobile accident with Carolyn Fliger. Fliger was insured under a no-fault insurance policy issued by State Farm Mutual Automobile Insurance Company which limited liability coverage to $25,000 for each person, which the policy defined as "all damages due to bodily injury to one person," and to $50,000 for each accident, which the policy defined as "all damages due to bodily injury to two or more persons in the same accident." John Descheemaeker filed suit against Fliger for his injuries, claiming damages in excess of $25,000. Patricia, David and Lisa Descheemaeker, John Descheemaeker's wife, son and daughter, joined in that action, seeking damages for loss of consortium, society and companionship and alleging damages in excess of $25,000. State Farm brought a declaratory judgment action against the Descheemaekers in Macomb Circuit Court, seeking a determination of whether its total liability on the Descheemaekers' claims was controlled by the "each person" limitation or the "each accident" limitation. The trial court, Kenneth N. Sanborn, J., ruled that the $25,000 "each person" limitation controlled and that plaintiff's total liability on all of defendants' claims was $25,000. Defendants appealed.

The Court of Appeals *held:*

The "each accident" coverage clearly applies only where there is a bodily injury to two or more persons in the same accident. Since the claims of the wife and children did not arise out of a separate bodily injury but rather were derivative claims arising out of a bodily injury to a single individual, the claims are controlled by the $25,000 "each person" limitation rather than the $50,000 "each accident" limitation.

Affirmed.

REFERENCES

Am Jur 2d, Automobile Insurance §§ 354, 357 *et seq.*

Consortium claim of spouse, parent or child of accident victim as within extended "per accident" coverage rather than "per person" coverage of automobile liability policy. 46 ALR4th 735.

INSURANCE — NO-FAULT — BODILY INJURY — LIMITS OF COVERAGE.

Derivative claims for loss of consortium, society and companionship brought by members of the family of a person injured in an automobile accident are, along with the claim for personal injury by the injured person, subject to the "each person" limitation of liability coverage of a no-fault insurance policy rather than the "each accident" limitation of the policy where the policy provides that the higher limit of coverage for each accident shall apply to "all damages due to bodily injury to two or more persons in the same accident."

Romain, Donofrio, Kuck & Egerer, P.C. (by *Ernst W. Kuck*), for plaintiff.

Levin, Levin, Garvett & Dill (by *Jeffrey A. Heldt*), for defendants.

Before: CYNAR, P.J., and SHEPHERD and MARILYN KELLY, JJ.

PER CURIAM. Defendants appeal as of right from a January 22, 1988, order granting summary disposition under MCR 2.116(C)(10) in favor of plaintiff on its complaint for declaratory relief. Plaintiff sought a determination of the extent of coverage afforded under a no-fault policy. The trial court ruled that all of defendants' claims came within the policy limit of $25,000 for "each person," and not the policy limit of $50,000 for "each accident" sought by defendants. We affirm.

The facts are not in dispute. On January 30, 1986, plaintiff's insured, Carolyn Fliger, was involved in an automobile accident with defendant John Descheemaeker, who sustained serious physical injuries. Fliger's insurance policy provided generally for liability coverage for bodily injury of $25,000 per person and $50,000 per accident.

John Descheemaeker filed suit against Fliger for his physical injuries, and his wife and children joined his suit seeking derivative damages for loss

of consortium, society and companionship. It was agreed by the parties that John Descheemaeker's damages alone exceeded $25,000 and that the damages to his wife and children also exceeded $25,000. Defendants' claims against Fliger were settled by payment of the undisputed $25,000 policy limit for liability to a single individual (John Descheemaeker), with the second $25,000 (the difference between the policy limit for "each person" and the policy limit for "each accident") left to the final outcome of plaintiff's declaratory action. We agree with the trial court's ruling that defendants were not entitled to the second $25,000.

Since the question presented for our consideration is essentially one of contract interpretation, we begin by noting some of the basic rules applied to the construction of insurance contracts. The insurance contract must be interpreted by reading it as a whole and giving the contract language its ordinary and plain meaning rather than a technical or strained meaning. *Boyd v General Motors Acceptance Corp,* 162 Mich App 446, 452; 413 NW2d 683 (1987). If, after reading the entire contract, it can be reasonably understood in different ways, one providing coverage and the other excluding coverage, the contract is ambiguous and it is to be liberally construed against the drafter and in favor of coverage. *Raska v Farm Bureau Mutual Ins Co of Michigan,* 412 Mich 355, 362; 314 NW2d 440 (1982); *Usher v St Paul Fire & Marine Ins Co,* 126 Mich App 443, 447; 337 NW2d 351 (1983). If, on the other hand, the contract language is not ambiguous, and does not contravene public policy, its terms must be enforced. *Raska, supra,* p 362; *Usher, supra,* p 447.

Here, defendants argue that, because John Descheemaeker's wife and children suffered derivative damages for loss of consortium, society and com-

panionship as a result of his physical injuries suffered in the accident with plaintiff's insured, they are entitled to an additional $25,000 under the policy provisions providing coverage for bodily injuries. We reject this argument for two reasons.

First, the underlying policy defines a "bodily injury" as meaning "bodily injury to a person and sickness, disease or death which results from it." This definition of "bodily injury" has been found to be unambiguous and has been understood as contemplating "actual physical harm or damage to a human body." *Farm Bureau Mutual Ins Co of Michigan v Hoag,* 136 Mich App 326, 334-335; 356 NW2d 20 (1984), and see *National Ben Franklin Ins Co of Michigan v Harris,* 161 Mich App 86, 89; 409 NW2d 733 (1987). Nonphysical injuries, such as humiliation and mental anguish, that lack any physical manifestations do not constitute a "bodily injury." *Hoag, supra,* p 335; *Harris, supra,* p 89. Therefore, it follows that other nonphysical injuries, such as a loss of consortium, society and companionship, which lack any physical manifestations, are also not bodily injuries.

Secondly, even if the claims made by John Descheemaeker's wife and children did meet the minimal requirement of physical manifestation, the policy limit of $25,000 for "each person" would preclude their recovery because their damages would still be derivative in nature to John Descheemaeker's bodily injury. When policies fix a maximum recovery for "bodily" injury to one person, it has generally been held that the limitation is applicable to all claims of damages flowing from the bodily injury, even if part of the damages are claimed by someone other than the person suffering the bodily injury in the accident. In other words "all damage claims, direct and consequential, resulting from injury to one person, are subject to the limitation." Anno: *Construction and application of provision in liability policy limiting the amount of insurer's liability to one person,* 13 ALR3d 1228, 1234.

Here, the underlying policy set forth a $25,000 "each person" limitation and a $50,000 "each accident" limitation in the declaration page for bodily injuries. The related provisions describing precisely what bodily injuries are covered and what limitations apply state, in pertinent part:

> We will pay damages which an *insured* becomes legally liable to pay because of:
> a. *bodily injury* to others,
>
> * * *
>
> caused by accident resulting from the ownership, maintenance or use of *your car.*
>
> * * *
>
> *Limits of Liability—Coverage A*
> The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability—Coverage A—Bodily Injury, Each Person, Each Accident." Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person.* Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person," for all damages due to *bodily injury* to two or more *persons* in the same accident. [Emphasis in original.]

We hold that this language is not ambiguous. Read as a whole, the $50,000 "each accident" limitation does not apply unless two or more persons "in the same accident" are entitled to recover damages due to a bodily injury. Here, only one of the defendants, John Descheemaeker, was in the accident and, hence, the only limitation that applies is the $25,000 "each person" limitation. By defining "each person" as "the amount of coverage

for all damages due to bodily injury to one person," the policy plainly subjects all damages, including any covered derivative damages, arising out of the physical/bodily injury to the person involved in the accident, to a $25,000 limitation.

Therefore, we conclude that the trial court correctly found that the "each person" liability limit of $25,000 under the policy was all that was available to satisfy the claims of all of the defendants in this lawsuit. John Descheemaeker was the only person to suffer physical injury from the accident and, hence, the only person to suffer the "bodily injury" necessary to trigger coverage under the policy. Since his damages alone exceeded $25,000, the other defendants cannot recover under any circumstances.[1]

Affirmed.

[1] Both parties cite *Auto Club Ins Ass'n v Lanyon*, 142 Mich App 108; 369 NW2d 269 (1985), as providing some support for their positions on whether defendants were entitled to an additional limit of liability. We disagree for the reason that *Lanyon* is factually distinct from this case. Unlike the underlying policy here, the *Lanyon* policy contained express language that the liability limit for "each person" includes "all claims for derivative damages." The mere absence of that express language here does not mean that derivative damages are "bodily injury" and is not dispositive of whether defendants are entitled to an additional limit of liability.

RAND v KNAPP SHOE STORES

Docket No. 106703. Submitted May 1, 1989, at Detroit. Decided June 13, 1989.

Joan Rand, individually and as next friend of James K. Rand, Jr., a minor, brought an action in Macomb Circuit Court against Knapp Shoe Stores and East Detroit Investment Company. Plaintiff alleged claims of negligence and attractive nuisance with respect to injuries sustained by the minor when he was struck by a motorist while riding his bicycle in an alley directly behind a store operated by Knapp Shoe Stores on premises leased from East Detroit Investment Company. The minor had allegedly been using a portion of a sidewalk which intersected the alley as a "bicycle jump ramp." The trial court, George R. Deneweth, J., granted summary disposition in favor of defendants, ruling that there existed no genuine issue of material fact and defendants were entitled to judgment as a matter of law. Plaintiff appealed.

The Court of Appeals *held:*

1. Generally, a business merchant's duty to keep its premises reasonably safe does not extend beyond the premises. In this case, because the accident giving rise to the child's injury occurred off defendants' premises, defendants cannot be held liable for the injury.

2. Plaintiff failed to establish that the condition she claimed to be an attractive nuisance is one of which the defendants knew or had reason to know and which defendants realized or should have realized involved an unreasonable risk of death or serious bodily harm to children. Summary disposition of the attractive nuisance claim was therefore proper.

Affirmed.

1. NEGLIGENCE — DUTY — OFF-PREMISES INJURY.

A business establishment is generally not liable for injury sustained in an area beyond the establishment's premises since

REFERENCES

Am Jur 2d, Negligence § 346; Premises Liability §§ 5 *et seq.*, 138 *et seq.*

See the Index to Annotations under Attractive Nuisances.

"adverse impact" test relied upon by the Court of Appeals is one of several tests developed by the federal courts to determine whether the diversion of unit work was a mandatory subject of bargaining. However, federal precedent regarding private sector labor law, while helpful in deciding cases arising under the PERA, is not controlling. It is relevant and persuasive only to the extent that it is based on similar facts and circumstances and best effectuates the policy of the PERA. The tests formulated by the federal courts and the NLRB to determine whether a duty to bargain over the diversion of bargaining unit work existed in the private sector are inappropriate for use in this case. In the federal cases, it was assumed that the work in question was bargaining unit work. In this case, by contrast, the disputed work had been interchangeably performed by more than one bargaining unit, thereby raising the real question regarding whether the transferred duties were in fact bargaining unit work.

PUBLIC EMPLOYMENT – PERA – COLLECTIVE BARGAINING – MANDATORY SUBJECT – DIVERSION OF BARGAINING UNIT WORK – EXCLUSIVITY RULE – APPLICATION – EFFECT The exclusivity rule developed by MERC recognizes that before a bargaining unit may lay sole claim to a particular work assignment, the unit must establish that the work was performed exclusively by its unit members. If the work has not been assigned exclusively to one unit, there is no obligation on the part of the employer to bargain before shifting duties among the employees. If particular work has been performed interchangeably by employees in several bargaining units, and the public employer has not been limited by the terms of a collective bargaining agreement, the public employer is able to make assignments according to the expertise required by the work. In this case, there is no dispute that the work in question was interchangeably assigned to the officers and civilian employees or that it was not exclusively assigned to the officers.

PANEL (Entire bench): GRIFFIN; Cavanagh with Archer dissenting; Boyle dissenting

SPENCER V HARTFORD ACCIDENT AND INDEMNITY CO (Aff'd)
August 9, 1989 109023

INSURANCE – AUTOMOBILE – NO FAULT – BENEFITS – WORK LOSS – WAGE CONTINUATION PLAN – EFFECT An employee may still suffer a "work loss" for purposes of the no fault act even where the employer continues to pay wages under a formal wage continuation plan, as here, or as a gratuity.
STATUTE: MCL 500.3107

INSURANCE – AUTOMOBILE – NO FAULT – BENEFITS – SET-OFF – GOVERNMENTAL BENEFITS – TOWNSHIP WAGE CONTINUATION PLAN – APPLICABILITY The no fault act requires a mandatory set-off of governmental benefits, the purpose being the elimination of duplicative recovery and the containment of insurance costs. The additional benefits paid in the instant case were not paid pursuant to any state or federal law as required by the act, but instead were paid pursuant to a collective bargaining agreement with a local township. Thus, the express language of the statute refutes the applicability of set-off under the instant circumstances.
STATUTE: MCL 500.3109

INSURANCE – AUTOMOBILE – NO FAULT – BENEFITS – SET-OFF – OTHER HEALTH AND ACCIDENT COVERAGE – APPLICABILITY Before concluding a state or federal benefit must be deducted from no fault benefits under the coordination of benefits section, it must be determined the benefits serve the same purpose as the no fault benefits and are provided or required to be provided as a result of the same accident. The purpose of the section authorizing a no fault carrier to offer a policy with a coordination of benefit clause, is to reduce the cost of no fault insurance by requiring a mandatory reduced premium when benefits are coordinated with similar coverage. However, this set-off applies only to other health and accident coverage.
STATUTE: MCL 500.3109a

INSURANCE – AUTOMOBILE – NO FAULT – BENEFITS – SET-OFF – OTHER HEALTH AND ACCIDENT COVERAGE – WAGE CONTINUATION PLAN – APPLICABILITY Benefits received pursuant to a wage continuation plan do not constitute "other health and accident coverage" subject to permissible set-off.
STATUTE: MCL 500.3109a
PANEL: McDonald, Sullivan, Reilly (P. C.)

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO V DESCHEEMAEKER (Aff'd)
June 13, 1989 106536

INSURANCE – AUTOMOBILE – NO FAULT – CONTRACT – CONSTRUCTION – GENERALLY An insurance contract must be interpreted by reading it as a whole, and giving the contract language its ordinary and plain meaning rather than a technical or strained meaning. If, after reading the entire contract, it can be reasonably understood in different ways, one providing coverage and the other excluding coverage, the contract is ambiguous and it is to be liberally construed against the drafter. If, on the other hand, the contract language is not ambiguous, and does not contravene public policy, its terms must be enforced.

INSURANCE – AUTOMOBILE – NO FAULT – CONSTRUCTION – BODILY INJURY – POLICY LIMIT – EACH PERSON/ACCIDENT – DERIVATIVE CLAIM – EFFECT Where the underlying policy defines a "bodily injury" as meaning bodily injury to a person and sickness, disease or death which results from it, the definition is unambiguous and contemplates actual physical harm or damage to a human body. As such, non-physical injuries such as humiliation and mental anguish that lack any physical manifestations do not constitute a bodily injury. Therefore, it follows that other non-physical injuries, such as a loss of consortium, society and companionship, which lack any physical manifestations, are also not bodily injuries. Further even if the claims made by the insured's wife and children met the minimal requirement of physical manifestation, the policy limit for "each person" would preclude their recovery because their damages would still be derivative in nature to the insured's bodily injury. All damages, claims, direct and consequential, resulting from injury to one person, are subject to the limitation. The larger "each accident" limitation does not apply unless two or more persons in the same accident are entitled to recover damages due to a bodily injury.
PANEL: Cynar, Shepherd, Marilyn Kelly (P. C.)

STEGENGA V MICHIGAN DEPARTMENT OF TREASURY (Aff'd)
August 8, 1989 110329

LICENSES – LIQUOR – REASSIGNMENT TO VENDOR – VENDEE'S DEFAULT – PROPRIETY A liquor licensee who sells his establishment and transfers his liquor license to the vendee may, as part of the transaction, enter into a contract with the purchaser for a reassignment of the liquor license to the vendor in the event of a default on the installment sales contract, even where liquor control commission rules prohibit the granting of a