AMERICAN NATIONAL FIRE INSURANCE COMPANY v FRANKENMUTH MUTUAL INSURANCE COMPANY

Docket No. 135663. Submitted December 10, 1992, at Detroit. Decided April 5, 1993, at 10:50 A.M.

American National Fire Insurance Company brought an action in the Oakland Circuit Court against Frankenmuth Mutual Insurance Company, seeking to recoup a proportionate share of the settlement and defense costs expended with regard to an underlying wrongful death action brought against Floyd Campbell, who was insured by both insurers. The underlying action was brought by the personal representative of a person who was killed when the vehicle in which he was a passenger collided with a farm combine, owned by Campbell and insured by the plaintiff, while the combine was parked on a road and unloading corn into a pickup truck, owned by Campbell and insured by the defendant. The court, John N. O'Brien, J., granted summary disposition for the defendant, finding that its residual liability policy did not provide coverage because the truck was not involved in the accident. The plaintiff appealed.

The Court of Appeals *held:*

1. The court erred in ruling as a matter of law that the pickup truck was not involved in the accident. Whether the pickup truck and the combine constituted a functional unit and the extent to which each element of the functional unit participated in the accident were matters for the jury to resolve.

2. A genuine issue of material fact exists regarding whether the pickup truck played a causal role, triggering the defendant's insurance policy. Physical contact between the pickup truck and the decedent's vehicle was not required to establish that the pickup truck played a causal role in the accident.

3. The exclusion in the defendant's policy that disallows coverage for bodily injury arising out of the operation of farm machinery conflicts with the liability coverage required by the no-fault act and, therefore, violates public policy. The exclusion is invalid.

4. The Court of Appeals will not decide the effect of the parties' "other insurance" clauses with regard to the determination of their respective liabilities because the trial court did not decide the issue.

5. The plaintiff had standing to seek common-law or statutory contribution, equitable subrogation, or indemnification.

Reversed and remanded.

REFERENCES

Am Jur 2d, Auto Insurance §§ 23-25, 194, 199, 204, 351-366, 432-445.

Automobile liability insurance: what are accidents or injuries "arising out of ownership, maintenance, or use" of insured vehicle. 15 ALR4th 10.

1. INSURANCE — AUTOMOBILES — INJURY — CAUSAL CONNECTION.

To establish causation between an injury and the use of a motor vehicle, the vehicle need not be the proximate cause of the injury, but there must be a causal connection between the injury sustained and the ownership, maintenance, or use of the vehicle that is more than incidental, fortuitous, or but for; the injury also must be foreseeably identifiable with the normal use, maintenance, and ownership of the vehicle.

2. INSURANCE — NO-FAULT — FARM IMPLEMENTS — MOTOR VEHICLES — PUBLIC POLICY.

Public policy requires no-fault coverage if a motor vehicle is involved in an accident with a farm implement on a public highway; an insurance policy that excludes coverage with regard to an insured motor vehicle for bodily injury arising out of the operation of farm machinery violates public policy; the parties to an insurance contract may not defeat the state's public policy by agreement.

3. TORTS — CONTRIBUTION — JOINT TORTFEASORS.

In addition to the common-law right of contribution, the right of contribution among nonintentional joint tortfeasors also exists pursuant to statute; the right of contribution based upon common law and statute is separate and distinct from the doctrine of equitable subrogation (MCL 600.2925a *et seq.*; MSA 27A.2925[1] *et seq.*).

4. INSURANCE — INDEMNIFICATION.

A separate suit between insurers for indemnification may be brought where one insurer pays a judgment against a common insured.

5. INSURANCE — CONTRIBUTION.

The choice of the plaintiff in an underlying action to advance a particular theory of liability does not affect the common-law right to contribution of the insurers of the defendant in the

motions for summary disposition, the trial court granted defendant's motion, ruling that defendant's residual liability policy did not provide coverage because the truck was not involved in the accident.

II

Although the trial court did not state the ground on which it granted defendant's motion for summary disposition, it was presumably granted under MCR 2.116(C)(10), which provides that summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

A motion for summary disposition pursuant to this subrule tests whether there is factual support for a claim. Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ. *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991). The courts are liberal in finding a genuine issue of material fact. *St Paul Fire & Marine Ins Co v Quintana*, 165 Mich App 719, 722; 419 NW2d 60 (1988).

III

We believe that the trial court erred in ruling that as a matter of law the truck was not involved in the accident that caused Rondo's death. As the agreed-upon statement of facts indicates, at the time of the accident, the combine was unloading harvested corn, by means of the auger, onto the pickup truck, which was parked alongside Bricker

Road. Even though the truck was not physically struck by the car in which the decedent was a passenger, it was undisputed that the truck was involved in the transfer of corn. Reasonable minds could conclude that the combine and the truck were connected by the auger so as to constitute a functional unit for the purpose of the transfer of grain and that the transfer could not have been accomplished without the joint participation of both vehicles. The extent to which each element of the functional unit participated in the accident would also be a matter for the trier of fact to resolve. For the trial court to conclude otherwise was plainly erroneous.

IV

Given that the trial court erred in concluding that the truck was not involved in the accident, the question is then presented whether the truck played a causal role in the occurrence so as to trigger defendant's insurance policy.

Defendant's policy insuring Campbell and his truck provided residual tort liability coverage under the following circumstances:

> Part B—Residual Liability Agreements "A" and "B".
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> Coverage A—Bodily Injury Liability; Coverage B —Property Damage Liability: To pay on behalf of the insured, all sums which the insured shall become legally obligated to pay as damages because of:
>
> A. Bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person;
>
> B. Injury to or destruction of property including loss of use thereof, hereinafter called "property damage"; arising out of the ownership, mainte-

the truck played a causal role in the accident, summary disposition is justified because an exclusion in defendant's policy disallows coverage for bodily injury arising out of the operation of farm machinery.

As a general rule, this Court declines to consider an issue that was not decided by the trial court unless the issue is one of law and the record is factually sufficient, or unless failure to consider the issue would result in manifest injustice. *Detroit v Dep't of Social Services,* 197 Mich App 146, 158; 494 NW2d 805 (1992). Although the trial court did not reach this issue, we will decide it because we believe that this exclusion violates public policy.

Under MCL 500.3101(1); MSA 24.13101(1) of the no-fault act:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance.

Under MCL 500.3131(1); MSA 24.13131(1):

> Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. This insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs. In this state this insurance shall afford coverage for automobile liability retained by section 3135.

MCL 500.3135(1); MSA 24.13135(1) provides:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

As the Supreme Court stated in *State Farm Mutual Automobile Ins Co v Ruuska,* 412 Mich 321, 335; 314 NW2d 184 (1982):

> Sections 3101, 3131 and 3135 of the no-fault act, when construed together, make it plain that at the time of the accident the Legislature intended that
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> 1. A person *using a motor vehicle* that causes certain types of damages shall remain liable in tort (§ 3135);
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> 2. An insurance policy in this state shall afford coverage for such liability (§ 3131);
>
> 3. An owner or registrant of a motor vehicle shall purchase such a policy (§ 3101). [Emphasis in original.]

In the case at bar, defendant's attempt to exclude insurance coverage arising out of the operation of farm machinery conflicts with the liability coverage required by the no-fault act. As the Supreme Court observed in *Shavers v Attorney General,* 402 Mich 554, 596; 267 NW2d 72 (1978), upholding the constitutionality of the no-fault act, the Legislature required residual liability coverage as well as personal injury protection benefits under the no-fault act in order to protect the general welfare of the public. The Court remarked:

> The insurance required under the No-Fault Act protects not only the driver of a motor vehicle, but also passengers, pedestrians, owners of fixed property, and owners of properly parked vehicles. . . . This principle, that those who use the public highways may properly be required to provide security

the loss would be prorated according to the parties' respective policy limits. Plaintiff's limit is $300,000 and defendant's is $250,000.

In disputes between a pro-rata and an excess clause involving two or more insurance policies covering the same insured against the same risk, two rules have evolved. Under the minority rule, both clauses are declared repugnant and are rejected in total. Once the clauses are disregarded, each insurer's liability is prorated according to the proportion of the combined policy limits represented by the limits of each insurer's policy. The rationale underpinning this approach is to avoid the intractable conflict of deciding which insurance policy is primary and which is secondary by splitting the difference. *Farm Bureau Mutual Ins Co v Horace Mann Ins Co,* 131 Mich App 98; 345 NW2d 655 (1983) (conflict between an escape clause and a pro-rata clause); *Mary Free Bed Hosp & Rehabilitation Center v Ins Co of North America,* 131 Mich App 105; 345 NW2d 658 (1983) (conflicting excess clauses).[2]

In contrast, the majority rule seeks to reconcile the competing provisions by discerning the parties' intent by analyzing the clauses. *St Paul Fire & Marine Ins Co v American Home Assurance Co,* 197 Mich App 521; 495 NW2d 814 (1992). If one policy contains an excess clause while another has a pro-rata clause, the policy containing the pro-rata clause is deemed primary.

In light of the fact that the trial court did not reach this issue, we need not decide whether to adopt the minority or the majority rule in determining the effect of the parties' other insurance clauses in this case. *Detroit v DSS, supra.*

[2] Both cases were decided by the same panel on the same day, and did not involve no-fault insurance. See *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc,* 424 Mich 537, 543, n 5; 383 NW2d 590 (1986), where the Court discussed the different approaches but expressed "no opinion as to the correctness of these decisions" because neither involved no-fault insurance.

First, we note that in three recent cases, different panels of this Court have ostensibly generated a conflict in deciding which rule to apply to resolve conflicts between other insurance clauses. In *Nat'l Indemnity Co v Budget Rent A Car Systems, Inc,* 195 Mich App 186, 188-190; 489 NW2d 175 (1992), the panel, in deciding which rule to apply to resolve a conflict between competing other insurance clauses containing excess provisions involving several no-fault automobile insurance policies, adopted the minority rule. See also *Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 316; 486 NW2d 351 (1992), where the panel wrote approvingly of the minority rule, but decided that the rule did not apply because there was no conflict between the two policies in question.

In *St Paul Fire & Marine v American Home, supra,* the panel considered the legal effect of other insurance provisions contained in three professional malpractice insurance policies and adopted the majority rule. After that decision, in *Secura Ins Co v Cincinnati Ins Co,* 198 Mich App 243; — NW2d — (1993), a case arising from an accident involving an all-terrain vehicle, the panel applied the minority rule in determining the parties' liability to a mutual insured pursuant to their respective homeowner's insurance policies. Insofar as *Nat'l Indemnity* is the only one of these cases that involves no-fault insurance, it is therefore arguable which rule ought to be applied to the present case where the conflict is between an excess clause and a pro-rata clause.

Moreover, the parties have not had the benefit of these cases in presenting this matter on appeal. Our refusal to decide this issue will enable them to brief the matter fully, particularly with regard to

> equalize the common burden by allowing reimbursement to the insurer paying the loss, for the excess paid over its share of the debt." [*Hastings Mutual, supra,* pp 436-437.]

Along with the common-law right of contribution, the right of contribution among nonintentional joint tortfeasors also exists by statute. MCL 600.2925a *et seq.*; MSA 27A.2925(1) *et seq.* See *Moyses v Spartan Asphalt Paving Co,* 383 Mich 314, 329, 334; 174 NW2d 797 (1970), where the Court abolished the common-law bar to contribution among nonintentional joint tortfeasors. *O'Dowd v General Motors Corp,* 419 Mich 597, 603; 358 NW2d 553 (1984). See MCL 600.2925b; MSA 27A.2925(2), where liability between joint tortfeasors is made apportionable on a pro-rata basis considering relative degrees of fault.

The right of contribution based upon common law and statute is separate and distinct from the doctrine of equitable subrogation. In *Commercial Union Ins Co v Medical Protective Co,* 426 Mich 109, 117; 393 NW2d 479 (1986), the Supreme Court, citing *Smith v Sprague,* 244 Mich 577, 579-580; 222 NW 207 (1928), stated:

> Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer."

A separate suit between insurers for indemnification may also be brought if one insurance company pays a judgment against an insured who was a common insured. See *Farmers Ins Group v Progressive Casualty Ins Co,* 84 Mich App 474, 484; 269 NW2d 647 (1978), where this Court recognized that an action for indemnification was proper between insurers where the plaintiff insurer defended the underlying tort case and settled the lawsuit and the defendant insurer refused to defend and denied insurance coverage, "since the injured person recovers for his injuries without delay while the insurers thereafter iron out their respective liabilities."

In analyzing this issue, we note that had the combine and truck been owned by separate owners, the plaintiff in the underlying wrongful death action could have joined them as defendants in the underlying tort action. As potential nonintentional joint tortfeasors, the separate owners of the combine and the truck would have had a statutorily based right to contribution for any loss arising out of the settlement of the underlying case.

In the instant case, the combine and the truck are owned by the same person, but are covered by policies issued by different insurers. Although plaintiff insurer defended the mutual insured and settled the underlying suit, the issue whether defendant insurer was liable for the loss was never addressed in the underlying action. As the parties acknowledge, the underlying tort action contained no allegations of negligence against Campbell regarding his ownership or operation of the pickup truck.

Nevertheless, the choice of the plaintiff in the underlying action to advance a particular theory of liability does not affect the plaintiff insurer's common-law right to contribution where there exists a genuine issue of material fact concerning the parties' common liability. See *Caldwell, supra,* p 420, which held that the plaintiff's caprice in choosing to join the third-party defendants was not

summary disposition in favor of defendant and remand for further proceedings to determine whether defendant's insurance policy afforded coverage for the loss sustained by the decedent for which damages were awarded in the underlying wrongful death action. If the trier of fact concludes that defendant has a coverage obligation, then the trier of fact must also determine the degree to which the truck was at fault in causing the accident as well as the amount that defendant insurer must reimburse plaintiff for the costs of defense and settlement arising from the underlying wrongful death action.

Reversed and remanded. We do not retain jurisdiction.