STATE OF MICHIGAN

COURT OF APPEALS

WESTFIELD INSURANCE COMPANY, Plaintiff-Appellee, v KEN'S SERVICE and MARK ROBBINS, Defendants-Appellants.	FOR PUBLICATION March 8, 2012 9:00 a.m. No. 300941 Antrim Circuit Court LC No. 10-008571-CK Advance Sheets Version

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

WHITBECK, J.

In this declaratory judgment action involving underinsured motorist coverage, the circuit court granted summary disposition pursuant to MCR 2.116(C)(10) for plaintiff, Westfield Insurance Company. Defendants, Ken's Service and Mark Robbins, appeal as a matter of right. On appeal, they assert that the trial court erred by misinterpreting the language in the insurance contract to deny them coverage. We affirm.

I. BASIC FACTS

On December 19, 2009, defendant Ken's Service, a tow truck company, dispatched one of its employees, Mark Robbins, to assist a police officer, Roderick Vessey, in removing his vehicle from a ditch on US-131. When he arrived at the scene, Robbins got out of the tow truck and connected the tow cables to the police vehicle. While he was operating the control levers positioned on the driver's side of the tow truck, another driver, Ashley See, sideswiped the tow truck and collided with Robbins. Robbins suffered substantial injuries, including a broken right arm and a protruding break of the right tibia/fibula. Robbins represents that he is "crippled for life."

Harold Ingersoll owned the car that Ashley See was driving. Ingersoll's insurance company, Auto-Owners Insurance Company, agreed to tender the full $100,000 limits of the policy to settle the claim. However, Robbins sought additional compensation from Westfield Insurance, Ken's Service's insurer, based on underinsured motorist coverage obtained for the tow truck. Ken's Service had underinsured motorist coverage in the amount of $1,000,000. The uninsured/underinsured motorist endorsement to the Westfield Insurance policy provided for underinsured coverage for the "insured," which the policy defined, in relevant part, to include "[a]nyone [besides the named insured or a family member] 'occupying' a covered 'auto' . . . ." Further, the endorsement defined "occupying" to mean "in, upon, getting in, on, out or off."

Westfield Insurance refused to pay on the basis of its determination that Robbins was not "occupying" the vehicle at the time of the accident. Westfield Insurance then commenced this action for a determination of its obligations to Ken's Service and Robbins under the insurance contract.

Ken's Service and Robbins moved for summary disposition. They claimed that Robbins was leaning on the tow truck for balance and support when See struck him and that this occurred while he was operating the towing controls, which were located on the driver's side of the truck. Ken's Service and Robbins asserted that Westfield Insurance owed Robbins additional compensation because his injuries greatly exceeded the negligent driver's $100,000 policy limit, and Robbins was an "insured" under the terms of the underinsured motorist endorsement to the policy because he was "occupying" the insured vehicle by leaning "upon" it.

Westfield Insurance responded, arguing that Robbins was not occupying the tow truck when See struck him. Westfield Insurance asserted that Robbins clearly had both feet on the ground and had been outside the truck for several minutes when he was hit and injured. Westfield Insurance claimed that the term "upon" can only be properly interpreted in the context of the word "occupying." Westfield Insurance maintained that Robbins's physical contact with the truck needed to be "in the context" of being physically inside the truck, that his actions were not "in the context" of being an occupant, and that he therefore was not insured under the policy.

The trial court interpreted the contract to mean that Robbins could only prevail if he could demonstrate that he was "occupying" the vehicle by being "upon" it when he was struck. The trial court focused on the word "occupying" and determined that coverage depended on a person's connectedness with the activity of being a driver or passenger of the vehicle. According to the trial court, if the activity or physical contact was incidental to being a driver or passenger, then the person was occupying the vehicle and therefore would be insured. The trial court said that physical contact with the vehicle alone was not relevant. According to the trial court, the dispositive issue was whether Robbins's actions were the natural and probable result of being a driver or passenger. Thus, on the basis of the fact that Robbins was operating the vehicle as a towing machine when he was struck, the trial court concluded that his use was unrelated to being a driver or passenger of the truck. Accordingly, the trial court ruled that Robbins was not covered under the policy.

Ken's Service and Robbins now appeal.

II. INTERPRETATION OF THE CONTRACT LANGUAGE

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of summary disposition.[1] The moving party must specifically identify the alleged undisputed factual issues and support his or her

[1] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

position with documentary evidence.[2] The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.[3] The court must consider all the documentary evidence in the light most favorable to the nonmoving party.[4] Further, this Court reviews de novo a trial court's interpretation of contractual language.[5]

B. APPLICABLE LEGAL PRINCIPLES

Courts treat insurance contracts no differently than any other contract. Accordingly, we should give contractual language that is clear and unambiguous full effect according to its plain meaning unless it violates the law or is in contravention of public policy.[6] A court cannot infer the parties' "reasonable expectations" in order to rewrite a clear and unambiguous contract.[7] Even if the contractual language is poorly worded, it is not ambiguous if it "'fairly admits of but one interpretation[.]'"[8]

The Michigan Supreme Court interpreted the identical contractual language at issue in this case in *Rednour v Hastings Mut Ins Co*.[9] In *Rednour*, an oncoming vehicle struck the plaintiff while he was changing a flat tire on the insured vehicle.[10] The plaintiff was approximately six inches away from the insured vehicle when the other car struck him.[11] He had loosened the lug nuts on the wheel and was moving toward the rear of the vehicle when the other car struck him.[12] The plaintiff claimed that he was an insured entitled to no-fault benefits because he was "occupying" the vehicle, as both the no-fault act and the language of the policy defined that word. Specifically, the plaintiff argued that he was "'upon'" the vehicle because he was knocked into the insured vehicle and pinned between the two vehicles during the collision.[13]

---

[2] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[3] *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[4] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[5] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[6] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

[7] *Id*. at 59-62.

[8] *Nankervis v Auto-Owners Ins Co*, 198 Mich App 262, 265; 497 NW2d 573 (1993), quoting *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982).

[9] *Rednour v Hastings Mut Ins Co*, 468 Mich 241; 661 NW2d 562 (2003).

[10] *Id.* at 242.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 249.

The Michigan Supreme Court noted in *Rednour* that its prior decision in *Rohlman v Hawkeye-Security Ins Co*[14] had interpreted the meaning of "occupant" under the no-fault statute.[15] The *Rohlman I* Court declared that a person could not be an "occupant" under the no-fault act unless they were "physically inside" the vehicle when struck.[16] However, since the language of the policy broadly defined "occupying" as "in, upon, getting in, on, out or off" the insured vehicle, the *Rohlman I* Court remanded the case for this Court to consider whether the plaintiff's conduct fell under the broader definition of "occupying" stated in the policy.[17] On remand, this Court noted that physical contact with the insured person is required in order to be "upon" the vehicle, although the person need not be completely physically supported by the vehicle.[18]

While the *Rednour* Court agreed with the *Rohlman II* statement that a person did not need to be physically inside the vehicle to be "upon" it, it nevertheless held that physical contact alone is insufficient to show that "the person was 'upon' the vehicle so as to be 'occupying' the vehicle."[19] Accordingly, the Court stated:

> Plaintiff was not "occupying" the vehicle under the policy definition of that term. He was outside the vehicle, approximately six inches away from it. He was not in the vehicle, nor was he getting in, on, out, or off the vehicle when he was injured.
>
> Plaintiff suggests that he was "upon" the car because he was pinned against it after being struck. Physical contact by itself does not, however, establish that a person is "upon" a vehicle such that the person is "occupying" the vehicle. The relevant dictionary definitions . . . clarify that one must be *on* or *up and on* a vehicle in order to be "upon" it. We reject the dicta in *Rohlman II* that suggests physical contact alone may be sufficient to show that the person was "upon" the vehicle so as to be "occupying" the vehicle.[20]

---

[14] *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 522, 531; 502 NW2d 310 (1993) (*Rohlman I*), citing MCL 500.3111.

[15] *Rednour*, 468 Mich at 246-247.

[16] *Rohlman I*, 442 Mich at 532; see *Rednour*, 468 Mich at 247.

[17] *Rohlman I*, 442 Mich at 522 n 1, 528 n 8, 535.

[18] *Rohlman v Hawkeye-Security Ins Co (On Remand)*, 207 Mich App 344, 357; 526 NW2d 183 (1994) (*Rohlman II*) (noting that a child could be "on" a scooter by having one foot on it and another on the ground).

[19] *Rednour*, 468 Mich at 250.

[20] *Id.* at 249-250.

C. APPLYING THE LEGAL PRINCIPLES

Here, the parties focused on the word "upon" and the meaning of that word. In *Rednour*, the Supreme Court interpreted the meaning of "upon" to mean "*on* or *up and on*." Robbins alleged that he was "upon" the truck because he had both hands on it and was leaning against the tow truck for balance and support at the moment of impact. But, as the Michigan Supreme Court stated in *Rednour*, "physical contact alone may [not] be sufficient to show that the person was 'upon' the vehicle so as to be 'occupying' the vehicle."[21] At the time of impact, Robbins was not in the vehicle, nor was he getting in, on, out, or off the vehicle. In fact, Robbins had been out of the vehicle for several minutes and was operating the towing controls of the truck. Thus, we conclude that the trial court did not err by concluding that Robbins was not "occupying" the vehicle when he sustained bodily injury.

We affirm.

/s/ William C. Whitbeck
/s/ David H. Sawyer

[21] *Id.* at 250.