

No. SC85175

IN THE
MISSOURI SUPREME COURT

STATE EX REL. FORD MOTOR COMPANY, KENNETH KING, BILLY GENSLER,
CHARLES HITT AND AMERICAN FAMILY INSURANCE COMPANY

Relators,

-vs-

THE HONORABLE MICHAEL P. DAVID, JUDGE
CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI

Respondent.

RELATORS' REPLY BRIEF

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I. INTRODUCTION

At issue is whether a lawsuit involving a workplace accident and defendants with no connection to the City of St. Louis can be brought in the City of St. Louis based on claims made against the plaintiff's automobile insurance policy which provides no coverage for the unassembled vehicle involved or the subject accident. All of plaintiff's claims against American Family are based on an automobile insurance policy issued to the decedent covering four automobiles which have no relevance to the present lawsuit. (Writ Exhibit D.)¹ Plaintiff alleges three claims against American Family: (1) uninsured motorist; (2) medical payments; and (3) accidental death benefits. (Writ Exhibit B at Counts X, XI, XII.) However, the record and pleadings do not support a cause of action under any of these claims. The insurance policy was issued to cover automobile accidents on roadways – not accidents involving non-registered vehicles undergoing design adjustments which have not left the assembly plant. The subject accident does not involve a vehicle while being used on the highways of Missouri. Rather, this accident occurred in an assembly plant during the assembly of a vehicle for use in Australia. Judge Neill² acknowledged this in dismissing plaintiff's uninsured motorist claim (Writ Exhibit A at 1, 7), noting the subject "Ford Explorer was not being

¹ All exhibits referred herein were attached to Relators' Suggestions in Support of their Petition filed on March 25, 2003.

² The Honorable Margaret M. Neill was the Presiding Judge who issued the subject Order. The Honorable Michael P. David is the current Presiding Judge.

operated as a vehicle for transportation purposes on a public road, but was being propelled along an assembly line.” (Writ Exhibit A at 9) (emphasis added.) For the reasons set for herein and in Relators’ Brief, Judge Neill should have also dismissed plaintiff’s claims for medical benefits and accidental death benefits.

Respondent argues plaintiff had valid causes of action on all three claims. Not only is Respondent incorrect, but he dodges several key arguments made by Relators and, at the same time, blurs the real issue with several reoccurring, irrelevant arguments. Most notably, Respondent insists on arguing plaintiff had a valid uninsured motorist claim – a claim which was dismissed by Judge Neill, the dismissal of which is not at issue before this Court. For the reasons set forth herein and in Relators’ Brief, this Court should make its Preliminary Writ permanent and prohibit Respondent from taking any further action on this case other than to transfer it to a county where venue is proper.

II. ARGUMENT

A. Plaintiff’s uninsured motorist claim is not an issue before the Court.

Respondent spends seven pages arguing that plaintiff had a valid uninsured motorist claim and that this Court should consider reinstating it. (Respondent’s Brief at A.I.) Judge Neill previously held the uninsured motorist coverage did not apply and dismissed this claim. (Writ Exhibit A.) Respondent did not appeal Judge Neill’s decision to dismiss the uninsured motorist claim and did not request the lower court to reconsider the ruling. Whether Judge Neill correctly dismissed the uninsured motorist

claim is not before this Court. Accordingly, none of the arguments³ contained in Section A.1. of Respondent's Brief should be considered.

³ For example, Respondent states that Relators argue the Ford Explorer was not a motor vehicle because it was "inoperable". (See Respondent's Brief at pp. 22.) Relators never asserted the subject Ford Explorer was "inoperable", rather Relators have consistently argued the subject vehicle was "unassembled" and, therefore, not a motor vehicle under the subject Policy. Respondent also contends Ford offered no evidence it obtained a certificate of self-insurance (Respondent's Brief at p. 24) which, according to Respondent, makes the workers' compensation exclusion invalid. (Respondent's Brief at p. 24.) Both of these arguments relate to the uninsured motorist claim which is not before this Court. Moreover, neither of these arguments form the bases for Judge Neill's dismissal of the uninsured motorist claim. Respondent further confuses the issues by arguing the subject Ford Explorer was a "motor vehicle" under the uninsured motorist coverage of the subject Policy by citing cases involving vehicles located everywhere but an assembly line. Respondent actually highlights the fact that the vehicles involved in those cases were located, for example, in a driveway and a parking lot – places out in the motoring public, not in an assembly plant or on an assembly line. See Keeler v. Farmers & Merchants Ins. Co., 724 S.W.2d 307 (Mo. Ct. App. 1987) (driveway); Thornburg v. Farmers Ins. Co., 859 S.W.2d 847 (Mo. Ct. App. 1993) (parking lot). Where the subject Ford Explorer was located at the time of the

B. Plaintiff has no cause of action under the medical expense coverage of the policy.

Respondent argues the workers' compensation exclusion of the Policy is ambiguous. (Respondent's Brief at p. 26.) Respondent also contends American Family's denial on the basis of a workers' compensation exclusion is not supported by Missouri law, citing only a self-serving letter plaintiff's counsel sent to American Family that suggested the exclusion was not enforceable. Neither of these arguments were considered by Judge Neill when deciding whether the workers' compensation exclusion applied and, therefore, these issues are not before this Court. Rather, Judge Neill erroneously concluded: 1) there was no evidence a workers' compensation claim was pending and 2) the term "highway vehicle" was ambiguous under the Medical Expense provision of the Policy. Therefore, Judge Neill allowed plaintiff to proceed with the medical expense claim. (Writ Exhibit A at 10.)

There is no dispute, however, that plaintiff filed a workers' compensation claim and is presently receiving benefits from her decedent's workers' compensation insurer. Respondent's Brief does not refute the fact that plaintiff is receiving workers' compensation on a monthly basis. (See Interrogatories Nos. 13, 14 at Writ Exhibit 4.) This information was verified under oath by plaintiff prior to the adjudication of the venue challenge. (See id.) It is also undisputed the subject policy provides the Medical

accident is not the issue. The issue is whether an unassembled Ford Explorer undergoing design adjustments on an assembly line is a "motor vehicle" under the subject Policy.

Expense Coverage for bodily injury is excluded where “during the course of employment . . . benefits are payable or must be provided under our workers’ compensation . . . law.” (Writ Exhibit D at Part II, Exclusion No. 6, p. 3.)

The subject accident occurred while the decedent was working at Ford’s assembly plant. (Writ Exhibit B at ¶ 15.) The accident allegedly occurred after carpet was installed on the floor console of the subject Explorer. (Id. at ¶ 16-23.) Accordingly, the decedent was injured “during the course of employment.” (Writ Exhibit D.) Not only are plaintiff’s benefits “payable or . . . provided [for] under a workers compensation” law based on the allegations in the Petition, but plaintiff is actually receiving workers’ compensation. Accordingly, plaintiff has no cause of action for medical expenses under the subject Policy.

Judge Neill also erroneously concluded the term “highway vehicle” is ambiguous under the subject Policy. According to Judge Neill, the term “highway vehicle” is ambiguous because the policy is unclear whether it refers to a vehicle operated on a highway, subject to being operated on a highway, or merely designed for highway use. (Writ Exhibit A at 10, 12.) Judge Neill’s Order ignores the mandate found in Toastmaster v. Mummert, 857 S.W.2d 869, 872 (Mo. Ct. App. 1993), which states language found in insurance policies must be given its plain meaning, consistent with the reasonable expectations, objectives, and intent of the parties. Courts cannot create an ambiguity to distort the language of an unambiguous insurance policy. Krombach v. Mayflower Ins. Co., Ltd., 829 S.W.2d 208, 210 (Mo. banc 1992).

When viewed in the context of the subject insurance policy, the plain meaning of the term “highway vehicle” is a completely manufactured vehicle ready to be sent into the stream of commerce for use on highways, roads, and other traffic ways. Judge Neill dismissed plaintiff’s uninsured motorist claim, concluding the subject Ford Explorer was not a vehicle subject to Missouri’s Motor Vehicle Financial Responsibility Laws and was not an “uninsured motor vehicle” under the terms of the subject Policy. (Writ Exhibit A at 9) (emphasis added.) Judge Neill further noted the subject “Ford Explorer was not being operated as a vehicle for transportation purposes on a public road, but was being propelled along an assembly line.” (Writ Exhibit A at 9) (emphasis added.) The question is not whether the term “highway vehicle” is ambiguous, but whether an unassembled vehicle located in an assembly plant can be subject to coverage under an automobile insurance policy that covers unrelated vehicles. Under the instant facts and the subject Policy language, the answer must be – no.

Respondent’s sole argument to the contrary is based on Stonger v. Riggs, 85 S.W.3d 703 (Mo. Ct. App. 2002). However, the Stonger case does not help Respondent and, in fact, supports Relators’ position.

In Stonger, the issue was whether the defendant, operating a lawn mower, owed an ordinary degree of care or the “highest degree of care” under Mo. Rev. Stat. § 304.012. Id. at 705. Before concluding the lawn mower was a “vehicle”, the court consulted other statutes defining “vehicles.” Id. at 707-07 (i.e. considering definition of Mo. Rev. Stat. § 301.010(64)). Similarly, Judge Neill could have, and should have, consulted the definition of “motor vehicle” under Missouri’s Motor Vehicle Safety

Responsibility Law, Mo. Rev. Stat. §303.010, et seq. in her evaluation of plaintiff's Medical Expense claim just as she did in evaluating and dismissing plaintiff's Uninsured Motorist claim.

In addition, Stonger does not address the issue in the present case – whether an unassembled vehicle, which is not ready for Missouri roads and in fact not intended to ever be used on Missouri roads, can be construed to be a “motor vehicle” under the terms of the subject automobile insurance policy. Stonger involved a lawn mower accident that occurred on a public street. Id. at 704. No analogy can be drawn from Stonger.

C. Plaintiff has no cause of action under the accidental death coverage of the policy.

Plaintiff did not have Accidental Death Coverage under the subject Policy at the time of the accident. The accident occurred on September 6, 1997. None of plaintiff's vehicles had Accidental Death Coverage at the time of the accident. (See Affidavits and Declaration Pages attached as Exhibit J. Counsel has highlighted relevant portions.) Only the policies issued after the accident contain Accidental Death Coverage. (See Affidavits and Declaration Pages attached as Exhibit K. Counsel has highlighted relevant portions.) As the Declarations reveal, Accidental Death Coverage was not in effect until October 13, 1997, well after the subject accident.

Respondent contends plaintiff had Accidental Death Coverage by citing a March 27, 1997, letter from American Family containing a “Coverage” section. This section simply details the types of coverage available for purchase. A thorough review of the letter reveals copies of insurance cards at the bottom of the page which were issued to

plaintiff. The insurance cards clearly indicate the only coverage available to plaintiff were: Bodily Injury Liability (BI), Property Damage Liability (PD), Uninsured Motorist Bodily Injury (UM), Medical Expense (ME), and Emergency Road Service (ERS). Conspicuously absent from the list of coverage is the designation for Death & Dismemberment – DD. Respondent also cites a letter that suggests plaintiff may have had Accidental Death Coverage. However, the letter was prepared on October 12, 1998. As described above, plaintiff had Accidental Death Coverage beginning on October 13, 1997 – a year before the letter was written. Accordingly, as of October 12, 1998, it would appear as though plaintiff did have accidental death benefits.

Even if plaintiff had Accidental Death Coverage at the time of the accident, the subject Ford Explorer was not a “land motor vehicle” under the Policy. Once again, Respondent relies on Stonger and, for the reasons discussed above, Stonger does not help Respondent. Respondent cites other decisions which are equally inapplicable. For example, Respondent attempts to compare the subject Ford Explorer, an unfinished/unassembled product within the confines of an assembly plant with the following:

- A stripped-down Volkswagen (i.e. “bush-buggy”) that was driven on a frozen surface of a lake. Bourgon v. Farm Bureau Mut. Ins. Co., 270 A.2d 151 (Vt. 1970);
- A farm combine involved in an accident in the middle of a field. Thedin v. U.S. Fidelity & Guar. Ins. Co., 518 N.W.2d 703 (N.D. 1994); and

- A farm tractor operated on a public road. Trierweiler v. Frankenmuth Mut., 550 N.W.2d 577 (Mich. Ct. App. 1996).

Each of the above decisions involved a particular set of facts applied to particular language found in a specific insurance policy, none of which are similar to the instant case. More importantly, these decisions involve vehicles that have been sent out into the stream of commerce and, in fact, were involved in accidents while being used in the stream of commerce. Neither can be said of the subject Ford Explorer.

