STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

and

JEFFERY SNYDER,

Intervening Plaintiff-Appellee,

v

CLARENDON NATIONAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 16, 2006

No. 258665
Macomb Circuit Court
LC No. 2002-005860-CK

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

This is a declaratory judgment action involving the interpretation of an automobile insurance policy issued by Frontier Insurance Company to Ryder Rental Trucks. Lakeyta Boatner rented a truck and tow dolly from a Ryder agent in Virginia to transport her belongings and car to Michigan. While in Michigan, the car came loose from the tow dolly and struck intervening plaintiff, Jeffery Snyder. Frontier subsequently filed for bankruptcy and defendant Clarendon Insurance Company assumed all of Frontier's coverage obligations and liabilities under the Frontier policy. Plaintiff Allstate Insurance Company, the insurer of Boatner's personal vehicle, brought this action seeking a declaratory judgment that defendant, rather than it, was obligated to defend and indemnify Boatner, under the Frontier policy, in an underlying action brought against her by Snyder. Defendant now appeals as of right from the trial court's order granting summary disposition to plaintiff under MCR 2.116(C)(10). We affirm the trial court's determination that residual liability coverage exists in favor of Boatner under the Frontier policy up to the policy limit of $2,000,000, but modify the trial court's judgment to provide that the coverage is excess to other available insurance.

A trial court's decision granting summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion

under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

"In interpreting a policy of insurance, we are obligated to construe clear and unambiguous provisions according to the plain and ordinary meaning of the terms as used in the provision." *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 11; 512 NW2d 324 (1993). Thus, "[c]lear and specific exclusions must be given effect," and "coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claim." *Trierweiler v Frankenmuth Mut Ins Co*, 216 Mich App 653, 657; 550 NW2d 577 (1996). "[T]echnical and strained constructions are [to be] avoided," and "[c]ourts must be careful not to read an ambiguity into a policy where none exists." *Century Surety Co v Charron*, 230 Mich App 79, 82-83; 583 NW2d 486 (1998).

"An insurance contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). "[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Id.* at 468. "[I]f the language of a contract is clear and unambiguous, its construction is a question of law for the court." *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). If an ambiguity is found, its meaning is a question of fact that must be decided by the trier of fact. *Klapp, supra* at 469.

I

Defendant first argues that the insurance policy's star-4 endorsement unambiguously excludes coverage for personal, non-business use of a vehicle by a renter, such as Boatner. We disagree.

Section II(A) of the policy provides:

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

The star-4 endorsement states that it modifies Section II(A), Liability Coverage, as follows:

> 1. Who Is An Insured
>
> The following are "insureds."
>
> a. The insurance with respect to any "auto rented to others" applies only to:
>
> (1) you [i.e., Ryder];

(2) the "rentee," a relative of the "rentee" who is of the same household and, *while used for business purposes of the "rentee,"* any employer or employee of the rentee." [Emphasis added.]

The star-4 endorsement also modifies Section V, Definitions, as follows:

The following definitions are added:

1. "Rentee" means anyone who rents a covered "auto" from you for a charge or fee and any other person expressly listed as an authorized driver in the rental agreement under which the "auto" is rented.

2. "Auto rented to others" means:

* * *

2. An "auto" of the commercial type, including trailers and semi-trailers, while rented without you or a chauffeur of yours in attendance.

Defendant concedes that because Boatner rented a truck and tow dolly from Ryder, she is a "rentee" of a covered "auto rented to others." However, defendant contends that Boatner does not qualify as an "insured" because the star-4 endorsement requires that a rentee use the vehicle for business purposes in order to be an insured. We disagree.

Contrary to what defendant argues, the star-4 endorsement does not *narrow* the definition of an insured, excluding all renters except business users. Rather, the star-4 endorsement unambiguously *broadens* the definition of an insured to include a rentee's employer and employees if the truck is used for a business purpose. The trial court correctly determined that Boatner is an insured as that term is defined in the star-4 endorsement and that the interpretation proposed by defendant is not supported by the clear and unambiguous language of the policy.

II

Because we have concluded that Boatner is entitled to coverage because she is an insured under the Frontier policy, it is unnecessary to determine whether coverage may be found because Michigan law required that such coverage be provided to Boatner. But we conclude that an examination of Michigan law is still necessary for the purpose of determining whether the residual liability coverage under the Frontier policy is primary or excess.

MCL 500.3101(1) and MCL 500.3102(1) require a nonresident owner of a motor vehicle, such as Ryder, to provide residual liability insurance coverage only if a vehicle is operated in Michigan for more than 30 days in any calendar year or is required to be registered in Michigan. In this case, it is undisputed that the truck rented by Boatner had not been operated in Michigan for more than 30 days in a calendar year, and was not required to be registered in Michigan. Therefore, Ryder was not required to provide residual liability insurance coverage under these statutes.

In this respect, this case is distinguishable from *State Farm Mutual Ins Co v Enterprise Leasing Co*, 452 Mich 25; 549 NW2d 345 (1996), which was decided on the basis of the defendant rental agencies' obligations under § 3101(1). Because residual liability coverage was not required under § 3101(1) in this case, we conclude that the holding in *State Farm* does not apply here. We also agree with defendant's argument that the policy's out-of-state coverage extension is only intended to ensure compliance with applicable state law and, therefore, does not require defendant to provide primary residual liability coverage in this case, because it is not required by state law.

Plaintiff argues that even if Michigan law does not require Ryder to carry primary residual liability coverage, defendant's predecessor, Frontier, voluntarily agreed to provide such coverage because it filed a certificate of compliance under MCL 500.3163. We disagree.

MCL 500.3163 provides:

> (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that *any accidental bodily injury or property damage occurring in this state* arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the *personal and property protection insurance system* under this act.
>
> (2) A nonadmitted insurer may voluntarily file the certification described in subsection (1). [Emphasis added.]

By virtue of its assumption of liability endorsement, defendant assumed Frontier's promise that "*accidental bodily injury or property damage* occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the *personal and property protection insurance system* under this act" (emphasis added). However, neither § 3163 nor Frontier's certificate of compliance refer to *residual liability coverage*. Thus, we conclude that the certificate does not obligate defendant to provide primary residual liability coverage in this case.

However, the star-3 endorsement, which amends section IV(B) of the Frontier policy, concerning general conditions, provides:

> 5. Other Insurance
>
> It is agreed that the coverage provided by this policy is primary insurance with respect to the "rentee" or driver as an "insured" under an "auto" rental contract.

This endorsement clearly and unambiguously states that coverage under the Frontier policy is primary. Thus, while *State Farm* and the out-of-state coverage extension do not require primary coverage, the star-3 endorsement does.

Despite the star-3 endorsement, however, the parties do not dispute that Boatner signed a rental agreement stating that "[t]he Liability Protection limits in Para. 10.A. are provided to Me (*coverage is excess* - Read Para. 10)" (emphasis added). Michigan allows rental agreements to modify the insurance coverage provided to the renter of a motor vehicle, as long as the agreement does not subvert the requirements of Michigan's no-fault law. See *Ryder Truck Rental, Inc v Auto-Owners Ins Co*, 235 Mich App 411, 414-416; 597 NW2d 560 (1999); see also *State Farm*, *supra*.

Here, if coverage existed because it was required under §§ 3101(1) and 3102(1), which require that an owner provide *primary* coverage, the rental agreement would be ineffective in modifying the policy's star-3 endorsement to provide for only "excess" coverage. But because we have concluded that residual liability coverage exists under section II(A) of the Frontier policy (because Boatner is an insured), not because state law requires Ryder to provide coverage, we conclude that the modification in the rental agreement does not offend state law and, therefore, the rental agreement effectively modifies the policy's star-3 endorsement. Therefore, as modified by the rental agreement, the residual liability coverage provided to Boatner under section II(A) of the Frontier policy is "excess" to other insurance.

III

Next, defendant argues that even if Boatner is a covered insured, coverage for this accident is excluded under the policy's star-9 endorsement, which provides:

> This insurance does not apply to any of the following:
>
> * * *
>
> 3. Auto With Less Than Four Wheels
>
> This insurance does not apply to "bodily injury" or "property damage" arising out of the operation by a "rentee" or by any other "insured" of any "auto" with less than four wheels. An "auto" with less than four wheels includes but is not limited to motorcycles, mopeds and motor scooters.

