STATE OF MICHIGAN

COURT OF APPEALS

MERTON WIEDBRAUK, d/b/a
MERT'S CITY CAB,

Plaintiff-Appellant,

v

AMERISURE COMPANIES,

Defendant-Appellee.

UNPUBLISHED
November 22, 1996

No. 183192
LC No. 94-1149-CK

Before: Corrigan, P.J., and Taylor and D.E. Johnston,* JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff appeals by right an order determining that defendant, the insurer of plaintiff's taxicab operations, was not required to defend and indemnify it, as defendant, in a tort action filed by the estate of a former passenger. We reverse and remand.

The deceased passenger's estate asserts that plaintiff was negligent in driving an intoxicated passenger to a secluded spot on a dark but busy highway and then in allowing the decedent to disembark from the cab at that point. The fatal injury occurred some 30 to 45 minutes later.

Plaintiff tendered defense of the suit to defendant, relying on a "business automobile policy." In relevant part, the policy provides:

> "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' . . . to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance, or use of a covered 'auto.'"

No dispute exists but that plaintiff is an "insured," that the underlying lawsuit involves "bodily injury," that a "covered 'auto'" is involved, and that some sort of "accident" occurred. The issue is whether the bodily injury arose from an "accident" which resulted from "ownership, maintenance or use of" plaintiff's covered taxicab.

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*Circuit judge sitting on the Court of Appeals by assignment.

The circuit court granted defendant's motion for summary disposition on the basis that plaintiff owed the passenger no actionable duty which can give rise to tort liability within the coverage of the policy. But whether or not plaintiff might be entitled to summary disposition on the basis of MCR 2.116(C)(8) in the underlying lawsuit is an issue of liability, which as to insurance coverage is premature at this time. It is, however, well established that the duty to defend is separate and distinct from and may be broader than the duty to indemnify. *State Farm Fire & Cas Co v Basham*, 206 Mich App 240, 242; 520 NW2d 713 (1994).

The critical language of the insurance policy at issue in this case is distinguishable from that used in §3105(1) of the No-Fault Insurance Act, because the policy, in contrast to the phraseology of the statute, does not require that the bodily injury caused by accident result from the "ownership, maintenance or use of a motor vehicle *as a motor vehicle*." The language of this policy thus permissibly affords more than the minimum coverage required by the No-Fault Insurance Act, Ins C §§3100 *et seq*. *Rohlman v Hawkeye Security Ins Co*, 442 Mich 520, 530-531 n 10; 502 NW2d 310 (1993). But for plaintiff's duties as a common carrier of passengers, *Frederick v City of Detroit*, 370 Mich 425; 121 NW2d 918 (1963); *Laney v Consumers Power Co*, 418 Mich 180, 183-184; 341 NW2d 106 (1983), which arises from plaintiff's ownership and use of a covered automobile, the underlying lawsuit would be without foundation. Because the appellant policy coverage is not limited to liabilities arising from use of the plaintiff's covered automobile as an automobile, case law applying §3105(1) of the No-Fault Act, e.g., *Kennedy v Auto Club of Michigan*, 215 Mich App 264; 544 NW2d 750 (1996), or applying similar policy language to persons not having the duty of a common carrier, *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1; 235 NW2d 42 (1975), is inapposite.

Reversed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston