STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE MUTUAL INSURANCE COMPANY,

Plaintiff/Counter defendant-Appellant,

v

CAREY TRANSPORTATION, INC., DIANE CAREY, AND GERRI THOMAS,

Defendants/Counter plaintiffs-Appellees

and

GERALD THOMAS, TRAILER X-PRESS, INC., and PHOENIX INSURANCE GROUP,

Defendants-Appellees.

UNPUBLISHED
January 4, 2007

No. 270339
Wayne Circuit Court
LC No. 05-503294-CK

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

On April 19, 2006, the circuit court entered an order granting summary disposition in favor of Gerri Thomas (Gerri), Trailer X-Press, Inc. (TXP), Phoenix Insurance Group (Phoenix), Carey Transportation, Inc. (CTI), and Diane Carey (Diane). Plaintiff/Counter defendant, Amerisure Mutual Insurance Company (Amerisure), appeals the circuit court's order as of right, arguing that the "employer's liability," "wokers' compensation," and "fellow employee" exclusions contained in its policy excluded coverage to Gerri because her injuries arose "out of and in the course of her employment." We reverse the circuit court's order to the extent that it granted summary disposition in favor of Gerri and CTI, and to the extent that it ruled that

Amerisure had a duty to defend and indemnify Mike[1] and CTI, and that TXP was a "motor carrier for-hire" and was required to carry $750,000 worth of insurance coverage.

I. Background

Mike and Gerri were employed by CTI and dispatched to drive goods from Michigan to California. Mike and Gerri successfully completed their trip to California, and were subsequently dispatched to pick up produce in Salinas, California, and drive it back to Michigan. In an effort to make their trips as quick and efficient as possible, Mike and Gerri alternated driving duties, with the "off-duty" individual spending time resting in the "sleeper berth" so that he or she could be rested for his or her next driving shift, as well as be in compliance with the Federal Motor Carrier Safety Regulations hours-of-service rules.[2] On June 30, 2004, approximately two hours after Mike and Gerri's third driver change in Cheyenne, Wyoming, where Mike took over driving duties and Gerri entered the "sleeper berth," Mike took a corner at too high of a speed causing CTI's truck to turn over, which resulted in injuries to both Mike and Gerri.

On November 8, 2004, Gerri filed suit in Ottawa Circuit Court against Mike and CTI alleging negligent operation of a motor vehicle. On February 4, 2005, Amerisure filed a declaratory action in Wayne Circuit Court to determine whether its policy with CTI provided liability coverage to Gerri, as well as to determine if it had to provide a defense and/or indemnify Mike, Diane, TXP or CTI in regard to the pending tort suit in Ottawa Circuit Court. Amerisure also sought a determination regarding the priority of coverage provided by Phoenix.[3] After various motions for summary disposition were filed, the Wayne Circuit Court concluded that the exclusions contained in Amerisure's policy did not apply because Gerri's injuries did not arise out of and in the course of her employment with CTI. Accordingly, the trial court entered an order granting summary disposition in favor of Gerri and CTI. The order also reflected that the court had ruled that Amerisure had a duty to defend and indemnify Mike and CTI, and that TXP was a motor carrier for hire with respect to the operation of the tractor-trailer on June 30, 2004, and thus, was obligated to have $750,000 of liability coverage.

II. Standard of Review

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[1] Mike Thomas is the husband of Gerri and was the operator of a tractor trailer in the course of his employment with CTI when the accident occurred, resulting in injuries to Gerri who occupied the "sleeper berth" of the tractor at the time.

[2] During a specified eight-day period, a driver cannot drive more than 14 hours in a 24-hour period, nor can a driver drive more than 11 hours straight without a rest period. A rest period must consist of ten consecutive hours, which must be spent in the "sleeper berth" if the truck is moving. 49 CFR § 395.1

[3] Amerisure later conceded that it had a duty to defend and indemnify TXP and Diane, and acknowledged that its policy was primary to Phoenix's policy.

