# STATE OF MICHIGAN

# COURT OF APPEALS

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MODERN SERVICE INSURANCE COMPANY,

Plaintiff-Counterdefendant-Appellant,

v

RACHEL FINKEL and ANTHONY CRINER,

Defendant-Appellees,

and

CNA INSURANCE COMPANY,

Intervening Defendant/Counterplaintiff-Appellee.

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UNPUBLISHED
October 7, 2003

No. 237161
Kalamazoo Circuit Court
LC No. 00-000612-CK

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to intervening defendant CNA Insurance Company (CNA) under MCR 2.116(C)(10). Plaintiff had filed a declaratory action against defendants Rachel Finkel and Anthony Criner seeking a judgment that plaintiff had no obligation to defend or indemnify Finkel for her act of hitting and injuring Criner with an automobile. The trial court agreed with CNA's argument that plaintiff did have a duty to provide automobile liability coverage to Finkel. We affirm.

Plaintiff, Finkel's automobile insurer, argues that the trial court erred in granting summary disposition to CNA, Criner's automobile insurer, because plaintiff's policy with Finkel (1) provides coverage only for an "accident" and (2) excludes coverage for intentional acts. Plaintiff contends that under the policy, it owes no duty to defend or indemnify Finkel in the lawsuit initiated by Criner against her because Criner's injuries resulted from Finkel's intentional and non-accidental act of striking Criner with her automobile. We disagree that reversal is warranted.

We review de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is appropriate "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Auto-Owners Ins Co v Allied Adjusters*

*& Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). In reviewing an order granting summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

This proper outcome in this case is squarely governed by this Court's opinion in *Detroit Automobile Inter-Ins Exchange v Higginbotham*, 95 Mich App 213; 290 NW2d 414 (1980). In *Higginbotham*, *id.* at 215-216, a man intentionally drove his vehicle into his wife's vehicle and then, when she was trapped in her vehicle, he walked over and wounded her with a gun. This Court stated:

> [T]he fact that the [husband] intended to assault the [wife] will not preclude her from recovering residual insurance benefits under the defendant's policy. The "intentional injury" exclusion clause contained in defendant's policy will not effect such preclusion.
>
> MCL 500.3131; MSA 24.13131 requires residual liability insurance coverage for "automobile liability retained by section 3135." MCL 500.3135; MSA 24.13135 states that such automobile liability includes "[i]ntentionally caused harm to persons or property." Where an insurance policy contains an exclusionary clause that was not contemplated by the Legislature, that clause is invalid and unenforceable. [*Higginbotham*, *supra* at 220-221.]

In other words, MCL 500.3131 requires residual insurance to cover the liability that MCL 500.3135 indicates has been retained despite the enactment of a no-fault system of automobile insurance. MCL 500.3135 indicates that tort liability has been retained with regard to certain situations, such as situations involving a serious impairment of a body function, see MCL 500.3135(1), or situations involving "[*i]ntentionally caused harm to persons or property*."[1] See MCL 500.3135(3)(a) (emphasis added). *Higginbotham* recognizes that these two statutes, read together, mean that an automobile insurer cannot exclude liability coverage for intentional acts. Accordingly, plaintiff is indeed required to defend and indemnify Finkel. Plaintiff argues that the *Higginbotham* rationale does not apply to the instant case because MCL 500.3135 has been amended since the *Higginbotham* decision. This argument is without merit, because the amendment did not change the language in MCL 500.3135 on which the *Higginbotham* Court relied.

An argument could be made that the above rationale from *Higginbotham* constitutes obiter dictum, because the Court ultimately rested its decision on other grounds. See *Higginbotham*, *supra* at 221-223. However, the Court *specifically decided* the issue of whether the insurance policy's intentional injury exclusion mandated summary disposition in favor of the insurer. See *id.* at 221 ("the grant of summary judgment on plaintiff's complaint cannot be supported on this basis"). Moreover, and significantly, we conclude that the *Higginbotham*

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[1] Criner alleged both of these theories in his complaint against Finkel.

Court properly interpreted the plain language of the statutes at issue. Accordingly, plaintiff's argument that it was not required to provide liability coverage to Finkel is without merit.

We acknowledge that the trial court rested its decision on grounds other than the *Higginbotham* rationale – instead, the Court largely relied on cases interpreting the meaning of "intentional acts" as applied to first-party personal injury protection benefits. The Court concluded that (1) under the case law, an "intentional act" requires that the actor intend not only the action causing the injury but also the injury itself; and (2) the evidence demonstrated that Finkel did not intend the injury because she skidded, i.e., applied her brakes, before hitting Criner. We do not agree with the Court's reliance on cases applicable to first-party personal injury protection benefits. However, because the court reached the right result (i.e., that plaintiff is required to defend and indemnify Finkel) for the wrong reason, we uphold the court's decision. See *Becker-Witt v Bd of Examiners of Social Workers,* 256 Mich App 359, 365; 663 NW2d 514 (2003).

Plaintiff argues that if it is required to provide liability coverage to Finkel by virtue of the no-fault act, its coverage should be limited to the statutory minimums found in MCL 500.3009(1). We cannot allow plaintiff to reap the benefit of this argument, however, when it failed to raise the argument in the trial court.[2] Plaintiff has waived the issue. See, generally, *Fast Air, Inc v Knight,* 235 Mich App 541, 549; 599 NW2d 489 (1999).

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens

[2] We also note that if the argument had been raised below, the trial court might have clarified its opinion and might have ruled differently on Criner's claim for underinsured motorist benefits.