STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Plaintiff,

vs.

HEISS ENTERPRISES, LLC; JEREMY HEISS; and CRUZITO ALVAREZ,

Defendants.
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Case No. 15-08172-CKB

HON. CHRISTOPHER P. YATES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

This insurance-coverage dispute turns upon whether Defendant Cruzito Alvarez was acting as an "employee" of Defendant Heiss Enterprises, LLC ("Heiss Enterprises") on the date Defendant Jeremy Heiss operated a vehicle in a manner that caused injury to Alvarez's hand. If Alvarez was an "employee" of Heiss Enterprises on that date, Plaintiff Progressive Michigan Insurance Company ("Progressive") has no duty to defend and indemnify Heiss Enterprises in connection with a lawsuit filed by Alvarez. But if Alvarez was not an "employee" of Heiss Enterprises on that day, Progressive has a duty to provide representation and coverage under a commercial auto insurance policy it issued to Heiss Enterprises. Because genuine issues of material fact required a trial to determine Alvarez's status *vis-a-vis* Heiss Enterprises on the date of his injury, the Court conducted a one-day bench trial on August 2, 2016. Based upon the evidence developed at that trial, the Court finds that Alvarez was an independent contractor – rather than an employee – of Heiss Enterprises on the date of his injury. Accordingly, the Court shall enter a declaratory judgment that Progressive has a duty to defend and indemnify Heiss Enterprises in connection with the underlying action.

I. Factual Background

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." The Court must render "[b]rief, definite, and pertinent findings and conclusions on the contested matters" that may take the form of a written opinion. See MCR 2.517(A)(2) & (3). Therefore, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

In January of 2014, Defendant Alvarez responded to an advertisement on Craig's List asking for workers for Defendant Heiss Enterprises. On January 6, 2014, just a few days into his tenure at Heiss Enterprises, Alvarez was lifting a trailer as Defendant Jeremy Heiss tried to back his truck up to the hitch on that trailer. Somehow, Alvarez's right index finger became caught between the truck and the trailer hitch, causing severe damage to Alvarez's finger. Two days later, Alvarez had surgery on his finger. He returned to work at Heiss Enterprises almost immediately after his surgery, but he could only use one hand on the job. Two weeks after his return, Alvarez could no longer work for Heiss Enterprises, so his tenure with the company ended less than 30 days after it began.

On April 24, 2015, Defendant Alvarez filed suit against Defendants Heiss Enterprises and Heiss himself. The Heiss defendants apparently demanded legal representation and coverage from Plaintiff Progressive in connection with that lawsuit. On September 3, 2015, Progressive filed the instant case, seeking a declaratory judgment "that Plaintiff Progressive does not owe a duty to defend or indemnify Heiss Enterprises, LLC" in the underlying action. Progressive also named Alvarez as a defendant in its complaint for declaratory relief. After turning back summary-disposition motions, the Court conducted a bench trial on August 2, 2016, to develop the record necessary to resolve the coverage dispute.

As the Court shall explain in detail in its conclusions of law, the central controversy in this case is whether Defendant Alvarez was an "employee" of Defendant Heiss Enterprises, so much of the trial focused upon that issue. Heiss Enterprises treated Alvarez as an independent contractor, as opposed to an employee. The company records identify Alvarez as a subcontractor, see Trial Exhibit D, the company paid Alvarez the full amount of his hourly wages without taking any deductions for taxes,[1] see id., and all three of the witnesses at trial testified unequivocally that Alvarez was not an employee of Heiss Enterprises. Although the company issued IRS Form W-2 statements to several of its employees, see Trial Exhibit 3, Heiss Enterprises did not issue any W-2 statement to Alvarez.[2] Beyond that, Alvarez spent less than a month working with Heiss Enterprises. Mindy Portner, who served as the bookkeeper for Heiss Enterprises, testified that the company ordinarily treated workers as independent contractors until the workers proved themselves worthy of employee status. Alvarez neither invested the time nor assumed the responsibilities necessary to become an employee. In fact, Alvarez had to leave the company after just a few weeks because he had to serve a jail term, and the company chose not to vouch for him when he sought work release during his jail stint. Beyond that, Alvarez did not return to Heiss Enterprises after he served his time in jail. Instead, he found a more traditional job that provided him with better pay and the accoutrements of conventional employment in the construction industry. Accordingly, by any traditional measure, Alvarez was not an employee of Heiss Enterprises. Nevertheless, Plaintiff Progressive insists that its policy exclusions dictate that Alvarez was an employee, even though the policy itself does not define the term "employee."

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[1] Defendant Heiss Enterprises paid Defendant Alvarez $8.50 per hour for his work.

[2] Remarkably, Defendant Heiss Enterprises did not even issue an IRS Form 1099 statement to Defendant Alvarez. Thus, for tax purposes, Alvarez's relationship with Heiss Enterprises did not even register.

II. Conclusions of Law

The scope of Plaintiff Progressive's duty to defend and indemnify the Heiss defendants must be gleaned from the insurance contract between Progressive and Defendant Heiss Enterprises. By all accounts, Progressive issued to Heiss Enterprises a Michigan commercial auto policy of insurance that was in effect on January 6, 2014, when Defendant Alvarez's injury occurred. See Trial Exhibit 1 (Complaint, Exhibit A – Coverage Summary and "Michigan Commercial Auto Policy"). Under that policy, Progressive asserts that it owes no duty to defend or indemnify Heiss Enterprises in the underlying action because Alvarez was an "employee" of Heiss Enterprises at time of his injury, so any injury to Alvarez was excluded from coverage. Thus, the Court shall turn to the language of the policy to decide whether Progressive must defend and indemnify Heiss Enterprises.

"An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to 'determine what the agreement was and effectuate the intent of the parties.'" Hunt v Drielick, 496 Mich 366, 372 (2014). The Court must "'employ a two-part analysis' to determine the parties' intent." See id. at 373. "First, it must be determined whether 'the policy provides coverage to the insured,' and, second, the court must 'ascertain whether that coverage is negated by an exclusion.'" Id. While it "'is the insured's burden to establish that his claim falls within the terms of the policy,'" id., the "'insurer should bear the burden of proving an absence of coverage[.]'" Id.

The commercial auto policy at issue states that Plaintiff Progressive "will pay damages . . . for bodily injury . . . for which an insured becomes legally responsible because of an accident arising out of the ownership, maintenance or use of an insured auto." See Trial Exhibit 1 (commercial auto policy at 6). Moreover, the policy makes clear that Progressive "will settle or defend, at our option, any claim or lawsuit for damages covered by" that provision. See id. Progressive concedes that the

the policy applies to the lawsuit filed by Defendant Alvarez unless an exclusion negates the coverage broadly prescribed in the language quoted above. But Progressive contends that three exclusions bar coverage with respect to Alvarez's lawsuit. Consequently, Progressive has "the burden of proving an absence of coverage" under those exclusions. Hunt, 496 Mich at 373. And as our Supreme Court has consistently ruled, "'[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured.'" Id. With those principles in mind, the Court shall consider each of the exclusions cited by Progressive to determine whether any of the exclusions defeats coverage.

A. The Workers-Compensation Exclusion.

The Michigan commercial auto policy that Plaintiff Progressive issued to Defendant Heiss Enterprises excludes from coverage:

> 3. Any obligation for which an insured or an insurer of that insured, even if one does not exist, may be held liable under workers' compensation, unemployment compensation, disability benefits law, or any similar law.

See Trial Exhibit 1 (commercial auto policy at 9: exclusion 3). Thus, even though Heiss Enterprises did not have workers-compensation coverage, the Court must consider the Michigan statutory system for workers compensation to determine whether Defendant Alvarez's injury could have given rise to workers-compensation benefits for the injury to his finger.

In Michigan, the Worker's Disability Compensation Act, MCL 418.101, *et seq*, provides for compensation to "[a]n employee, who receives a personal injury arising out of and in the course of employment . . . ." See MCL 418.301(1); Hoste v Shanty Creek Management, Inc, 459 Mich 561, 570 (1999). The Act also "defines who is an 'employee' in § 161, and by doing so determines which individuals have essentially traded the right to bring a tort action for the right to benefits" under the

Act.[3] Hoste, 459 Mich at 570. Under MCL 418.161(1)(n), an "employee" includes "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." Our Supreme Court has reasoned that "'each provision must be satisfied for an individual to be an employee.'" See Auto-Owners Inc Co v All Star Lawn Specialists Plus, Inc, 497 Mich 13, 19 (2014). Thus, "if a person, in relation to the service in question, maintains a separate business *or* holds himself or herself out to and renders service to the public *or* is an employer subject to this act . . . then that person is excluded from employee status."[4] Id.

But our Legislature recently added gloss to the definition of an "employee." Specifically, MCL 418.161(1)(n) now additionally states: "On and after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan administrative hearing system determines to be in an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department or treasury in revenue ruling 87-41, 1 C.B. 296." Thus, the Court must consider the 20-factor test to ascertain whether Defendant Alvarez was an employee of Heiss Enterprises – and thereby covered by the workers-compensation system to the exclusion of coverage under the commercial auto policy – when he injured his hand.

Many of the 20 factors indicate that Defendant Alvarez was not an "employee" of Defendant Heiss Enterprises at the time of his injury. For example, nobody at Heiss Enterprises gave training

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[3] Defendant Alvarez made no "trade" because he received no workers-compensation benefits.

[4] Defendant Alvarez was not "an employer subject to th[e] act." Whether Alvarez maintained a "separate business" or "held himself out to and rendered service to the public" is unclear. He tried to secure other jobs because he found the pay and conditions at Heiss Enterprises unsatisfactory.

to Alvarez (factor 2), Alvarez's work cleaning the facility was not integrated into Heiss Enterprises's business operations (factor 3), Alvarez had no continuing relationship with Heiss Enterprises (factor 6), Alvarez had no set work hours (factor 7), Alvarez was not obligated to devote full-time attention to his work at Heiss Enterprises (factor 8), Heiss Enterprises did not regulate the order or sequence of Alvarez's work (factor 10), Alvarez was not obliged to submit reports to Heiss Enterprises (factor 11), Alvarez received no compensation for business or travel expenses (factor 13), Alvarez had to bring his own gloves and safety glasses to work at Heiss Enterprises (factor 14), and Alvarez could work for other employers during his brief tenure at Heiss Enterprises (factor 17). To be sure, some of the 20 factors militate in favor of declaring Alvarez an "employee" of Heiss Enterprises, but the preponderance of factors supports the opposite conclusion. Thus, the Court concludes that Alvarez was not an "employee" of Heiss Enterprises under MCL 418.161(1)(n), so the policy exclusion that relies upon workers-compensation eligibility does not apply to bar coverage.

B. The "Employee" Exclusion.

The Michigan commercial auto policy that Plaintiff Progressive issued to Defendant Heiss Enterprises contains the following exclusion for bodily injury to "employees" of the company:

> 5. Bodily injury to . . . [a]n employee of any insured arising out of or within the course of: (i) [t]hat employee's employment by any insured; or (ii) [p]erforming duties related to the conduct of any insured's business[.]

See Trial Exhibit 1 (commercial auto policy at 9-10: exclusion 5). Since Defendant Alvarez's injury arose out of performing duties on the job with Heiss Enterprises, the applicability of that exclusion depends entirely upon whether Alvarez was an "employee" of Heiss Enterprises. Consequently, the Court must consider the meaning of the term "employee" in that exclusion.

Remarkably, the parties agree that the 20-factor test from the workers-compensation context does not apply to the "employee" exclusion at issue. Instead, in the absence of any definition of the term "employee" in the policy, the parties have urged the Court to apply the four-factor economic-reality test described in Clark v United Technologies Automotive, Inc, 459 Mich 681, 688 (1999).[5] Accord Meridian Mutual Ins Co v Wypij, 226 Mich App 276, 280 (1997). It seems anomalous that Michigan law has multiple, multi-factor definitions for the simple word "employee," but the Court shall follow the parties down each rabbit hole in search of the proper definition of "employee" with respect to each of the three exclusions cited by Plaintiff Progressive.[6]

The economic-reality test focuses upon four factors: (1) the control of the worker's duties; (2) the payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties toward the accomplishment of a common goal. See Meridian Mutual, 226 Mich App at 280. First, the record establishes that Defendant Heiss Enterprise's principal, Jeremy Heiss, assigned odd jobs to Defendant Alvarez, but neither Heiss himself nor anyone else affiliated with Heiss Enterprises

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[5] Michigan courts have applied the economic-reality test in civil-rights litigation, see Ashker v Ford Motor Co, 245 Mich App 9, 11-12 (2001), No-Fault Act actions, see Adanalic v Harco Nat'l Ins Co, 309 Mich App 173, 190-191 (2015), and workers-compensation disputes. See Clark, 459 Mich at 686-689. Significantly, our Court of Appeals has also used the test in a lawsuit quite similar to the instant case. See Meridian Mutual Ins Co v Wypij, 226 Mich App 276, 278-281 (1997).

[6] The situation calls to mind Humpty Dumpty's advice to Alice:

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."

LEWIS CARROLL, THROUGH THE LOOKING GLASS. Here, the Court is doubly frustrated because the plaintiff had the opportunity to be the master of the term by defining "employee" in the policy, but it neglected to do so, even though it has to establish that its exclusions concerning "employees" bar coverage. And so here we are.

supervised or instructed Alvarez in any meaningful way. Second, Alvarez received pay at the rate of $8.50 per hour when he showed up for work, but Heiss Enterprises did not take deductions from his pay for taxes or any other expenses, nor did Heiss Enterprises issue any type of tax document to Alvarez. For all practical purposes, Alvarez received cash for a three-week tenure that flew entirely under the radar for tax and regulatory purposes. Third, the relationship between Heiss Enterprises and Alvarez did not involve hiring, firing, or discipline. Alvarez came to work whenever he felt like doing so, he left to serve a jail term, and he received no guidance or discipline on the job. Fourth, although Alvarez occasionally performed framing, the bulk of his tasks simply entailed cleaning up the premises of Heiss Enterprises. That work was certainly not an integral part of Heiss Enterprises's business. Indeed, cleaning is a service that private and public entities routinely assign to independent contractors, who need no knowledge of the entities' work in order to perform the necessary cleaning functions. Thus, the Court readily concludes that Alvarez cannot be deemed an employee under the economic-reality test at any point during the three-week period that he worked at Heiss Enterprises, so the exclusion for bodily injury to "employees" does not bar coverage under the policy.

C. The "Fellow Employee" Exclusion.

The final exclusion cited by Plaintiff Progressive forecloses coverage for:

> 6. Bodily injury to a fellow employee of an insured injured while within the course of their employment or while performing duties related to the conduct of your business.

See Trial Exhibit 1 (commercial auto policy at 10: exclusion 6). The applicability of that exclusion turns upon whether Defendant Alvarez was "a fellow employee of an insured," so the exclusion has no application if Alvarez was not an "employee" of Defendant Heiss Enterprises. Mercifully, both

sides seem to agree that resolution of that issue does not require consideration of a third definition of the term "employee." Instead, as Plaintiff Progressive appears to concede, the analysis of that term with respect to the "fellow employee" exclusion simply depends upon the very same four-factor economic-reality test that the Court employed in addressing the "employee" exclusion. Accordingly, the Court's analysis of the "fellow employee" exclusion tracks the discussion already provided with respect to the "employee" exclusion and dictates that the "fellow employee" exclusion does not bar coverage under the policy.

III. Verdict

For the reasons stated in the Court's findings of fact and conclusions of law, the Court hereby renders a verdict in favor of the defendants and against Plaintiff Progressive with respect to the duty to defend and the duty to indemnify Defendant Heiss Enterprises in the underlying civil case pending in the Kent County Circuit Court styled as Cruzito Alvarez v Jeremy Heiss, *et al*, No. 15-03742-NI. None of the three exclusions cited by Progressive bars coverage for the injury to Defendant Alvarez, who was never an "employee" during his three-week relationship with Defendant Heiss Enterprises. Consequently, the Court invites the defendants to submit a proposed declaratory judgment under the so-called seven-day rule, see MCR 2.602(B), that memorializes the Court's verdict.

IT IS SO ORDERED.

Dated: August 4, 2016

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge