

STATE OF MICHIGAN
COURT OF APPEALS

WESTFIELD INSURANCE COMPANY,
Plaintiff-Appellee,

v

KEN'S SERVICE and MARK ROBBINS,
Defendants-Appellants.

FOR PUBLICATION
March 8, 2012
9:00 a.m.

No. 300941
Antrim Circuit Court
LC No. 10-008571-CK

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

WHITBECK, J.

In this declaratory judgment action involving underinsured motorist coverage, the circuit court granted plaintiff Westfield Insurance Company's motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants Ken Service and Mark Robbins appeal as a matter of right. On appeal, they assert that the trial court erred by misinterpreting the language in the insurance contract to deny them coverage. We affirm.

I. BASIC FACTS

On December 19, 2009, defendant Ken's Service, a tow truck company, dispatched one of its employees, Mark Robbins, to assist a police officer, Roderick Vessey, in removing his vehicle from a ditch on US-131. When he arrived at the scene, Robbins got out of the tow truck and connected the tow cables to the police vehicle. While he was operating the control levers positioned on the side of the tow truck, another driver, Ashley See, sideswiped the tow truck and collided with Robbins. Robbins suffered substantial injuries, including a broken right arm and a protruding break of the right tibia/fibula. Robbins represents that he is "crippled for life."

Harold Ingersoll owned the car that Ashley See was driving. Ingersoll's insurance company, Auto-Owners Insurance, agreed to tender the full \$100,000 limits of the policy to settle the claim. However, Robbins sought additional compensation from Westfield Insurance, Ken's Service's insurer, based on underinsured motorist coverage obtained for the tow truck. Ken's Service had underinsured motorist coverage in the amount of \$1,000,000. The uninsured/underinsured motorist endorsement to the Westfield Insurance policy provided for underinsured coverage for the "insured," which the policy defined in relevant part to include "[a]nyone [besides the named insured or a family member] 'occupying' a covered 'auto'" Further, the endorsement defined "occupying" to mean "in, upon, getting in, on, out or off."

Westfield Insurance refused to pay based on its determination that Robbins was not “occupying” the vehicle at the time of the accident. Westfield Insurance then commenced this action for a determination of its obligations to Robbins under the insurance contract.

Ken’s Service and Robbins moved for summary disposition. They claimed that Robbins was leaning on the tow truck for balance and support when See struck him and that this occurred while he was operating the towing controls, which were located on the driver’s side of the truck. Ken’s Service and Robbins asserted that Westfield Insurance owed Robbins additional compensation because: (1) his injuries greatly exceeded the negligent driver’s \$100,000 policy, and (2) Robbins was an “insured” under the terms of the underinsured motorist endorsement to the policy because he was “occupying” the insured vehicle by leaning “upon” the tow truck.

Westfield Insurance responded, arguing that Robbins was not occupying the tow truck when See struck him. Westfield Insurance asserted that Robbins clearly had both feet on the ground and had been outside the truck for several minutes when he was hit and injured. Westfield Insurance claimed that the term “upon” can only be properly interpreted in context of the word “occupying.” Westfield Insurance maintained that Robbins’ physical contact with the truck needed to be “in the context” of being physically inside the truck, that his actions were not “in the context” of being an occupant, and that he therefore was not insured under the policy.

The trial court interpreted the contract to mean that Robbins could only prevail if he could demonstrate that he was “occupying” the vehicle by being “upon” it when struck. The trial court focused on the word “occupying” and determined that coverage should depend on a person’s connectedness with the activity of being a driver or passenger of the vehicle. According to the trial court, if the activity or physical contact was incidental to being a driver or passenger, then the person would be occupying the vehicle and therefore would be insured. The trial court said that physical contact alone with the vehicle was not relevant. According to the trial court, the dispositive issue was whether Robbins’ actions were the natural and probable result of being a driver or passenger. Thus, based on the fact that Robbins was operating the vehicle as a towing machine when struck, the trial court concluded that his use was unrelated to being a driver or passenger of the truck. Accordingly, the trial court ruled that Robbins was not covered under the policy.

Ken Service and Robbins now appeal.

II. INTERPRETATION OF THE CONTRACT LANGUAGE

A. STANDARD OF REVIEW

This Court reviews de novo a trial court’s grant of summary disposition.¹ The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.² The nonmoving party then has the burden to produce admissible

¹ *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

² MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

evidence to establish disputed facts.³ The court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁴ Further, this Court reviews de novo a trial court's interpretation of contractual language.⁵

B. APPLICABLE LEGAL PRINCIPLES

Courts treat insurance contracts no differently than any other contract. Accordingly, we should give contractual language that is clear and unambiguous full effect according to its plain meaning unless it violates the law or is in contravention of public policy.⁶ A court cannot infer the parties' "reasonable expectations" in order to rewrite a clear and unambiguous contract.⁷ Even if the contractual language is poorly worded, it is not ambiguous if it "fairly admits of but one interpretation[.]"⁸

The Michigan Supreme Court interpreted the identical contractual language at issue in this case in *Rednour v Hastings Mutual Ins Co*.⁹ In *Rednour*, an oncoming vehicle struck the plaintiff while he was changing a flat tire on the insured vehicle.¹⁰ The plaintiff was approximately six inches away from the vehicle when the other car struck him.¹¹ He had loosened the lug nuts on the wheel and was moving towards the rear of the vehicle when the other car struck him.¹² The plaintiff claimed that he was an insured entitled to no-fault benefits because he was "occupying" the vehicle, as both the no-fault act and the language of the policy defined that word. Specifically, the plaintiff argued that he was "upon" the vehicle because: he was knocked into the insured vehicle and pinned between the two vehicles during the collision.¹³

The Michigan Supreme Court noted that a prior decision—*Rohlman v Hawkeye-Security Ins Co*,¹⁴—had interpreted the meaning of "occupant" under the no-fault statute.¹⁵ The

³ *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

⁴ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

⁵ *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

⁶ *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

⁷ *Id.* at 59-62.

⁸ *Nankervis v Auto-Owners Ins Co*, 198 Mich App 262, 265; 497 NW2d 573 (1993), quoting *Raska v Farm Bureau Mutual Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982).

⁹ *Rednour v Hastings Mutual Ins Co*, 468 Mich 241; 661 NW2d 562 (2003).

¹⁰ *Id.* at 242.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 249.

¹⁴ *Rohlman v Hawkeye-Security Ins Co (Rohlman I)*, 442 Mich 520, 522; 502 NW2d 310 (1993), citing MCL 500.3111.

Rohlman I Court declared that a person could not be an “occupant” under the no-fault act unless they were “physically inside” the vehicle when struck.¹⁶ However, since the language of the policy broadly defined occupancy as “in, upon, getting in, on, out or off” the insured vehicle, the *Rohlman I* Court remanded the case for this Court to consider whether the plaintiff’s conduct fell under the broader definition of “occupying” stated in the policy.¹⁷ On remand, this Court noted that physical contact with the insured person is required to be “upon” the vehicle, although the person need not be completely physically supported by the vehicle.¹⁸

While the *Rednour* Court agreed with the *Rohlman II* statement that a person did not need to be physically inside the vehicle to be “upon” it, it nevertheless held that physical contact alone is insufficient to show that “the person was ‘upon’ the vehicle so as to be ‘occupying’ the vehicle.”¹⁹ Accordingly, the Court stated:

Plaintiff was not “occupying” the vehicle under the policy definition of that term. He was outside the vehicle, approximately six inches away from it. He was not in the vehicle, nor was he getting in, on, out, or off the vehicle when he was injured.

Plaintiff suggests that he was “upon” the car because he was pinned against it after being struck. Physical contact by itself does not, however, establish that a person is “upon” a vehicle such that the person is “occupying” the vehicle. The relevant dictionary definitions . . . clarify that one must be *on* or *up and on* a vehicle in order to be “upon” it. We reject the dicta in *Rohlman II* that suggests physical contact alone may be sufficient to show that the person was “upon” the vehicle so as to be “occupying” the vehicle.^[20]

C. APPLYING THE LEGAL PRINCIPLES

Here, the parties focused on the word “upon” and the meaning of that word. In *Rednour*, the Supreme Court interpreted the meaning of “upon” to mean “on or up on.” Robbins alleged that he was “upon” the truck because he had both hands on and was leaning against the tow truck for balance and support at the moment of impact. But, as the Michigan Supreme Court stated in *Rednour*, “physical contact alone may [not] be sufficient to show that the person was ‘upon’ the vehicle so as to be ‘occupying’ the vehicle.”²¹ At the time of impact, Robbins was not in the vehicle, nor was he getting in, on, out, or off the vehicle. In fact, Robbins had been out of the

¹⁵ *Rednour*, 468 Mich at 246-247.

¹⁶ *Rohlman I*, 442 Mich at 531-532; see *Rednour*, 468 Mich at 247.

¹⁷ *Rohlman I*, 442 Mich at 535.

¹⁸ *Rohlman v Hawkeye Security Ins Co (Rohlman II)*, 207 Mich App 344, 357; 526 NW2d 183 (1994) (noting that a child could be “upon” a scooter by having one foot on it and another on the ground).

¹⁹ *Rednour*, 468 Mich at 250.

²⁰ *Id.* at 249-250 (emphasis in original).

²¹ *Id.* at 250.

vehicle for several minutes and was operating the levers of the tow truck. Thus, we conclude that the trial court did not err in concluding that Robbins was not “occupying” the vehicle when he sustained bodily injury.

We affirm.

/s/ William C. Whitbeck
/s/ David H. Sawyer

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M. J. KELLY, J. (*dissenting*).

Because I believe the trial court erred in its interpretation of the word “upon” in the subject underinsured motorist insurance policy, I would reverse its decision to grant summary disposition in favor of plaintiff Westfield Insurance Company (Westfield) and instead grant summary disposition in favor of defendants Ken’s Service and Mark Robbins. Therefore, I must respectfully dissent.

Robbins worked for Ken’s Service as a tow truck driver. On the evening of the accident, Robbins was sent to tow a police vehicle out of a ditch. After pulling his tow truck to the shoulder of the highway, Robbins activated the emergency lights, got out of the tow truck, hooked cables to the police cruiser and walked back to the truck’s bed. He then began the process of pulling the police vehicle from the ditch by activating the levers on a control panel located on the back of the truck. He averred in an un rebutted affidavit that he was leaning on the tow truck for balance and support with both his hands touching the truck; his right hand was on the control panel, and with the left he grasped the truck’s railing. It was then that a passing motorist struck him and caused him serious injuries.

At issue is Robbins entitlement to underinsured motorist coverage under the tow truck’s Westfield policy. Under the policy an “insured” is entitled to uninsured or undersinsured motorist coverage resulting from “bodily injury” caused by “an accident.” The policy provides that, if the named insured is an individual, the insureds are the “Named Insured and any ‘family members’” as well as anyone “else ‘occupying’ a covered ‘auto’ or temporary substitute for a

covered ‘auto.’”¹ Thereafter, the policy defines “occupying” as “in, upon, getting in, on, out or off.” We are asked to determine whether, under the definitions that Westfield provided in its insurance policy, Robbins was “upon” the tow truck at the time of the accident.

As noted by the majority, our Supreme Court has interpreted this identical language. See *Rednour v Hastings Mutual Ins Co*, 468 Mich 241, 661 NW2d 562 (2003). In *Rednour*, the plaintiff was struck by an oncoming vehicle while changing a flat tire on the insured vehicle. *Id.* at 242. The plaintiff was approximately six inches away from the vehicle when he was struck by the other car. He had loosened the lug nuts on the wheel and was moving towards the rear of the vehicle when he was hit. *Id.* The plaintiff claimed that he was an insured entitled to no-fault benefits because he was “occupying” the vehicle, as defined by both the no-fault act and the language of the policy. He argued that he was “upon” the vehicle because he was pinned between the two vehicles during the collision. *Id.* at 249. The Court noted that it had already interpreted the meaning of “occupant” under the no-fault statute and declared that a person could not be an “occupant” *under the no-fault act* unless they were “physically inside” the vehicle when struck. See *id.* at 247, citing *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531-532, 502 NW2d 310 (1993) (*Rohlman I*). However, since the language of the policy in its case, like the policy here, broadly defined occupancy as “in, upon, getting in, on, out or off” the insured vehicle, the Court in *Rohlman I* remanded the matter to this court to consider whether the plaintiff’s conduct fell under the broader definition of “occupying” stated in the policy. *Rohlman*, 442 Mich at 535.

On remand, this Court noted that physical contact with the insured vehicle is required to be “upon” the vehicle, although the person need not be completely physically supported by the vehicle. *Rohlman v Hawkeye Security Ins Co*, 207 Mich App 334, 357; 526 NW2d 183 (1994) (*Rohlman II*) (noting that a child could be “upon” a scooter by having one foot on it and another on the ground). While the *Rednour* Court agreed with the *Rohlman II* statement that a person did not need to be physically inside the vehicle to be “upon” it, the Court nevertheless held that physical contact alone is insufficient to show that “the person was ‘upon’ the vehicle so as to be ‘occupying’ the vehicle.” *Rednour*, 468 Mich at 249-250. The Court explained: “The relevant dictionary definitions . . . clarify that one must be *on* or *up and on* a vehicle in order to be ‘upon’ it.” *Id.*

More recently still, this Court analyzed the identical contractual language in *Bledsoe v Auto Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2003 (Docket No. 236735). There the plaintiff’s foot was run over by a truck while he was stopped at a toll booth to pay the toll. While leaning on the covered vehicle and bending over to

¹ Though not fully developed below, Ken’s Service—a business—was listed by the Westfield policy as “An Individual” with the result being that his family members, who presumably did not drive this large, commercial tow truck, would have been covered for these injuries regardless of whether they were “upon” the vehicle and yet Robbins, the employee who actually drove the tow truck on a regular basis and as part of his employment duties, was not. This is not an issue before us on appeal but remains a conundrum.

locate some dropped change, the truck attempted to pass him and ran over his foot. *Id.* at 1. This Court noted that the insurance policy provided greater coverage than that guaranteed under the no-fault act. *Id.* After distinguishing *Rednour*, the Court in *Bledsoe* concluded that the plaintiff was insured because he was “upon” the truck:

In the instant case, plaintiff testified that he was balancing himself with one hand *on the step of the insured truck* when the accident occurred. Even under the *Rednour* . . . Court’s restricted definitions, plaintiff was, according to his testimony, “upon” the truck at the time of the accident. We believe that a commonsense interpretation of the term “upon” leads to this conclusion. Moreover, the Supreme Court in *Rednour* . . . indicated (1) that one must be “on” a vehicle to be “upon” it and (2) that a dictionary is an appropriate reference tool in giving meaning to the terms at issue here. See [Rednour, 468 Mich at 250.] *Random House Webster’s College Dictionary* (1997) lists the following as the first definition of “on”: “so as to be or remain supported by or suspended from.” Plaintiff testified that he was balancing himself with one hand on the step of the truck when the accident occurred. If the factfinder were to believe plaintiff’s testimony, then (1) plaintiff clearly was being “supported by” the truck, (2) he therefore was “occupying” the vehicle under the terms of the Auto Owners’ policy, and (3) the parked vehicle exclusion in policy does not apply. The trial court properly denied summary disposition to Auto Owners with respect to the issue of PIP benefits. [*Id.*]

Although not binding precedent, I find this reasoning persuasive. Robbins’ un rebutted affidavit indicates that he was leaning on the tow truck for balance and support at the time he was struck by the passing automobile. Therefore, like the plaintiff in *Bledsoe*, he was “on” (“supported by”) or “upon” and thus “occupying” the vehicle in accordance with the policy. And because there is no evidence to rebut that Robbins was being supported by the vehicle, the trial court should have granted summary disposition in his favor.

If Westfield wanted a more restrictive definition for “occupying”, it could have chosen to insert a different definition into its policy. As it is, the words they chose were “in, upon, getting in, on or off.” And, because the definition of “on” is “so as to be or remain supported by or suspended from”, Robbins plainly demonstrated that he comes within the policy’s definition of “occupying” and coverage should have been afforded him.

For this reason, I respectfully dissent.

/s/ Michael J. Kelly