

STATE OF MICHIGAN
COURT OF APPEALS

GERALD COGGINS,

Plaintiff-Appellee,

November 9, 1993

v

FARMERS INSURANCE EXCHANGE,

Defendant-Appellant.

No. 138280

LC No. 90-398512-CK

Before: Weaver, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from the February 14, 1991, order of the Oakland Circuit Court granting in part plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying defendant's motion for summary disposition. We reverse.

This appeal concerns an insurance coverage dispute. Plaintiff was injured in an automobile accident while he was a passenger, when he collided with a truck driven by Gerald Domigan during the course of Domigan's employment with Michigan Container. Domigan was apparently unable to stop for a red light due to brake problems with the truck.

Michigan Container had leased the truck from the owner of the truck, E & L Leasing Company. E & L Leasing Company had a truckers' insurance policy with Insurance Company of the State of Pennsylvania (ICSP). Michigan Container was uninsured. Plaintiff originally filed a complaint in the Wayne Circuit Court against Domigan, Michigan Container, and E & L Truck Rental (a separate entity from E & L Leasing). Ultimately, a default judgment in the amount of \$40,110 was entered against Domigan and Michigan Container. However, E & L Truck Rental was dismissed as it was determined that it was not the truck's owner.

Plaintiff later sought uninsured motorist benefits from his no-fault insurer, defendant Farmers Insurance Exchange. A dispute arose as to whether the truck was an uninsured motor vehicle and the parties submitted the matter to arbitration. The arbitrator, however, declined to go forward believing that he did not have the power to determine if the truck was an uninsured motor vehicle within the meaning of defendant's insurance policy. Plaintiff then filed a complaint in the Oakland Circuit Court requesting declaratory relief and asserting that he was entitled to uninsured motorist benefits under his insurance policy issued by defendant Farmers Insurance Exchange. Plaintiff requested that the court declare the rights of the parties and determine the amount of damages sustained by plaintiff in the automobile accident.

Both parties moved for summary disposition. The trial court ruled that the insurance policy issued by ICSP provided only excess coverage in this case because Michigan Container was uninsured. Therefore, the court found that the truck was uninsured within the meaning of plaintiff's insurance policy with defendant and plaintiff could recover uninsured motorist benefits. The court denied defendant's motion for summary disposition and granted partial summary disposition for plaintiff.

This case involves the interpretation of an insurance policy. An insurance policy is much the same as any other contract. It is an agreement between the parties and a court will determine what that agreement was and effectuate the intent of the parties. Auto-Owners Ins Co v Churchman, 440 Mich 560, 566; 489

NW2d 431 (1992). The court must look to the contract as a whole and give meaning to all the terms. *Id.* The court must enforce the language of the contract as it is written. *Group Ins Co v Czopek*, 440 Mich 590, 596-597; 489 NW2d 444 (1992). Further, contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense. *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 181; 468 NW2d 498 (1991).

We agree with defendant that its insurance policy in this case did not provide primary coverage against plaintiff's claims for bodily injury arising out of the automobile accident involving the truck leased by E & L Leasing to Michigan Container. The applicable provision in the policy issued by defendant states the following:

Uninsured Motor Vehicle means (1) a land motor vehicle or trailer with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law of the state in which the insured motor vehicle is principally garaged, no bodily injury liability insurance or bond applicable at the time of the accident, or (2) a land motor vehicle or trailer where there is bodily injury liability insurance or an applicable bond at the time of the accident in amounts less than the limits carried by the insured under Uninsured Motorists Coverage, or (3) where there is such applicable insurance or bond but the company writing the same (a) denies coverage thereunder or (b) is or becomes insolvent within one year of such accident, or (4) a hit-and-run motor vehicle, as defined.

Plaintiff argues that the uninsured motorist benefit provision applies because Michigan Container was uninsured and E & L Leasing's policy did not provide primary coverage in this case. The applicable provision in the policy issued to E & L Leasing by ICSP provides in pertinent part:

OTHER INSURANCE - PRIMARY AND EXCESS INSURANCE PROVISIONS.

1. This policy's liability coverage is primary for any covered auto while hired or borrowed by you [E & L Leasing] and used exclusively in your business and over a route or territory, if any, you are authorized to serve by public authority. This policy's liability coverage is excess over any other collectible insurance for any covered auto while hired or borrowed from you by another trucker. However, while a covered auto which is a trailer is connected to a power unit, this policy's liability coverage:

a. Is on the same basis, primary or excess, as for the power unit if the power unit is a covered auto.

b. Is excess if the power unit is not a covered auto.

2. Any trailer interchange insurance provided by this policy is primary for any covered auto.

3. Except as provided in Paragraphs 1 and 2 above, this policy provides primary insurance for any covered auto you own and excess insurance for any covered auto you don't own.

4. When two or more policies cover on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the policies covering on the same basis.

Neither party disputes that the truck was operated as a leased vehicle and was therefore hired or borrowed by Michigan Container from E & L Leasing. However, because Michigan Container was uninsured, it is clear that there was no "other collectible insurance" and thus the policy issued to E & L Leasing does not provide only excess insurance as plaintiff claims. Rather, the policy issued to E & L Leasing

by ICSP provided primary coverage in this case because there is no other collectible insurance where the lessee was uninsured. Accordingly, the policy issued to E & L Leasing provided primary coverage and the truck was not uninsured.

Further, the following endorsement in E & L Leasing's policy provides:

A. PHRASE WITH SPECIAL MEANING

In addition to the WORDS AND PHRASES WITH SPECIAL MEANING in the policy, the following phrase has special meaning in this endorsement:

"Leased auto" means an auto you lease to a lessee for one year or more, including any substitute, replacement or extra auto needed to meet seasonal or other needs, under a lease agreement which requires the lessee to provide primary insurance for you.

B. LIABILITY INSURANCE and any required no-fault insurance provided by the policy for a covered auto which is a leased auto applies subject to the following provisions:

1. a. The lessee has furnished you with a certificate of insurance, a copy of the policy or a copy of the endorsement making you an additional insured on the lessee's policy as required by the leasing agreement, and

b. At the time of an accident the insurance required by the leasing agreement is not collectible.

2. For you, your employees or agents, the limit of our liability for the insurance provided by this endorsement is the lesser of

a. The limits of liability required by the leasing agreement, or

b. \$500,000.00

3. For the lessee, any employee or agent of the lessee or any person, except you or your employees or agents, operating the leased auto with the permission of any of these, the limit of our liability for the insurance provided by this endorsement is the minimum limit required by any applicable compulsory or financial responsibility law.

4. The insurance provided by this endorsement is excess over any other collectible insurance, whether primary, excess or contingent, unless such insurance is specifically written to apply in excess of this policy.

Again, because Michigan Container, the lessee, was uninsured, there is no other collectible insurance and the excess coverage provision stated in paragraph four does not apply. Thus where there is no excess insurance, E & L Leasing's policy would provide the primary coverage as set forth in paragraph one.

In requiring the other insurance to actually be collectible, we are merely following the public policy of this state that no-fault coverage of a motor vehicle registered in this state is required if the motor vehicle is involved in an accident. MCL 500.3101(1); MSA 24.13101(1); See American National Fire Ins Co v Frankenmuth Mutual Ins Co, 199 Mich App 202, 210-212; 501 NW2d 237 (1993). Thus, E & L Leasing's insurance policy with ICSP is the primary insurance where there is no other collectible insurance. In this case, there is no other collectible insurance because Michigan Container, as the lessee, was uninsured.

Because E & L Leasing's policy provided the primary coverage in this case, the uninsured motorist benefits provision in the policy issued by defendant did not provide no-fault benefits to plaintiff. The truck was insured by E & L Leasing through its policy with ICSP and was therefore not an uninsured vehicle so that plaintiff could collect uninsured motorists benefits under his policy with Farmers Insurance Exchange.

Accordingly, the trial court erred as a matter of law in holding that the policy issued by ICSP to E & L Leasing provided only excess coverage and that the truck was therefore uninsured within the meaning of plaintiff's no-fault insurance policy with defendant.

The trial court's grant of partial summary disposition to plaintiff and denial of summary disposition for defendant is reversed.

/s/ Elizabeth A. Weaver
/s/ William B. Murphy
/s/ Kathleen Jansen