Similar to her flawed analysis under the Medical Expense claim, Judge Neill concluded the term “land motor vehicle” as used in the Accidental Death Coverage is ambiguous under the subject Policy. (Writ Exhibit A at 10, 12.) As discussed above, Judge Neill’s analysis of the term “land motor vehicle” as used in the Accidental Death Coverage should have been consistent with her analysis of the term “motor vehicle” as used in the Uninsured Motorist Coverage. The plain meaning of the term “land motor vehicle”, when viewed in the context of the subject insurance policy, means a completely manufactured vehicle capable of being driven on a highway, road, or other traffic way; not an unassembled vehicle “being propelled along an assembly line.” (Writ Exhibit A at 9) (emphasis added.) Under the instant facts, the subject Ford Explorer is not a “land motor vehicle” under any proposed definition of “vehicle.”

D. Plaintiff had no realistic belief she had a cause of action against American Family.

Relators have fully explained why plaintiffs had no valid claims for medical expense and accidental death benefits as a matter of law. Relators further refer

to its previously filed Brief. In summary, the pleaded facts in plaintiff's Petition fail to state a claim against American Family because:

1. The subject vehicle was on the assembly line in an assembly plant and, therefore, not a "motor vehicle" under the terms of the subject insurance Policy and Missouri law;
2. Plaintiff has no medical expenses claim under the Policy because plaintiff has received workers' compensation and the claims are excluded by the terms of the Policy; and
3. Plaintiff has no accidental death claim because the policy in place at the time of the accident did not contain such coverage and, in the event there was accidental death coverage, the claim is excluded by the terms of the Policy.

For similar reasons, plaintiff could not have had a realistic belief that she had valid medical and accidental death claims against American Family under the instant facts. The decedent's insurance policy was issued to cover automobile accidents on roadways – not accidents involving non-registered vehicles undergoing design adjustments which have not left the assembly plant. A product in the manufacturing process is not ready to be sold or marketed and, thus, is not a "motor vehicle." Any valid claim under the Policy requires a motor vehicle to have been involved in causing a plaintiff's injuries. To the contrary, plaintiff's claims are premised on an assumption that the subject Ford Explorer was a fully assembled vehicle out in the stream of commerce. Under such facts, plaintiff simply could not have had a realistic belief that under the law and evidence any claim could be valid under any implicated provision of plaintiff's automobile insurance policy.

E. American Family did not waive its right to join in on a Motion to Transfer.

Respondent argues throughout its Brief that Relators waived their venue argument because American Family failed to file a transfer motion. Plaintiff's argument is disingenuous. If American Family's Motion to Dismiss was granted on all counts, it would have been dismissed entirely from the lawsuit. If American Family's Motion to Dismiss was denied on any count, American Family would have remained in the lawsuit and venue would be proper in the City of St. Louis. American Family would have had no reason, much less legal authority, to file a motion to transfer. This point is a red herring and is without merit.

F. Ford complied with all procedural requirements.

Relators refer the Court to their Brief regarding Respondent's argument that Relators untimely filed their Motion to Transfer for Improper Venue. (See Relators' Brief at p. 19). Respondent does not refute the fact that at a hearing with Judge Neill, Relators disclosed that the motion was timely filed on April 2, 2001, but the motion included a prior closed case number. The mistake was corrected and the issue was resolved. This point relied on by Respondent is without merit and in no way precludes the issues before this Court. See Borello v. Adams, 975 S.W.2d 188, 191 (Mo. Ct. App. 1998) (default judgment set aside for "good cause shown" where attorney in filing answer "inadvertently" put the wrong case number on the answer and therefore answer was filed in a closed case).

III. CONCLUSION

For the reasons set forth above and in Relators' previously filed Brief, Respondent erred by not dismissing plaintiff's remaining claims against American Family and transferring this matter to a proper forum because the subject Policy does not provide plaintiff with a cause of action against American Family. Because none of the remaining defendants are residents of the City of St. Louis and because the cause of action did not arise in the City of St. Louis, venue under Mo. Rev. Stat. § 508.010 is improper in the City of St. Louis. Relators respectfully request this Court to make its Preliminary Writ permanent and prohibit Respondent from taking any further action in this case other than dismissing the claims against American Family and transferring this case to a proper forum.

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CERTIFICATE PURSUANT TO RULE 84.06(c)

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the requirements of Rule 84.06(b), and contains 3,252 words. The undersigned further certifies the enclosed disk has been scanned for viruses and is virus free.

Attorneys for Relator

Signature of this filing certifies a copy of the foregoing was mailed via First Class, U.S. Mail, postage prepaid this 4th day of September, 2003, to:

The Honorable Michael P. David
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