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Michigan's Court Of Appeals Reaffirms That Surplusage, Alone, Does Not An Ambiguity Make

By Timothy Bahorski

In *Estate of Abay v DaimlerChrysler Corporation and DaimlerChrysler Insurance Company,*[1] the Estate sought insurance coverage under a Commercial Auto Policy issued by DCIC[2] to DCC.[3] At issue was the application of Endorsement No. 19, INDIVIDUAL NAMED INSURED.[4]

Lee owned the vehicle Brooks was driving at the time of the automobile accident.[5] Lee loaned the car to Taylor, who used the car with Lee's permission to drive to work. At lunch, Taylor ran an errand and picked up Brooks. After the two returned to Taylor's place of employment, Brooks took Lee's car. Brooks was involved in the crash that led to Abay's death.

The Estate sued Brooks, Lee and Taylor and settled with Lee for her $100,000 policy limit. A default was entered against Brooks.[6] The Estate then filed a declaratory judgment action against DCIC and DCC, among others.

SECREST WARDLE NOTES:

This case underscores the difference in a policy's distinction between the terms "you" and "insured" when construing a policy. One must always be mindful of this distinction when applying a policy's specific provisions to avoid reading into a policy to achieve a desired but incorrect result.

Brooks allegedly lived with her father, James Trent, at the time of the accident. Trent, a DCC retiree, leased a car from DaimlerChrysler that was insured by the policy issued by DCIC. The Estate asserted that this policy covered Brooks. Cross motions for summary disposition were filed. The trial court granted summary disposition in favor of the Estate, and DCIC and DCC appealed.

On appeal, the Court of Appeals concluded that Trent, as a permissive user of a DCC vehicle insured by the DCIC policy, was an "insured" under the policy's WHO IS AN INSURED section. The Court of Appeals, however, did not agree that this was enough to find coverage for Brooks under the policy.

At issue was the interpretation of the Endorsement that read, in relevant part:

> *If you are an individual*, the policy is changed as follows:
>
> A. Changes in Liability Coverage
>
> * * *
>
> 2. Personal Auto Coverage
>
> While any "auto" you own of the "private passenger type" is a covered "auto" under Liability Coverage:
>
> * * *
>
> b. Any "auto" you don't own is a covered "auto" while being used by you or by any "family member"....

The Estate argued that Brooks was an insured because she was a "family member" of an "insured" (Trent) and was using an automobile (Lee's vehicle) that was not owned by Trent. DCIC and DCC argued that Brooks was not an insured under this endorsement because her father, Trent, was not the "named insured" and, therefore, she was not a family member of a "named insured."

The Court of Appeals agreed with DCIC and DCC, writing:

> "The trial court went beyond the plain language of the policy and noted the entangled relationship between DaimlerChrysler and DCIC and the fact that the policy refers to no individual insureds. It found 'a patent ambiguity in the language of the policy which contains both an "individual named insured" endorsement and a listed named insured business entity as the sole "named insured."' The court appears to have been troubled because of its interpretation of the policy as failing to provide any coverage to any individual. As a result of this it looked outside the policy language. However, the court failed to consider the fact that the policy defines who is insured, and that definition appears to include Trent himself or persons while using with DaimlerChrysler's permission a covered auto owned, hired or borrowed by DCC. The policy language describes unambiguously who is insured under the policy. The policy does not extend to Trent or his family members when such persons use an automobile not owned by DaimlerChrysler, as provided in the endorsement. Therefore, coverage does not extend to Brooks under the circumstances of this case. This interpretation is based on the clear language of the policy. The court was required to apply the policy as written. It erred in creating an ambiguity where none exists and looking outside the policy language in determining its meaning."

The Court of Appeals specifically rejected the claim that the policy was rendered ambiguous simply by the fact that this Endorsement, if construed as written, would be rendered surplusage. Citing *Michigan Twp Participating Plan v Pavolich,*[7] the Court of Appeals affirmed that, if a policy is "'not ambiguous [, it] should be construed as written, even if certain provisions are rendered meaningless by a plain reading of the language.'"[8]

[1] Unpublished opinion per curiam of the Court of Appeals, entered August 13, 2009, (No. 283624).

[2] Now known as Chrysler Insurance Company.

[3] Now known as Chrysler LLC.

[4] ISO CA 99 17 07 97.

[5] The Lee vehicle was insured through AAA.

[6] A jury in the underlying case returned a verdict in favor of the Estate and a judgment of $3.2 million, plus interest, was entered against her. Brooks is uncollectible.

[7] 232 Mich App 378, 384; 591 NW2d 325 (1998).

[8] Quoting *Pavolich* at 384-388.

CONTACT US

Farmington Hills
30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens
94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing
6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

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CONTRIBUTORS

Insurance Coverage Practice Group Chair
Stacey L. Heinonen

Editors
Bonny Craft/Julie Gorney

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