STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

UNPUBLISHED
February 2, 2010

v

No. 288530
Kent Circuit Court
LC No. 07-012609-CK

ANDREA DEE LARGE and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants-Appellees,

and

AYME K. FRITZ,

Defendant.

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiff Auto-Owners Insurance Company ("Auto-Owners") appeals as of right the October 3, 2008, order denying its motion for summary disposition and granting summary disposition in favor of defendant Citizens Insurance Company of America ("Citizens").[1] We affirm.

The pertinent facts underlying this appeal are undisputed. On March 25, 2005, defendant Andrea Large was involved in an automobile accident with defendant Ayme Fritz. At the time of the accident, Large was driving a vehicle owned by Bollinger's Inc. ("Bollinger's"), an automobile dealership, while Large's own vehicle was being serviced. Bollinger's carried garage liability insurance issued by Auto-Owners; Large carried automobile insurance issued by Citizens on her personal vehicle, which was not involved in the accident. While Large and her husband typically paid for their vehicles to be serviced by Bollinger's, this particular repair was being made without charge, because Bollinger's typically performed "squeaky brake" repairs for its customers for no charge - as a "good will" repair.

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[1] Defendant-Appellant Andrea Large joined in the arguments raised by Citizens on appeal.

Fritz filed suit against Large and Bollinger's seeking to recover for injuries she sustained in the accident, for which Large was admittedly at fault. Thereafter, Auto-Owners filed this declaratory action to determine the priority of liability insurance coverage as between its policy, issued to Bollinger's, and Large's policy issued by Citizens. Following cross motions for summary disposition, the trial court determined that Auto-Owners must provide the first $500,000 in coverage for damages resulting from the accident, with Citizens liable only on an excess basis after Auto-Owners' coverage has been exhausted.

Auto-Owners argues that the trial court erred by determining that Large was not a "garage customer" at the time of the accident, and by concluding that it was required to provide coverage to Large to the full extent of its policy limits. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). This Court also reviews de novo questions of statutory interpretation or application. *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 117; 667 NW2d 880 (2003); *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

We need not determine whether the trial court erred by concluding that Large was not a "garage customer" within the meaning of the Auto-Owners policy at the time of the accident. Even were we to so conclude, pursuant to this Court's decision in *Auto-Owners v Martin*, 284 Mich App 400; 773 NW2d 29 (2009), Auto-Owners is primarily liable for providing coverage to the full extent of its policy limits for damages resulting from Large's permissive use of Bollinger's vehicle.

In *Martin*, this Court was asked to resolve the priority of coverage between an auto-dealership's garage liability policy, also issued by Auto-Owners and identical in all pertinent respects to the policy at issue here, and the personal insurance policy of the driver of a vehicle owned by the dealership, who was involved in an accident while he was test driving that vehicle. As here, the action was filed by Auto-Owners seeking a declaration regarding the priority of coverage as between itself and the driver's insurer. In that case, like this one, Auto-Owners acknowledged that under our Supreme Court's decision in *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225; 531 NW2d 138 (1995),

> the provision in its policy excluding residual liability coverage for "garage customers" – except when the customer is uninsured or underinsured "up to the applicable limit of the financial responsibility law of the state" – is invalid to the extent that it would preclude coverage required by the no fault act. Thus, the question at hand is the amount of residual liability coverage Auto-Owners is required to provide for [the driver's] use of [the dealership's] vehicle. [*Martin*, 284 Mich App at 436.]

As it does here, Auto-Owners argued in *Martin* that its primary liability coverage was limited to the "20/40" coverage requirement imposed by the no-fault act, under *Citizens*. And, in *Martin*, as here, the driver's insurance company argued that, under case law issued after *Citizens*, Auto-Owners was primarily liable up to its policy limit before the driver's policy providing excess

coverage applied. *Martin*, 284 Mich App at 436-437. Faced with the same pertinent arguments raised here, this Court held that the garage customer exclusion as defined by the policy was invalid, with the result that Auto-Owners was responsible for providing primary coverage to the permissive driver of the dealership's automobiles up to the policy limits. *Martin*, 284 Mich App at 429.

Here, as in *Martin*, Auto-Owners knew or should have known that the garage customer exclusion in the policy at issue was void. "The no-fault act clearly directs that a policy sold pursuant to the act must provide residual liability coverage for *use* of the vehicle insured, and, [nine] years before Auto-Owners issued its policy, our Supreme Court expressly declared the type of exclusion at issue invalid. *Citizens, supra.* Consequently . . . , the policy must be construed in favor of the insured to provide coverage up to the policy limits to both the owner of the vehicle and its permissive users." *Martin*, 284 Mich App at 445-446.[2]

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[2] Auto-Owners argues here that our Supreme Court's decision in *Husted v Auto-Owners Ins Co*, 459 Mich 500; 591 NW2d 642 (1998), supports its position that it is not required to provide Large with any residual liability coverage. However, *Husted* is inapposite. At issue in *Husted* was whether a business-use exclusion in the driver's personal insurance policy, which excluded coverage for the driver's operation of any "automobile not of the private passenger type while used in a business or occupation . . .," was valid to exclude coverage for liability arising from an accident occurring while he was operating his employer's vehicle in the course of his employment. The Court determined that the business-use exclusion in the driver's policy was valid, noting that it was specifically permitted by the essential insurance act, MCL 500.2102 *et seq*, and that it was not contrary to the requirements of the no-fault act. *Id.* at 506-508. The Court specifically noted that, while the no-fault act requires owners or registrants to maintain residual liability coverage for use of the automobile, it contains no such requirement for operators, and further, it does not require that an insured maintain residual liability coverage with respect to any and all vehicles that the insured may operate. *Id.* at 508. The Court explained:

> Consideration of [the no-fault act's] provisions demonstrates that they do not evince a policy to require residual liability coverage for an insured's operation of *any* vehicle, i.e., even a vehicle specifically excluded from coverage by the insured's policy. The most obvious refutation of such a policy is that § 3101(1) requires owners or registrants, but not operators, to maintain residual liability coverage. Plaintiff cites no provision of the no-fault act that requires an insured to maintain residual liability coverage with respect to any and all vehicles the insured operates. [*Id.*]

Stated differently, at issue in *Husted* was whether an insured's policy could exclude coverage for his use of a particular vehicle; at issue here is whether a vehicle owner's policy can exclude coverage for an entire class of permissive users of a vehicle. Our Supreme Court has repeatedly held that the no-fault act requires the owner or registrant of a vehicle to purchase insurance that provides residual liability coverage for loss arising from the use of that vehicle, and that such coverage may not exclude an entire class of persons who use the vehicle. *Enterprise*, 452 Mich at 31-32, 36; *Citizens*, 448 Mich at 228-229, 231. This Court's ruling in *Martin*, 284 Mich App at 429, and our ruling here are consistent with that principle of law.

Auto-Owners argues that it has provided full coverage for the use of the vehicle by insuring the owner for owner's liability for that use, and that the owner's insurer has full subrogation and indemnity rights against the driver, "with the result that the Citizens policy would be ultimately primary because its insured is the driver with the ultimate liability to the owner." Faced with this same argument in *Martin*, this Court concluded that Auto-Owners' assertion lacked merit, reasoning as follows:

> By seeking to limit its coverage to the statutory minimum of $20,000, and then any remaining amount of damages for which [the dealership] is held liable only after [the driver's] insurance coverage is exhausted, Auto-Owners is attempting to unilaterally shift a portion of the residual liability away from the owner of the vehicle to the driver or the driver's insurance company, neither of which is a party to the contract. Our Supreme Court has expressly condemned such shifting as violative of the no-fault act. As stated in *Citizens*, although "the Legislature has remained silent concerning who among competing insurers must provide *primary* residual liability benefits, we refuse to construe that silence as expressly authorizing an owner's insurer . . . to unilaterally dictate the priority of coverage among insurers in a manner that shifts insurance costs to the nonowner of the vehicle." *Citizens*, *supra* at 235 (emphasis in original). The Supreme Court extended its analysis of this issue in *Enterprise* and held that "*any* such shifting provision is void. Vehicle owners . . . are required to provide primary coverage for their vehicles and all permissive users of their vehicles." *Enterprise*, *supra* at 27-28 (emphasis added). Pursuant to the owner's liability statute, MCL 257.401, [the dealership] remains 100 percent liable for damages related to the subject accident. In attempting to distinguish between [the dealership] as the owner insured and [the driver] as a permissive user, which Auto-Owners is also statutorily required to include as an insured, Auto-Owners is attempting to unilaterally dictate priority of coverage. This it cannot do. Given our finding that Auto-Owners is primarily liable up to its policy limits of $1 million, we need not address Auto-Owners' argument regarding subrogated indemnification and State Farm's coverage. [*Martin*, 284 Mich App at 448-450.]

Auto-Owners also argues that its policy contains a statutory compliance provision that limits its liability to the statutory minimum when a policy exclusion is invalid.[3] This Court rejected this same assertion in *Martin*, explaining that

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[3] That provision provides:

> 5. FINANCIAL RESPONSIBILITY. Such insurance as is afforded by this coverage form under Coverages A and B shall comply with the provision of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of an automobile during the policy period, to the extent of the coverage and limits of liability required by such law.

> Auto-Owners' position lacks merit for several reasons. First, this Court in [*Farmers Ins Exch v Kurzmann,* 257 Mich App 412, 417; 668 NW2d 199 (2003)] rejected a similar argument by the insurer in that case, and held that the existence of a statutory compliance provision in the face of a known invalid exclusion and policy limits above the statutory minimum rendered the policy ambiguous and therefore the policy limits applied. [*Id.*] at 416, 418. Second, the provision in Auto-Owners' policy addresses compliance with motor vehicle financial responsibility law, which is not the law at issue in this case. Rather, Auto-Owners' policy violates the no-fault act. Third, Auto-Owners' provision contains no amending or conforming language. It merely states that its policy shall comply with motor vehicle financial responsibility law to the extent of the coverage and limits of liability required by such law. Aside from an improper exclusion of garage users, Auto-Owners' policy did comply with financial responsibility law, as it sold a policy that provided coverage in an amount that complied with financial responsibility law in Michigan. The provision contains no language indicating that in the event an exclusion is deemed void, only the statutory minimum applies. We cannot be expected to read into the policy language that it did not provide. Finally, if Auto-Owners wanted to limit its coverage of garage customers to the statutory minimum, it could have expressly stated so; it chose not to, creating the ambiguity at issue. [*Martin*, 284 Mich App at 447-448.]

The trial court correctly concluded that Auto-Owners' "garage customer" exclusion did not limit its liability for providing coverage, on behalf of Large, to the statutory 20/40 minimum coverage requirement. Rather, as is clear under this Court's decision in *Martin*, 284 Mich App 452, Auto-Owners is required to provide Large with coverage to the full extent of the policy limits ($500,000), and Large's personal insurer, Citizens, is liable only for amounts in excess of that coverage. Thus, the trial court did not err by granting Citizen's motion for summary disposition.

We affirm. Defendants Citizens and Large, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens