

07608

STATE OF MICHIGAN  
COURT OF APPEALS

---

CLARK CLOUSE, FRANKLIN CLOUSE,  
CAROL CLOUSE and KAY CLOUSE,

SEP 24 1990

Plaintiffs-Appellants,

v

No. 117106

AMERICAN STATES INSURANCE COMPANY,

Garnishee-Defendant-  
Appellee,

and

KEVIN BUEHLER and WALTER BUEHLER,  
jointly and severally, TWIN LAKES  
COUNTRYSIDE MARKET, INC., d/b/a  
TWIN LAKES COUNTRY MARKET,

Defendant.

---

Before: Marilyn Kelly, P.J., and Sawyer and Weaver, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order dismissing their garnishment action against defendant American States Insurance Company based on no genuine issue of material fact. MCR 2.116(C)(10).

This cause arose from an automobile accident in which Clark Clouse was injured while a passenger in a 1983 Ford Ranger truck driven by Kevin Buehler. Kevin was intoxicated at the time.

The title to the Ranger listed Kevin and his father, Walter Buehler, as owners. Kevin purchased the vehicle on June 2, 1986. Part of the purchase price included the trade-in of two automobiles, one a 1976 Ford Courier. Walter had assigned the Courier to Kevin in order to assist him in buying the Ranger. Walter also cosigned Kevin's bank loan. Kevin was the sole driver of the Ranger. He insured it through defendant Transamerica.

Kevin's parents insured all of their vehicles with American States. On May 31, 1986, the parents deleted the Courier from their coverage and dropped Kevin as a named insured, because he had moved from their household. They were not aware that Walter had been listed as co-owner of the Ranger. This was done apparently by the dealership. On March 14, 1988, the Buehlers entered into a consent judgment of \$120,000 with plaintiffs. Twenty thousand dollars of that amount was to be paid by Transamerica. Plaintiffs agreed not to execute on the personal assets of the Buehlers but retained the right to seek recovery from another insurance carrier.

On March 31, 1988, plaintiffs filed this garnishment action against American States for the remaining \$100,000. American States moved for summary disposition, claiming the Ranger was not covered by the policy and that Kevin Buehler was not a named insured or resident of his parents' household. The judge granted the motion, concluding that there was no coverage for the 1983 Ford Ranger under the clear terms of the policy.

On appeal plaintiffs claim that the owned automobile exclusion contained in the policy was vague and ambiguous and thus unenforceable. Their argument rests primarily on the Supreme Court's decision in Powers v DAIIE, 427 Mich 602; 398 NW2d 411 (1986). In Powers the Court found a substantially similar clause vague and unenforceable. However, Powers involved an unowned automobile. Here the vehicle is allegedly owned.

We do not reach the meaning of the specific provisions of the insurance contract, because the parties to the contract never intended the Ranger be covered.

As a general rule, where a contract is open to construction, it is the duty of the court to determine the true intent of the parties. In ascertaining intent, the court should consider the language employed in the contract, its subject matter and the circumstances surrounding the making of the agreement. Remes v Holland, 147 Mich App 550, 555; 382 NW2d 819

(1985). Where there is a mutual mistake, a contract may be rescinded. There must be a belief by the parties that is not in accord with the facts. In addition, the erroneous belief must relate to a basic assumption of the parties upon which the contract is based. Shell Oil Co v Estate of Kert, 161 Mich App 409, 421-422; 411 NW2d 770 (1987), lv den 430 Mich 893 (1988).

It is uncontested that American States and the Buehlers were all under the erroneous belief that none of the Buehlers owned the Ranger. Thus they believed the truck was not insured with American States. The Buehlers did not pay a premium to have it insured. If, under the terms of the policy, the Ranger could be said to be covered, that part of the contract would be invalid due to the mutual mistake of the parties.

Affirmed.

/s/ Marilyn Kelly  
/s/ David H. Sawyer  
/s/ Elizabeth A. Weaver