STATE OF MICHIGAN

COURT OF APPEALS

MARIE HUNT, Personal Representative for the ESTATE OF EUGENE WAYNE HUNT,

Plaintiff/Counter-Defendant/Cross-Defendant-Appellee,

v

ROGER DRIELICK d/b ROGER DRIELICK TRUCKING, and COREY DRIELICK,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs/Third-Party-Defendants/Counter-Defendants,

and

GREAT LAKES CARRIERS CORP.,

Defendant/Cross-Defendant-Appellee,

and

GREAT LAKES LOGISTICS & SERVICES, INC., and MERMAID TRANSPORTATION INC.,

Defendants/Cross-Defendants,

and

SARGENT TRUCKING, INC.,

Defendant-Appellee,

and

NOREEN LUCZAK and THOMAS LUCZAK,

Third-Party-Defendants/Counter-Defendants/Appellees,

and

FOR PUBLICATION
November 20, 2012
9:00 a.m.

No. 299405
Bay Circuit Court
LC No. 96-003280-NI

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Garnishee-Defendant-Appellant.

BRANDON JAMES HUBER,

Plaintiff-Appellee,

v

No. 299406
Bay Circuit Court
LC No. 97-003238-NI

COREY A. DRIELICK, and ROGER DRIELICK d/b ROGER DRIELICK TRUCKING,

Defendants/Third-Party-Plaintiffs,
and

GREAT LAKES CARRIERS CORP.,

Defendant-Appellee,

and

GREAT LAKES LOGISTICS & SERVICES, INC., and MERMAID TRANSPORTATION INC.,

Defendants,
and

SARGENT TRUCKING, INC.,

Defendant-Appellee,
and

GREAT LAKES CARRIERS, INC.,

Third-Party-Defendant,
and

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Garnishee-Defendant-Appellant.

THOMAS LUCZAK and NOREEN LUCZAK,

Plaintiffs-Appellees,

v

No. 299407
Bay Circuit Court
LC No. 96-003328-NI

COREY A. DRIELICK, and ROGER DRIELICK d/b ROGER DRIELICK TRUCKING,

Defendants/Third-Party Plaintiffs,

and

GREAT LAKES CARRIERS, CORP.,

Defendant-Appellee

and

GREAT LAKES LOGISTICS & SERVICES, INC., and MERMAID TRANSPORTATION,

Defendants,

and

SARGENT TRUCKING, INC.,

Defendant-Appellee,

and

GREAT LAKES CARRIERS, INC.,

Third-Party-Defendant,

and

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Garnishee-Defendant-Appellant.

Before: RONAYNE KRAUSE, P.J., and BORRELLO, and RIORDAN, JJ.

RIORDAN, J.

In a consolidated appeal from docket nos. 299405, 299406, and 299407, garnishee-appellant, Empire Fire and Marine Insurance Co. (Empire), appeals as of right from the trial

court order overruling its objections to the garnishment sought by Great Lakes Carriers Corp. (Great Lakes Carriers), and Sargent Trucking, Inc. (Sargent). The garnishments were made payable to plaintiffs Marie Hunt, Thomas and Noreen Luczak, and James Huber, all of whom were involved in a car accident with truck driver Corey Drielick (Corey). We reverse.[1]

I. BACKGROUND FACTS

A. Previous Appeal

Corey was driving a 1985 freightliner semi-tractor without the attached trailer when he was in a car accident with plaintiffs. After the accident, plaintiffs Hunt, the Luczaks, and Huber filed separate lawsuits, later consolidated, against numerous parties including Corey and his brother, Roger Drielick, as well as Sargent and Empire. In a previous appeal in the case, this Court summarized the factual developments and procedural history as follows:

> Defendant Roger Drielick contacted the insurance carrier for his trucking company, Empire, regarding the lawsuits. Empire had issued a non-trucking use, or bobtail, policy to Drielick Trucking. The policy covered damages and liability when the semi truck was not engaged in the business of hauling a trailer or under lease to a carrier. Empire denied coverage and refused to defend, based on the policy's business use exclusion, claiming that the truck was under lease to or being used in the business of Great Lakes at the time of the accident, and under the named driver exclusion. The policy excluded Corey as a covered driver.
>
> Following settlement negotiations, all plaintiffs settled with Great Lakes and Sargent and entered into a covenant to dismiss the suit against Great Lakes and Sargent and/or their insurance carriers. The settlement agreements did not release the Drielicks and expressly indicated that all plaintiffs and defendants were free to proceed against Empire. As a result of the settlement negotiations, plaintiffs also entered into consent judgments with the Drielicks. Thereafter, the parties agreed to an "Assignment, Trust and Indemnification Agreement." The Drielicks, to avoid the collection and execution of the consent judgments against them, assigned their right to collect on their insurance claims to plaintiffs, as well

[1] In their appellate brief, plaintiffs claim that this Court has already determined that this appeal cannot be an appeal as of right. Plaintiffs cite this Court's order in Docket No. 299389, involving the trial court order dated July 12, 2010, which vacated previous trial court orders nunc pro tunc. The order appealed from in this case, however, is a different order entered on July 12, 2010, which overruled Empire's objections to the garnishment judgments. Thus, plaintiffs' argument is factually inaccurate, as this Court has not ruled that the order appealed from in the instant appeal is not a final order. Moreover, when dismissing Empire's delayed application for leave to appeal, this Court specifically stated that Empire's claims could be raised in this appeal as of right. *Estate of Eugene Wayne Hunt v Roger Drielick*, unpublished order of the Court of Appeals, entered January 21, 2011 (Docket Nos. 299290, 299286, 299292). Thus, plaintiffs' challenge to this Court's jurisdiction is meritless.

> as Great Lakes and Sargent. In turn, Great Lakes and Sargent agreed to attempt to collect the consent judgments and to intervene in any collection action filed by plaintiffs.
>
> As a result of this agreement and the assignments therein, the attorney for Great Lakes filed writs of garnishment, with plaintiffs' consent, against Empire for the amounts of the consent judgments. Plaintiffs agreed to share in the proceeds with Great Lakes and Sargent in exchange for their collection efforts. Empire filed a motion to quash the writs, arguing that Great Lakes and Sargent lacked standing to seek the writs and that it properly denied coverage, based on the policy exclusions. The trial court denied the motion, finding that Empire improperly denied coverage under its policy. The court specifically found that Empire's named driver exclusion did not comport with MCL 500.3009(2), and that its business use exclusion was ambiguous. The trial court then issued three judgments against Empire, and in favor of plaintiffs, in order to execute the consent judgments. [*Hunt v Drielick*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket Nos. 246366, 246367, 246368) (unpub at 3-4).]

Empire appealed the trial court's garnishment ruling in this Court, claiming that the named driver exclusion and the business use exclusion justified the denial of coverage. *Hunt*, unpub at 4-6. Empire's policy is titled "Insurance for Non-Trucking Use," and the business use exclusion states that Empire is not liable for "bodily injury or property damage while a covered auto is used to carry property in any business or while a covered auto is used in the business of anyone to whom the auto is leased or rented." While this Court held that the named driver exclusion was invalid, we also held that the business use exclusion was unambiguous and further factual development was needed to allow the trial court to determine if the business use exclusion applies and, if so, whether a writ of garnishment was properly entered against Empire. *Hunt*, unpub at 5.

B. Business Use Exclusion

Thus, the only remaining issue in the lawsuit is whether the business use exclusion applies and precludes coverage. At the time of the accident, Corey was driving to the Great Lakes Carriers yard because William Bateson had dispatched Corey to haul a load. Corey was only miles from the yard at the time of the accident, and was not transporting any property.[2]

After a hearing regarding the business use exclusion, the trial court issued an opinion and order finding that both prongs of Empire policy's business use exclusion were not applicable. The trial court noted that Corey had yet to pick up the trailer at the time of the accident, Corey was not under orders to be at Great Lakes Carriers's yard at a particular time, Corey was free to complete personal business before arriving at the yard, and there was an oral agreement that

[2] For the reasons stated *infra*, this Court need not consider the second clause of the business use exclusion regarding whether there was a lease agreement.

Corey would not be paid until the cab was coupled with the trailer. The trial court also concluded that the lack of the written lease and the lack of a state identification card from Great Lakes Carriers suggested that the truck was not being used in the business of anyone who had leased the truck. The trial court held that Empire's policy was in full force at the time of the accident and overruled Empire's objections to the garnishment. Empire now appeals.

II. STANDARD OF REVIEW

"Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are . . . reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

III. ANALYSIS

Empire contends that the first part of the business use exclusion applies and precludes coverage and garnishment by Great Lakes Carriers and Sargent.[3] We agree. "[I]nsurance polices are subject to the same contract construction principles that apply to any other species of contract." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005) (emphasis, quotation marks, and citation omitted). Thus, insurance contracts must be interpreted according to the terms in the contract and when the terms are clear, they must be enforced as written. *Westfield Ins Co v Ken's Serv*, 295 Mich App 610, 615; 815 NW2d 786 (2012); *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 24; 800 NW2d 93 (2010). Moreover, "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured[,]" although "[c]lear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume." *Hayley v Allstate Ins Co*, 262 Mich App 571, 574; 686 NW2d 273 (2004) (quotation marks and citation omitted). If the terms of an insurance policy are not "clearly defined within the policy" they are "given their commonly used meaning." *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992).

The first part of the business use exclusion states that coverage does not apply when bodily injury or property damage occurred "while a covered auto is used to carry property in any business." As there is no Michigan law directly on point, Empire cites numerous federal cases that involve the exact same exclusionary language of the automobile being "used to carry property in any business." One such case is *Carriers Ins Co v Griffie*, 357 F Supp 441, 442 (WD Pa 1973), which involved a driver who was leased on with a carrier. The carrier dispatched the

[3] Empire makes a passing reference that the motion for reconsideration was improperly denied. However, Empire failed to raise this issue in its issue presented section. Therefore, this issue is "not preserved for appeal because these arguments were not set forth in [the party's] statement of the question involved. Therefore, we need not consider them." *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003); see also MCR 7.212(C)(5) (stating that an appellant's brief must include "[a] statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately . . . .") But, even considering Empire's passing reference that the motion for reconsideration was improperly denied, we find the issue to be meritless.

driver to pick up a load and consistent with the carrier's policy, the driver first drove to a garage to have the truck inspected. *Carriers Ins Co*, 357 F Supp at 442. At the garage, the driver drove over the victim's foot, which resulted in the subsequent litigation regarding an exclusion in the insurance policy that stated coverage did not apply "while the automobile . . . is used to carry property in any business." *Id.*

When interpreting this phrase, the court stated that "[t]he mere fact that no cargo was being handled at the particular moment when the accident occurred does not mean that the [truck] was not 'used to carry property in any business.'" *Id.* The court stated that the truck "was regularly so used to carry property in the carrier's business as a trucker" and "[i]f the intent had been to extend coverage except when the [truck] was actually hauling a load, it would not have been difficult to express such an intention clearly." *Id.* The court ultimately held that the insurance company was not liable under the policy. *Id.* at 443.

Likewise in this case, the parties agree that truck driver Corey was under dispatch at the time of the accident and was only a couple of miles away from the yard. Even though Corey did not have to be at the yard at a specific time, he was not driving aimlessly, and there is no dispute that he was specifically driving to the yard to attach the loaded trailer and drive to Cheboygan. While Corey was not carrying property at the time of the accident, the exclusion does not state that the auto must be carrying property. Rather, the exclusion applies "while the covered auto is used to carry property in any business." The term "while" is defined as "an interval of time" and the term "use" is defined as "to employ for some purpose; put into service." *Random House Webster's College Dictionary* (2001).[4] Further, the policy at issue in this case states on its cover "Insurance for Non-Trucking Use." Since Corey was purposely driving to the yard to transport property, the accident occurred during an interval of time when the truck was employed for the purpose of carrying property in the trucking business. This is not a case where the driver was engaged in an activity unrelated to the business of transporting property, such as driving a truck on a personal matter, to which the exclusion would not apply.[5]

We must apply the plain language of the contract as written. See *Westfield Ins Co*, 295 Mich App at 615. If the parties had intended to draft an exclusion limiting coverage to only those occasions when cargo was actually, physically, on the truck, they were free to do so, but chose not to. Instead, the language of the exclusion is "*while* a covered auto *is used to carry property* in any business," not "while a covered auto is *carrying* property in any business." To disregard the word "while" or the phrase "is used" would violate this Court's mandate to give

[4] As noted above, if the terms of an insurance policy are not "clearly defined within the policy" they are "given their commonly used meaning." *Group Ins Co of Mich*, 440 Mich at 596.

[5] In *Connecticut Indemnity Co v Stringfellow*, 956 F Supp 553, 558 (MD Pa 1997), a federal district court interpreted a phrase similar to the exclusion in this case to mean that the auto must actually carry property. However, in *Stringfellow*, the driver was not under any order to pick up or drop off property, nor was he engaged in any sort of inspection as was the driver in *Griffie*. The driver in *Stringfellow* instead was having his truck washed and was shopping for a Christmas present.

effect to every word, phrase, and clause in order to avoid rendering terms surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

IV. CONCLUSION

Since the first clause of the business use exclusion applies, we need not address whether the second clause relating to a lease or rental agreement applies. Moreover, since the business use exclusion applies, Empire was relieved from its duty under the contract and the trial court erred in concluding otherwise. We reverse. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello