STATE OF MICHIGAN

COURT OF APPEALS

REGINA MOSHER and DARREN FINDLING, personal representatives of the estate of MICHAEL JOHN VERSCHURE,

Plaintiffs-Appellees,

v

ESSEX INS. CO.,

Defendant-Appellant,

and

UNDERWRITERS & BROKERS, INC., RITA L. CARR, and MIDWEST UNDERWRITERS INS. AGENCY, INC.,

Defendants.

UNPUBLISHED
June 16, 2009

No. 279135
Wayne Circuit Court
LC No. 06-609475-CK

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

In this dispute over liability insurance coverage under the commercial general liability (CGL) policy issued to a bar, defendant Essex Insurance Co. (Essex) appeals by leave granted from the trial court's order denying its motion for summary disposition, which had sought an order declaring no coverage. Because we find there is no insurance coverage here, we reverse and remand for entry of summary disposition in Essex's favor.

In August 2002, Essex issued a CGL insurance policy to Vision, Inc., d.b.a. Wild Woody's Chill & Grill in Roseville, Michigan. Whether the policy provides liability insurance coverage is at issue in this case.

In April 2003, in the parking lot of Wild Woody's Chill and Grill, plaintiffs' decedent, Michael John Verschure, was struck and run over by a vehicle driven by Nassib Elassal. The accident occurred shortly following a confrontation in the Wild Woody's parking lot involving Elassal, Verschure, and Verschure's friend, Christina Flora. According to testimony, Elassal began yelling at Verschure when Verschure and Flora were in Flora's car. Verschure did not respond, but Flora left her car and began yelling at Elassal. Employees of Wild Woody's began

running at Elassal, and he began to fear for his safety. Elassal ran to his car, put the car in reverse, and "floored" it to leave the parking lot. In his haste to leave the scene, Verschure, who had left Flora's car, was hit and run over by Elassal. Verschure died from the injuries he sustained as a result of being run-over by the vehicle. Elassal was charged, *inter alia*, with manslaughter with a motor vehicle and assault and battery. He later pled guilty to a charge of attempted manslaughter.

Plaintiffs filed a wrongful death action against Vision alleging that Wild Woody's employees negligently caused Elassal to attempt to flee the parking lot, which caused Elassal to accidentally kill Verschure, and that Wild Woody's employees negligently failed to call the police before the altercation escalated to the point resulting in Verschure's death. Essex refused to defend or indemnify Vision/Wild Woody's. Subsequently, Vision/Wild Woody's entered into a consent judgment with plaintiffs, and conveyed to plaintiffs their rights to a cause of action for breach of contract against Essex.

Plaintiff's brought this action against Essex, contending that the claims brought in its wrongful death action against Vision were covered/insured occurrences within the meaning of the CGL policy issued by Essex to Vision. Essex moved for summary disposition in the trial court pursuant to MCR 2.116 (C)(10), contending that under the unambiguous terms of the policy, Vision's assignment of a cause of action to plaintiffs was invalid and plaintiffs lacked standing to sue Essex. Essex further claimed that even if plaintiffs had standing, the unambiguous terms of the policy excluded from coverage any liability for damages arising out of claims of allegations of assault and battery, negligent hiring, training and/or supervision of employees, and that the policy also excluded claims or damages arising out of the use of an automobile. The trial court denied the motion for summary disposition. This Court granted Essex' application for leave to appeal.

Essex argues that the trial court erred in denying its motion for summary disposition, because the policy provides no coverage for the liability at issue. We agree.

This Court reviews summary disposition rulings de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 41; 718 NW2d 386 (2006). A written contract's interpretation is also reviewed de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* But such evidence is only considered to the extent that it is admissible. MCR 2.116(G)(5). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *The Healing Place at North Oakland Med Ctr, supra* at 56.

This Court enforces contracts according to their terms, in order to uphold the parties' liberty of contract, *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005), and we give the words of the contract their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co*,

469 Mich 41, 47; 664 NW2d 776 (2003). An unambiguous contractual provision reflects the parties intent as a matter of law, and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Courts may not impose an ambiguity on clear contract language. *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). This Court must honor the parties' bargain, and cannot rewrite it. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811, 816 (2008).

The policy provides coverage, in the section known as the insuring agreement, for liability resulting from "bodily injury" or "property damage" caused by an "occurrence" that takes place in the "coverage territory" during the policy period. The policy defines "occurrence" as "*an accident* including all continuous or repeated exposure to substantially the same general harmful conditions." (Emphasis added.) The policy does not define "accident."

The policy also contains the following exclusions:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected or Intended Injury**
>
> "Bodily injury" or "property damages" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> * * *
>
> **b. Aircraft, Auto or Watercraft**
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading"
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment training or monitoring of others by the insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

The policy also has an endorsement entitled "COMBINATION GENERAL ENDORSEMENT," which provided, in relevant part:

> THIS ENDORSEMENT CHANGES THE POLICY.
>
> * * *

2. With respect to any "auto" under 2, Exclusions, g. Aircraft, Auto or Watercraft . . . the first paragraph is replaced by the following and applies throughout this policy:

> This insurance does not apply to "bodily injury" or "property damage" arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment of others of any "auto." Use includes operation and "loading and unloading."

Finally, the policy contains an endorsement entitled "RESTAURANT, BAR, TAVERN, NIGHT CLUBS, FRATERNAL AND SOCIAL CLUBS ENDORSEMENT, which states:

> The coverage under this policy does not apply to "bodily injury," "property damage," "personal injury," "advertising injury" or any injury, loss or damages arising out of:
>
> * * *
>
> 4. Assault and/or Battery, or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of any Insured, Insured's employees, patrons or any other person. Furthermore, assault and/or battery includes "bodily injury" resulting from the use of reasonable force to protect persons or property. The sentence "This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect person or property" is deleted from the Commercial General Liability Coverage Form, Section I, Item 2, Exclusions, a.
>
> * * *
>
> 6. Any charges or allegations of negligent hiring, employment, training, placement or supervision, nor are any expenses nor any obligation to share some damages with or repay anyone else who must pay damages from same covered in this policy.

Determination of the scope of coverage is a separate inquiry from whether coverage is negated by an exclusion. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). "[T]he proper construction of a contract requires that [a court] first determine whether coverage exists, and then whether an exclusion precludes coverage." *Allstate Ins Co v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989). The insured bears the burden of proving coverage, while the insurer must prove that an exclusion to coverage is applicable. *Heniser, supra* at 161 n 6. Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001)

First, we consider whether there is coverage under the insuring agreement. Essex contends that there was no "occurrence" because there is no question that the cause of the decedent's death was being struck and run over by another patron driving an automobile. Essex points out that the driver of the vehicle was charged with homicide-manslaughter with a motor vehicle, assault and battery, and possession of firearm; that he admitted he struck and ran over

Verschure; and that he pleaded guilty to attempted manslaughter. We disagree with Essex's argument.

In *Allstate Ins Co v McCarn* (*McCarn I*), 466 Mich 277, 280; 645 NW2d 20 (2002), our Supreme Court held that if a term is not defined in an insurance policy, we interpret the term in accordance with its commonly used meaning. In *McCarn I*, the Court was faced with an accident-based policy, i.e., defining occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage." *Id*. at 281-282. As here, accident was not defined in the policy. The Court noted that the term "accident" has consistently been interpreted to mean "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *Id*. (citations and quotations omitted). Further, "[a]ccidents are evaluated from the standpoint of the insured, not the injured party." *Id*. at 282. "[I]f both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured." *Id*. at 282-283. Accordingly, the proper analysis to determine if there was an accident, and therefore an occurrence, is to look to whether "the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured." *Id*. at 283.

We agree with plaintiffs' arguments that it cannot be construed that the bouncers intended to cause harm, or that the consequences of their actions, as those consequences actually happened, reasonably should have been expected. On the contrary, the consequence of the bouncers' behavior, the death of another patron, reasonably would not have been expected by the bouncers. *McCarn I*, *supra* at 283. Accordingly, we hold that the insurance agreement in the first instance, contemplates coverage of the accident. However, we must next consider whether coverage is excluded by one or more exclusions.

Essex argues that the exclusions in the policy preclude coverage, and begins with the "expected or intended injury" exclusion and the "RESTAURANT" endorsement regarding "assault and battery." We disagree. Essex merely summarily states that "there is no question that the underlying cause of Mr. Verschure's death is being struck and run over by an auto being driven by Nassib Elassal," without any meaningful analysis as to why the exclusion and endorsement should be deemed to apply. We agree with plaintiffs that this exclusion and endorsement do not preclude coverage. There is no evidence presented that the bouncers at Wild Woody's expected or intended bodily injury to Verschure, or that the bouncers were in the process of suppressing an assault and battery that caused the injury. Instead, the bouncers were pursuing Elassal after he allegedly struck the female patron in the parking lot. Moreover, plaintiffs presented the deposition testimony of Elassal who stated that it was not his intent to strike the decedent with his car, and Elassal never pleaded guilty to assault and battery. Therefore, Essex was not entitled to summary disposition based on this exclusion and endorsement.

Essex further argues that the auto exclusion, and the "COMBINATION GENERAL ENDORSEMENT," eliminate any coverage for liability for bodily injury resulting from any automobile. We agree.

The endorsement changes the auto exclusion, so that the exclusion provides, in relevant part: "*This insurance does not apply to bodily injury . . . arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment of others of any auto.* Use includes operation and loading and unloading." (Internal quotation marks omitted; emphasis added.) Essex contends that it is undisputed that Verschure's bodily injury arose out of, or was caused by, the use of any auto, and therefore, the unambiguous language of the above provision excludes coverage. Yet, the trial court ruled that the language of the provision implied that it is the insured who would have to be either driving the vehicle, maintaining the vehicle, using the vehicle, or entrusting the vehicle to another, in order for the exclusion to apply. We disagree. The trial court interpreted the exclusion incorrectly, since the language mentions nothing about the insured having to be the one using the auto involved. Instead, it is clear that the exclusion indicates that there was no coverage for any bodily injury caused by, among other things, the use of any auto. This would include an automobile accident in the parking lot or the property surrounding the bar owned by Wild Woody's, regardless of whether the vehicle was driven by an employee, a patron, or anyone else. The words of the bargain struck by the parties must control. *Grand Trunk W RR, Inc v Auto Warehousing Co*, 262 Mich App 345, 351; 686 NW2d 756 (2004). The Court will not change the terms of an agreement for the parties, nor make a new agreement. *Purlo Corp v 3925 Woodward Ave*, 341 Mich 483, 487; 67 NW2d 684 (1954).

Case law supports this conclusion. Although plaintiffs alleged that but-for the bouncers' conduct, Elassal would not have sped away and struck their decedent, this dual causation argument is undermined by another decision cited by Essex, *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 (1991), overruled on other grounds, *Wilkie v Auto Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003). In *Vanguard Ins Co*, the plaintiff's parents and brother died from carbon monoxide emitted from her father's vehicle. The plaintiff's father had come home intoxicated, and had left the engine running after he closed the garage door opener. As personal representative of the estate of her mother and brother, the plaintiff filed a wrongful death lawsuit against her father's estate, and Vanguard filed a declaratory action, claiming that an auto exclusion in the homeowner's insurance policy issued to the plaintiff's parents absolved it of any contractual obligation to defend or provide liability coverage. *Vanguard Ins Co*, *supra* at 467-468. The policy excluded coverage for liability for "bodily injury or property damages arising out of the ownership, maintenance, operation, use, loading or unloading of . . . any motor vehicle owned or operated by, or rented or loaned to any Insured . . . ." *Id*. at 468. Vanguard filed a motion for summary disposition, which the plaintiff opposed on the theory of dual causation – that the deaths resulted from two proximate causes: the closing of the garage door and the operation of the automobile. The trial court granted summary disposition, ruling that the sole proximate cause of the deaths was the operation of the motor vehicle. *Id.* at 468-469. This Court reversed the decision, adopting the dual causation theory, but the Supreme Court reversed, stating in relevant part:

> The policy exclusion in the instant case plainly stated that homeowner's coverage would not extend to personal injury or property damage arising out of the use or operations of an automobile. Certainly, as the Court of Appeals recognized, the policy would have provided coverage had the garage door alone produced an injury, such as by closing on the insured's foot. In the instant case, however, the fumes produced by the operation of an automobile, and not the

> garage door, comprised the death-producing instrumentality. The direct terms of the auto-related occurrence exclusion therefore apply. [*Id*. at 473.]

In light of this reasoning in *Vanguard*, plaintiffs' dual causation argument fails. In sum, coverage for the liability arising out of Verschure's death, from being run over by an auto, is excluded by the Essex policy. The trial court therefore erred in denying Essex's motion for summary disposition.

In light of our conclusion that Essex's policy excludes coverage, Essex's remaining arguments are moot. *In re Duane Baldwin Trust*, 274 Mich App 387, 404; 733 NW2d 419, 429 (2007).

Reversed and remanded for entry of an order of summary disposition in Essex's favor. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot