

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN MCGHEE, Individually and as
Next Friend of HERBERT MCGHEE, a Minor,

UNPUBLISHED
January 31, 1995

Plaintiff-Appellee,

v

No. 148141
LC No. 90-023991 CK

AUTOMOBILE CLUB INSURANCE
ASSOCIATION, a/k/a ACIA,

Defendant-Appellant,

v

CITIZENS INSURANCE COMPANY,

Third Party Defendant-
Appellee,

v

RUBY CRUM MASTERS,

Fourth Party Defendant.

Before: Doctoroff, C.J., and T.G. Kavanagh* and R.C. Livo,** JJ.

PER CURIAM.

Defendant Automobile Club Insurance Association [ACIA] appeals as of right the December 10, 1991, order of the Wayne Circuit Court granting summary disposition to plaintiff Susan McGhee, individually and as next friend of her son Herbert, on her complaint for arbitration of their uninsured motorist claim with ACIA. We reverse and remand for the entry of judgment in favor of ACIA.

This litigation arose out of an automobile accident. Susan McGhee, insured by ACIA, was driving with her son, Herbert, when a car driven by David Masters and travelling in the oncoming lane, crossed the center line and crashed into the McGhee car, causing injury to all parties. David Masters' car was titled, registered, and insured by Citizens Insurance Company in the name of Ruby Carolyn Crum, the premarital name of Ruby Carolyn Crum Masters, David's wife. David resided with Ruby but did not have a valid driver's license.

Susan McGhee applied for and received no-fault benefits from ACIA her herself and her son.

Plaintiff sought residual liability coverage from Citizens under Ruby Masters' policy. Plaintiff's claim was denied on the ground that David was using the vehicle without permission of the owner, Ruby. Plaintiff did not file a declaratory action to determine her rights to coverage by Citizens, but

*Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1994-7.

**Circuit Judge, sitting on the Court of Appeals by assignment.

instead sought uninsured motorist coverage from ACIA, her insurer. ACIA denied uninsured motorist coverage on the ground that the vehicle driven by David was insured at the time of the accident.

Plaintiff filed the instant lawsuit seeking uninsured motorist benefits from ACIA. ACIA filed a third party complaint against Citizens and Citizens filed a fourth party complaint against Carolyn. Plaintiff moved for summary disposition against ACIA arguing that Citizens' denial of liability coverage meant that Masters' vehicle was uninsured as defined by ACIA's policy. Citizens concurred in the motion and filed a separate motion arguing it had no liability to pay plaintiff based on exclusion 16 which excluded liability coverage for "[a]ny person using the vehicle without a reasonable belief that the person is entitled to do so".

In response, ACIA argued that, under MCL 500.3009(2); MSA 24.13009(2), a resident driver cannot be excluded unless the name of the person and a warning is listed on the declarations page of the policy; that David was a "named assured" as defined by the policy and therefore was not excluded by exclusion 16; and that the exclusion was at least vague giving rise to a fact question as to whether the exclusion applied to David as a named assured.

The trial court granted plaintiff's and Citizens' motions for summary disposition pursuant to MCR 2.116(C)(10), stating there was no material question of fact that David was excluded from coverage under exclusion 16.

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Featherly v Teledyne Industries, Inc, 194 Mich App 352, 357; 486 NW2d 361 (1992). Giving the benefit of any reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. Id. If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

On appeal, an order granting a motion for summary disposition is reviewed de novo. Adkins v Thomas Solvent Co, 440 Mich 293, 302; 487 NW2d 715 (1992).

Finding that Citizens policy was ambiguous regarding whether exclusion 16 applied to David Masters, we construe the policy in favor of the insured and find that David Masters is not excluded from coverage. He is an insured motorist under the Citizens' policy.

Citizen's policy provides for liability coverage in pertinent part as follows:

SECTION ONE

DEFINITION OF WORDS USED ON THIS SECTION

1. "Named Assured" means the individual . . . named in Item 1 of the Declarations. When the named Assured is an individual it shall also include named Assured's spouse, if a resident of the same household.

SECTION TWO - AUTOMOBILE LIABILITY

COVERAGE C--Liability for Bodily Injury

COVERAGE D--Liability for Property Damage

The Company will pay on behalf of the Assured all sums which the Assured shall become legally obligated to pay as damages because of

COVERAGE C. Bodily Injury or

COVERAGE D. Property Damage

To which this insurance applies, caused by an occurrence

* * *

PERSONS INSURED UNDER SECTION TWO

1. The named Assured with respect to the owned automobile.

* * *

DEFINITIONS OF WORDS USED UNDER THIS SECTION

The definitions under Section One of "Named Assured" . . . also apply under this Section Two.

EXCLUSIONS

This Policy Under Section Two Does Not Apply To:

* * *

11. The United States of America or any of its agencies, or to any person, including the named Assured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States government

* * *

15. Any person intentionally causing bodily injury or property damage.

16. Any person using a vehicle without a reasonable belief that the person is entitled to do so. (Emphasis added.)

The only reference to "any person" are the ones quoted above in exclusions 11, 15, and 16.

The general rule of construction applicable to insurance policies is that an ambiguous provision in an insurance contract must be construed against the drafting insurer and in favor of the insured. Clevenger v Allstate Insurance Co, 443 Mich 646, 652; 505 NW2d 553 (1993); Michigan Mutual Insurance Company v Dowell, 204 Mich App 81, 87; 514 NW2d 185 (1994). However, if the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary and popular sense. Clevenger supra; Dowell, supra. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against the drafter and in favor of coverage. Clevenger, supra; Dowell, supra.

While the term "any person" has a clear and unambiguous meaning standing alone, the manner in which the term is used in the above exclusions renders it susceptible to different interpretations. The phrase "to any person, including the named Assured" in exclusion 11 indicates that the named assured is

not necessarily included in the term "any person." Therefore, it is unclear whether exclusion 16 is intended to apply to the named assured when the term "any person" is used without a specification that the named assured is included. This ambiguity requires us to construe the policy in favor of the insured David Masters and find that he is not "any person" as referenced in exclusion 16 and is not excluded from coverage under Citizens' policy. Economy Fire & Casualty Co v Kubik, 142 Ill App 3d 906; 97 Ill Dec 68; 492 NE2d 504 (1986)

Because David Masters is covered by Citizens' policy, ACIA owes no uninsured motorist benefits to plaintiff. ACIA is therefore entitled to judgment as a matter of law with regard to plaintiff's suit for such benefits. Plaintiff's appropriate remedy is to pursue residual liability benefits from Citizens, David Masters insurer.

Because we find the foregoing issue dispositive, it is unnecessary to address ACIA's remaining issues on appeal

Reversed and remanded for the entry of judgment in favor of ACIA. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Thomas Giles Kavanagh
/s/ Robert C. Livo