We review a circuit court's decision to grant or deny a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Here, the circuit court's order granting summary disposition in favor of appellees was predicated on its finding that the exclusions contained in Amerisure's policy with CTI did not preclude coverage for the June 30, 2004, accident because Gerri's injuries did not arise out of and in the course of her employment with CTI. The proper interpretation of a contract, including an insurance policy, and whether the language of the contract is ambiguous are questions of law that we review de novo. *Klapp v United Ins Group Agency*, 468 Mich 459, 463; 663 NW2d 447 (2003). We also review preliminary legal questions, such as the interpretation of a statute, de novo. *Wakin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

III. Analysis

In relevant part, Amerisure's policy states that it "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.'"[4] However, Amerisure's policy also contains three relevant exclusions. One exclusion, "Employee Indemnification and Employer's Liability," states that Amerisure's policy does not cover bodily injury to:

> [a]n 'employee' of the 'insured' arising out of and in the course of:
>
> (1) Employment by the 'insured' or
>
> (2) Performing the duties related to the conduct of the 'insured's' business

Furthermore, Amerisure's "Fellow Employee" exclusion states that Amerisure's policy does not cover bodily injury to:

> any fellow 'employee' of the 'insured' arising out of and in the course of the fellow 'employee's' employment or while performing duties related to the conduct of your business.

Finally, Amerisure's "Workers' Compensation" exclusion states that Amerisure's policy does not cover:

> [a]ny obligation for which the 'insured' or the 'insured's' insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

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[4] The parties agree that, absent an applicable exception, the policy would cover the accident.

Moreover, the federally mandated "MCS-90" endorsement contained in Amerisure's policy, which provides indemnity coverage to the "insured" for "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles," expressly provides that the indemnity coverage does not "apply to injury to or death of the insured's employees while engaged in the course of their employment." Thus, Amerisure correctly points out that its policy does not cover Gerri's injuries, nor does it have a duty to defend Mike or CTI, if Gerri's injuries arose "out of and in the course of" her employment or if Gerri was "performing the duties related to the conduct of the insured's business." Furthermore, Amerisure does not have to indemnify Mike or CTI if Gerri's injuries occurred "while engaged in the course of [her] employment."

The terms of an insurance policy are given their commonly used meanings, unless clearly defined in the policy. *Twichel v MIC General Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). Amerisure's policy does not define "arising out of and in the course of" employment, "performing duties related to the conduct of" the insured's business, nor "while engaged in the course of" employment. However, an ambiguity is not created because the definition of a word that has a common usage has been omitted. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000). An insurance contract is only ambiguous if its "provisions are capable of conflicting interpretations." *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). If insurance contract language, exclusionary clauses in particular, are found to be ambiguous, any ambiguities must be strictly construed against the insurer to maximize coverage. *American Bumper & Manufacturing Co v Hartford Fire Ins Co*, 452 Mich 440, 448; 550 NW2d 475 (1996); *Zurich American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 533; 547 NW2d 52 (1996).

Given the common usage of the questioned terminology, we conclude that the questioned terminology is not ambiguous. *Morinelli, supra* at 262. Because Amerisure's policy did not define the aforementioned terminology, we will look to collateral sources, such as Black's Law Dictionary, to find the commonly used meaning of the terminology. *Twichel, supra* at 534; *Morinelli, supra* at 262 (a court may consult a legal dictionary to determine the meaning of a phrase that has a peculiar legal meaning).

Here, the circuit court determined that Gerri's injuries did not arise out of and in the course of her employment with CTI. In doing so, the circuit court agreed with appellees argument that the federal Motor Carrier Safety regulations, which provide safety regulations for the trucking industry, should be used to help define the meaning of "arising out of and in the course of" employment. The federal Motor Carrier Safety regulations, which have been adopted by Michigan pursuant to MCL 480.11a, state that "time spent resting in a sleeper berth" is not considered to be "on-duty time." 49 CFR § 395.2. However, since the federal Motor Carrier Safety regulations do not define or even utilize the phrase "arising out of and in the course of employment," and instead merely contain measures to insure the safety of truck drivers, we conclude that it was error for the circuit court to use the federal Motor Carrier Safety regulations definition of "on-duty" to define what Amerisure meant when it attempted to exclude coverage for injuries "arising out of and in the course of" employment. *Twichel, supra* at 534; See also *People v Yamat*, 475 Mich 49, 54-58; 714 NW2d 335 (2006) (stating that cases interpreting terms in an insurance contract are not pertinent to determining the definition of a different statutory term relating to the same subject matter). And, as explained below, just because an

employee is considered to not be "on-duty" at the time he or she is injured, does not necessarily mean that his or her injuries did not arise "out of and in the course of" employment.

Since Amerisure did not define "arising out of and in the course of" employment, and Michigan courts have not previously interpreted this exclusionary language in any other insurance contract, we look to a legal dictionary for help to define this phrase that has a peculiar legal meaning. See *Morinelli, supra* at 262. Black's Law Dictionary defines "course of employment" as "events that occur or circumstances that exist as part of one's employment; esp., the time during which an employee furthers an employer's goals through employer-mandated directives." Black's Law Dictionary, Deluxe Seventh Edition (West 1999).[5]

Here, we conclude that Gerri's injuries occurred as a result of a circumstance that existed as part of her employment. The following undisputed facts support this conclusion. It is undisputed that Gerri and Mike were employees of CTI and were driving cross-country pursuant to a CTI dispatch. It is also undisputed that as a result of driving cross-country, Mike and Gerri needed to comply with federal law regarding driving and rest time. As a result of that circumstance, Gerri was resting in the "sleeper berth" while Mike was driving, and the accident occurred under that scenario.

In other words, although the federal and state regulations indicated that Gerri was off duty while in the sleeper, the regulations designation of this "off duty" time is to inform drivers that when they are in the sleeper, they need not comply with any of the safety standards. But because Gerri was in the sleeper to comply with the rest period regulations, and these rest period regulations only come into play because Gerri and Mike were dispatched by CTI to drive cross-country, we conclude Gerri was injured in the course and scope of her employment.

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[5] We note that this Court has held that the exclusionary insurance policy language "arising out of his or her employment" should be construed in a manner consistent with the Workers' Disablity Compensation Act (WDCA) because the language is identical to that used in § 301, and thus, it is believed that the language was crafted in consideration of workers' compensation law. *State Farm Mut Auto Ins Co v Roe*, 226 Mich App 258, 265; 573 N.W.2d 628 (1997). In the context of the WDCA, this Court has concluded that an injury arises "out of and in the course of employment" if a causal connection exists between the injury and a work-related event and the predominant cause of the harm is not attributable to a personal risky choice where the circumstance of employment do not significantly add to the risk of harm. *Ruthruff v Tower Holding Corp/Tower Automotive, Inc*, 261 Mich App 613, 618-619; 684 NW2d 888 (2004). Furthermore, in *Beck v C & J Commercial Driver Away, Inc*, 260 Mich 550, 553-554; 245 NW 806 (1932), our Supreme Court concluded that employees who were sleeping in their vehicles incident to their employment were considered to be within the course of their employment for purposes of the WDCA. However, as previously discussed, in *Yamat, supra* at 54-58, our Supreme Court strongly suggested that it is improper for courts to use cases interpreting insurance contract terms as a guide to interpret statutory terms, and vice versa. Thus, we will not use cases interpreting the WDCA's statutory terms as a guide in this insurance contract dispute. *Id*.

It is irrelevant whether Mike and Gerri were required to work as a driving team, as they were operating as one in this particular instance. The fact that Gerri was not being paid at the time of the accident is also not dispositive, as under the relevant definition, Gerri's presence in the "sleeper berth" was a circumstance that occurred as a result of her cross-country over the road employment with CTI.[6]

Accordingly, construing "arising out of and in the course of" employment in a consistent manner with the definition contained in Black's Law Dictionary, we conclude that, under the factual scenario before us, Gerri's injuries arose "out of and in the course of" her employment, and thus, likewise occurred "while engaged in the course of employment." The circuit court erred when it held that the exclusions contained in Amerisure's policy were not applicable to preclude coverage, and likewise erred when it held that Amerisure had a duty to defend and indemnify Mike and CTI.

Finally, Amerisure, TXP and Phoenix also argue that the circuit court erred when it concluded that TXP was a "motor carrier for-hire" and was required to carry $750,000 worth of insurance coverage. Under the federal Motor Carrier Safety Act and the federal Motor Carrier Safety regulations, which have been adopted by Michigan pursuant to MCL 480.11a, "for-hire motor carriers" or "private motor carriers" are required to maintain liability insurance in the amount of $750,000 for nonhazardous interstate or foreign commerce that has a "gross vehicle weight of 10,001 pounds or more." 49 CFR 387.1; 49 CFR 387.3; 49 CFR 387.9. "For-hire motor carriers" or "private motor carriers" include, but are not limited to, "a motor carrier's agent, officer, or representative; an employee responsible for hiring, supervising, training, assigning, or dispatching a driver; or an employee concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories." 49 CFR 387.5. A "for-hire" carrier is in the "business of transporting, for compensation, the goods or property of another." 49 CFR 387.5. A "for-hire motor carrier" is additionally defined as "a person engaged in the transportation of goods or passengers for compensation." 409 CFR 390.5. In *Del Real v United States Fire Ins Crum & Forster*, 64 F Supp 2d 958, 964 (ED CA 1998), the court held that a company that leased a trailer that was involved in an accident involving one of its lessee's employees driving a tractor carrying lessor's trailer, was not a "for-hire motor carrier."

Here, the circuit court found that TXP was a "motor carrier for hire," and was required under the federal regulations to carry $750,000 worth of insurance coverage. The circuit court concluded that the tractor-trailer was one vehicle, and thus, the vehicle as a whole needed to have $750,000 worth of insurance coverage.

It is undisputed that the tractor-trailer involved in the accident was considered to be one vehicle under Michigan law. 49 CFR 387.305; MCL 480.11a. Furthermore, it is undisputed that the tractor-trailer was required to have $750,000 worth of coverage to be in compliance with the federal Motor Carrier Safety Act. 49 CFR 387.1; 49 CFR 387.3; 49 CFR 387.9. However, even

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[6] We are not persuaded by appellees' hypothetical fears of what could result under our ruling. Our task is to decide the case in accordance with the law and facts developed in the case, not to be swayed by hypothetical results.

though TXP was a registered authorized federal motor carrier, we conclude that TXP was not a "for-hire motor carrier" regarding the accident in question because TXP was not hired to transport the goods being delivered by Gerri and Mike, and did not dispatch or employ Mike or Gerri, but rather merely leased the trailer involved in the accident to CTI for a flat weekly rate. 49 CFR 387.5; 40 CFR 390.5; *Del Real, supra* at 964. Therefore, the circuit court erred when it held that TXP was a "motor carrier for-hire" and was required to carry $750,000 worth of insurance coverage. 49 CFR 387.1; 49 CFR 387.3; 49 CFR 387.9.[7]

Accordingly, we reverse the circuit court's April 19, 2006, order to the extent that it granted summary disposition in favor of Gerri and CTI, and to the extent that it ruled that Amerisure had a duty to defend and indemnify Mike and CTI, and that TXP was a "motor carrier for-hire" and was required to carry $750,000 worth of insurance coverage.

Reversed and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

[7] It is undisputed that CTI was a motor carrier for hire, and that CTI carried $750,000 worth of coverage for the vehicle involved in the accident pursuant to its policy with Amerisure. The tractor trailer was therefore in compliance with the federal Motor Carrier Safety Act regardless of whether TXP carried the required $750,000 worth of coverage for the accident in question. 49 CFR 387.1; 49 CFR 387.3; 49 CFR 387.9; 49 CFR 387.305.