STATE OF MICHIGAN

COURT OF APPEALS

WAKEFIELD LEASING CORPORATION,
d/b/a PORT CITY CAB and
KALAMAZOO YELLOW CAB,

Plaintiff-Appellant,

v

TRANSAMERICA INSURANCE COMPANY
OF MICHIGAN,

Defendant/Third-Party
Plaintiff-Appellee,

v

DONALD MUROAKA and VICKIE MURAOKA,

Third-Party Defendants-
Appellants.

FOR PUBLICATION
August 29, 1995
9:25 a.m.

Nos. 162911; 162924
LC No. 92-001045-CZ

WAKEFIELD LEASING CORPORATION,
d/b/a PORT CITY CAB and
KALAMAZOO YELLOW CAB,

Plaintiff-Appellee
Cross-Appellant,

v

MICHIGAN MUTUAL INSURANCE COMPANY,

Defendant/Third-Party
Plaintiff-Appellant,

v

DONALD MURAOKA and VICKIE MURAOKA,

Third-Party Defendants-
Appellees/Cross-Appellees.

No. 165938
LC No. 92-002129-CZ

Before: MacKenzie, P.J., and Griffin and Neff, JJ.

GRIFFIN, J.

This appeal consolidates two declaratory judgment actions regarding liability coverage for a personal injury claim asserted by Donald and Vickie Muraoka against Wakefield Leasing Corporation

doing business as Port City Cab and Kalamazoo Yellow Cab (Wakefield). Donald Muraoka seeks personal injury damages and Vickie Muraoka seeks loss of consortium arising out of an assault and battery committed upon Donald Muraoka by a passenger in Muraoka's taxicab. Muraoka alleges the status of a subcontractor at the time he was leasing a taxicab from Wakefield.

In the underlying complaint for personal injuries against Wakefield, the Muraokas assert the following theories of liability: (1) failure to warn of other delivery robberies in the area of which Wakefield either knew or should have known in the area, (2) failure to properly train its employees, agents, or assigns to warn subcontractor drivers such as Donald Muraoka of the dangers of driving a taxicab, (3) failure to instruct its employees and/or agents to notify the police department when subcontracting drivers are sent into a known high crime area, and (4) failure "to provide a safe motor vehicle to be used as a taxicab, in that there was no protection in the way of a screen or shield between the front and rear seats to prevent persons in the rear of the vehicle from robbing or assaulting the driver."

In this appeal, we express no opinion as to the merits of the underlying personal injury action. We only review the order of the lower court holding Wakefield's auto liability insurance carrier, defendant Michigan Mutual Insurance Company (Michigan Mutual) solely responsible for providing the defense. On cross appeal, Wakefield contends that the lower court erred in failing to order both indemnification and defense. Although the personal injury action had not been tried, Wakefield argues that the lower court erred in limiting its ruling to a duty to defend.

We affirm the cross claim and hold that the lower court correctly reserved its ruling as to the duty to indemnify on the ground that the issue was premature. As to the principal appeal, we hold that the duty to defend the underlying tort action is the sole responsibility of the general liability carrier, defendant Transamerica Insurance Company (Transamerica). Accordingly, we reverse and remand for entry of judgment in favor of defendant Michigan Mutual and against defendant Transamerica.

I

At the outset, we dispense with three of the claims in the personal injury complaint which clearly fall within the scope of the general commercial liability policy and not the automobile liability policy. The allegations of failure to warn of other robberies in the area; failure to properly train its employees, agents, or assigns to warn drivers; and failure to instruct its employees and/or agents to notify the police department when drivers are sent into high crime areas are clearly claims that do not arise out of the ownership, operation, or use of a motor vehicle. These claims pertain directly to the general operation of a taxicab business; they are unrelated to the operation, maintenance, or use of a motor vehicle, itself. Accordingly, defendant Transamerica must provide a defense as these claims are clearly within its coverage.

II

The main issue is whether the allegation of Wakefield's liability for failing to install a partition in the taxicab also triggers a duty to defend under defendant Michigan Mutual's automobile liability policy. We hold that it does not.

In this appeal, both Wakefield and Transamerica argue that the causality standard for residual liability insurance is different from the causality standard for no-fault personal protection or property protection insurance. We disagree and have rejected this argument in Century Mutual Ins Co v League General Ins Co, ___ Mich App ___; ___ NW2d ___ (1995) (Docket No. 157870). See also American Nat'l Ins Co v Frankenmuth Mutual Ins Co, 199 Mich App 202; 501 NW2d 237 (1993); and A & G Associates, Inc, v Michigan Mutual Ins Co, 110 Mich App 293; 312 NW2d 235 (1981).

In Century Mutual, we applied the Thornton[1]/Kangas[2] casuality standard to a residual automobile liability coverage question. In doing so, we adopted 6B Appleman, Insurance Law & Practice (Buckley ed), § 4317, pp 367-369 as a clarifying test:

> . . . three rather interesting rules have been set up to determine the insurer's liability: 1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury.

III

Applying the above principles to the present case, we conclude that the allegation in the underlying personal injury complaint of failure to provide a protective partition is insufficient to invoke automobile liability coverage. Under the third part of the Appleman test, the "automobile must not merely contribute to cause the condition which produces the injury but must, itself, produce the injury. See also Thornton, supra at 661, and A & G Associates, supra at 296-298.

The allegation at issue relates not to the automobile, itself, but to a special modification to the vehicle that should have been made if the automobile were to be used for a unique purpose in a particular area. Wakefield's liability, if any, arises from a negligent or intentional business decision. No liability is alleged arising out of the ownership, maintenance, or use of the automobile itself. Rather, liability is predicated on the theory that it was tortious for Wakefield to: (a) dispatch an automobile, (b) as a commercial taxicab, (c) to a high crime area, (d) without providing safety partitions to separate the driver from his dangerous passengers. Like Marzonie v Auto Club Ins Ass'n, 441 Mich 522, 529; 495 NW2d 788 (1992), quoting with approval O'Key v State Farm Mutual Automobile Ins Co, 89 Mich App 526, 530; 280 NW2d 583 (1979), "the automobile was not the instrumentality of the injury." See also Bourne v Farmers Ins Exchange 449 Mich 193; ___ NW2d ___ (1995). Cf. Vanguard Ins Co v Clarke, 438 Mich 463, 473; 475 NW2d 48 (1991).

Accordingly, we hold that the duty to defend the underlying personal injury action is the sole responsibility of the general liability carrier, defendant Transamerica Insurance Company.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Barbara B. MacKenzie

I concur in result only.

/s/ Janet T. Neff

[1] Thornton v Allstate Ins Co, 425 Mich 643; 391 NW2d 320 (1986).

[2] Kangas v Aetna Casualty & Surety Co, 64 Mich App 1; 235 NW2d 42 (1975).