

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU MUTUAL INSURANCE
COMPANY OF MICHIGAN,

April 9, 1992

Plaintiff-Appellant/
Cross-Appellee,

v

No. 134339

DEBRA A. WARNER,
a personal representative of the Estate of
HEATHER LYNN WARNER, and
BRADLEY ALAN WARNER, a minor,

UNPUBLISHED

Defendants-Appellees/
Cross-Appellants,

and

FUNG PEN GUNTLE,

Defendant.

Before: Fitzgerald, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff appeals from that part of the trial court's decision which found that coverage existed under a no fault insurance policy that had been issued to Robert Guntle. On cross-appeal, defendant Debra Warner appeals from that part of the trial court's decision which found that coverage did not exist under an umbrella policy that had been issued to Robert Guntle. We affirm in part and reverse in part.

Defendants were parties in an underlying lawsuit that stemmed from an accident in which a 1982 Plymouth owned and operated by Fung Pen Guntle struck and killed Debra Warner's daughter and injured her son. The 1982 Plymouth was insured by Meridian Mutual Insurance Company and had liability limits of \$100,000 per person and \$300,000 per occurrence. The parties entered into a consent judgment in the amount of \$300,000, and after Meridian Mutual tendered \$100,000, the limit under its no fault policy, defendants presented a claim to Farm Bureau Mutual Insurance Company for the remainder.

Farm Bureau had issued two policies to Fung Pen Guntle's husband, Robert Guntle, a Farmowners Umbrella Liability Policy and a Family Auto Liability Policy. Under the umbrella policy, Farm Bureau agreed to pay all sums that the insured was obligated to pay in excess of \$500,000, the limit of liability Robert Guntle was required to maintain in an underlying automobile liability policy. Debra Warner claimed that Fung Pen Guntle, as a spouse of the named insured, was covered under the umbrella policy that had been issued to her husband Robert before the couple was married.

In denying the Warner claim, Farm Bureau relied on an endorsement to the umbrella policy which explained that "insofar as coverage is provided to the Insured in the underlying insurance policy(ies), as set forth in the Schedule of Underlying Insurance, this policy does not apply to the ownership, maintenance, operation, use, loading, or unloading of any automobile while away from premises owned by, rented to, or controlled by the Insured." Endorsement 1203. Farm Bureau claimed that the umbrella policy did not apply because the Meridian Mutual policy on the 1982 Plymouth was not listed on the Schedule of Underlying Insurance.

With respect to the no fault policy issued by Farm Bureau to Robert Guntle, the insurer claimed that it was responsible only for the sums that the insured became obligated to pay because of the "ownership, maintenance or use of the owned automobile or any non-owned automobile." An owned automobile was defined as "a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded." A non-owned automobile was defined as an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative. Because the 1982 Plymouth was not an owned or non-owned automobile under the terms of Robert Guntle's no fault policy, Farm Bureau denied coverage.

These same arguments were repeated in the declaratory judgment action and the trial court agreed that the accident involving Fung Pen Guntle and her 1982 Plymouth did not trigger the coverage provided for in Robert Guntle's umbrella policy. The fact that the umbrella policy specifically excluded losses below \$500,000 was also relied on by the trial court in reaching this decision.

However, the trial court disagreed with Farm Bureau over the coverage afforded by Robert Guntle's no fault automobile policy. The trial court, relying on Powers v DAIFE, 427 Mich 602; 398 NW2d 411 (1986), found that the terms owned and non-owned were ambiguous and voided the exclusion from the policy.

With respect to the umbrella insurance policy issued by Farm Bureau, we agree with the trial court that this policy does not include the 1982 Plymouth insured by Meridian Mutual because it was not listed in the Schedule of Underlying Insurance. Furthermore, under the terms of the policy, the umbrella does not cover losses below \$500,000. Because the settlement amount in the underlying lawsuit was less than the limit at which the excess coverage became applicable, there is no liability under the umbrella policy. See Michigan Millers Mutual Ins Co v North American Reinsurance Corp, 182 Mich App 410; 452 NW2d 841 (1990).

With respect to the no fault insurance policy issued by Farm Bureau, we disagree with the trial court that this policy covers the 1982 Plymouth insured by Meridian Mutual because, under the Powers rationale, the owned/non-owned exclusion is ambiguous and should be deleted from the insurance contract. Powers, a plurality opinion, dealt with whether an insurance policy can exclude coverage when an insured is driving a vehicle not named in the policy which is owned by a resident family member. For this reason, two panels of this Court have distinguished Powers and declined to extend its reasoning to situations where coverage is sought for the owner of a separately insured vehicle under a policy covering a resident relative's automobile. See State Farm Mutual Automobile Ins Co v Koutz, 189 Mich App 535; 473 NW2d 709 (1991) and VanDyke v League General Ins Co, 184 Mich App 271; 457 NW2d 141 (1990).

In this case, resident relatives such as Fung Pen Guntle have coverage for owned vehicles under the no fault automobile insurance policy issued to Robert Guntle if the owned vehicle is described in the policy and a specific premium charge indicates that coverage is afforded. Because the 1982 Plymouth owned by Fung Pen Guntle and insured by Meridian Mutual was not described in the no fault policy issued to Robert Guntle, the trial court erred in determining that coverage was available.

Affirmed in part and reversed in part.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ Mark J. Cavanagh