Section V(B) of the Frontier policy defines an "auto" as including a "trailer," and it is undisputed that the tow dolly had less than four wheels.

But regardless of whether the tow dolly falls within the scope of the star-9 endorsement, section II(A), Liability Coverage, independently provides:

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

As previously discussed, Boatner is an "insured" and the Ryder truck she was driving at the time of the accident is a covered "auto." There is no dispute that Boatner was operating the truck when her car came off the tow dolly, and the officer who investigated the accident opined that

the normal bouncing of the truck caused the car to come off. Further, there is no genuine issue of material fact that it was the operation of the truck that propelled the car off the tow dolly and into Snyder. Thus, but for the fact that the tow dolly was attached to and being moved (and jostled) by the truck, the accident would not have occurred. Therefore, as the trial court found, residual liability coverage for this accident existed by virtue of the rental truck's involvement in the accident.

Lastly, defendant argues that the trial court erred in finding that it was liable up to the $2,000,000 policy limits. We disagree.

Boatner signed a rental agreement for the truck and the tow dolly, which stated:

> I have received, read, and *hereby agree to the terms and conditions of the Rental Agreement*, which appear in the Rental Information Folder, and agree to pay the charges for the options I have selected. I decline Physical Damage Waiver and accept Limited Damage Waiver. I am responsible for $250 of loss or damage to the vehicle (Read Para. 4). I decline Personal Accident and Cargo Protection (Read Para. [illegible].) I decline TowGuard Protection. (Read para. 12.) The Liability Protection limits in Para. 10.A. are provided to Me (coverage is excess - Read Para. 10). I decline Supplemental Liability Protection. I received a Ryder towing guide. Only the driver listed hereon is authorized to drive the Vehicle (Read Para. 2.c.). [Emphasis added.]

Defendant has submitted a copy of a pamphlet titled Terms and Conditions of Rental Agreement, which, it alleges, is the document referenced above. However, the pamphlet is undated, and is not signed or initialed by anyone.

In pertinent part, section 10(A) of the pamphlet provides:

> To the extent permitted by applicable state law, automobile liability coverage provided under the Liability Protection Plan will be excess over any valid and collectible insurance otherwise available to Me or any permissive user, unless otherwise indicated on the Rental Information Sheet. Unless I elect higher limits of liability protection with Supplemental Liability Protection and this Rental Information Sheet is so endorsed, . . . [the policy] is the only automobile liability coverage extended to Me under this Agreement and *the limits of liability to be furnished to Me pursuant to this Agreement are split limits of $10,000 for each person injured, subject to the limit of $20,000 from all injuries resulting from one accident*, and a limit of $5,000 for damages to property resulting from any one accident, *unless the limits required by an applicable compulsory or financial responsibility law of the state in that the accident occurs are higher, in which case such higher limits will apply*. [Emphasis added.]

In Michigan, the minimum residual liability coverage required is $20,000 per person and $40,000 per occurrence. MCL 500.3109(1).

Plaintiff concedes that Michigan allows rental agreement to lower policy limits to the minimum required by MCL 500.3109(1), but not lower. See *Ryder Truck Rental, supra* at 414-

416. As plaintiff argues, however, there is no evidence that the undated, unsigned pamphlet produced by defendant is the "terms and conditions of the Rental Agreement, which appear in the Rental Information Folder," referenced in the rental agreement. Further, defendant did not submit any documents, affidavits, or deposition testimony in support of its position that the pamphlet it submitted is the document referred to in the rental agreement, much less that Boatner was given a copy of it. Therefore, defendant failed to create a question of material fact concerning whether Boatner agreed to limit the residual liability insurance coverage to the minimum required by Michigan law.[1] *Maiden*, *supra* at 121.

In sum, we affirm the trial court's determination that residual liability coverage exists in favor of Boatner under the Frontier policy up to the policy limit of $2,000,000, but modify the trial court's judgment to provide that the coverage is excess to other available insurance.

Affirmed in part and modified in part consistent with this opinion.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[1] Plaintiff also argues that even if Boatner had agreed to lower policy limits, there is no evidence that defendant's obligation to its insured (*Ryder*) is similarly limited. However, that has no bearing on the coverage available to Boatner.