

STATE OF MICHIGAN  
COURT OF APPEALS

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WESTFIELD INSURANCE COMPANY,

Plaintiff-Appellant,

v

JESSE ADAM MCCLUSKY and SARAH  
SUZANNE CANEVER,

Defendants-Appellees.

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UNPUBLISHED  
September 11, 2003

No. 238947  
Genesee Circuit Court  
LC No. 97-054569-CK

Before: Donofrio, P.J., and Bandstra and O’Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right a declaratory judgment stating that plaintiff had a duty to defend and indemnify defendant Sarah Canever in an underlying negligence action and that plaintiff breached that duty by refusing to satisfy the consent judgment entered in that action. We affirm in part, reverse in part and remand for further proceedings.

Plaintiff first argues on appeal that the trial court erred in finding that Canever was not “operating” the motor vehicle in which she, Steven Mitchell, and Jesse McClusky crashed. We disagree. A trial court’s findings of fact are reviewed for clear error. *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002). A factual finding is clearly erroneous if this Court is left with a firm conviction that the trial court made a mistake. *Id.* A trial court’s legal determination is reviewed de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997).

Plaintiff was Canever’s homeowner’s insurance carrier when she, McClusky and Mitchell were involved in a car accident. At the time of the accident, Mitchell was driving his father’s pick up truck, McClusky was in the front passenger seat, and Canever was sitting in the front seat between the other two. While Mitchell was driving, Canever dropped the top off a bottled beverage she was drinking. Canever asked Mitchell to pick the cap off the floor for her. It was nighttime, so Mitchell turned the interior light on and saw the cap on the floor. Mitchell then turned the light off and reached down to pick up the cap. As Mitchell was attempting to pick up the cap, he saw that Canever had placed her hand on top of the steering wheel and told Mitchell, “I got the wheel.” When Canever first placed her hand on the steering wheel, Mitchell kept his eyes on the road in front of him as he reached down to pick up the cap. After observing the roadway, Mitchell took his eyes off the road to reach for the cap but kept his right hand on

the bottom of the steering wheel. As he was placing his fingers on the bottle cap, Mitchell felt the steering wheel jerk to the right. The car slid across the road and slammed against the guard rail. As a result of the accident, Canever and McClusky were ejected from the vehicle and McClusky sustained serious injuries.

In 1996, McClusky filed an amended complaint against Canever alleging negligence (hereinafter the “McClusky action”). Canever requested that plaintiff defend her and pay any judgment entered against her in the McClusky action. Plaintiff refused.

On February 11, 1997, plaintiff filed the instant action for declaratory judgment naming Canever and McClusky as defendants.<sup>1</sup> Plaintiff alleged that the insurance contract between itself and Canever relieved plaintiff from its obligation to defend and indemnify Canever in the McClusky action because the insurance contract excluded coverage for injuries arising out of Canever’s operation of a motor vehicle and that Canever was operating the pickup truck when the accident occurred.<sup>2</sup> Plaintiff requested that the trial court grant a judgment declaring that plaintiff is not obligated to defendant Canever in the McClusky action and that plaintiff is not required to pay any judgment that may be entered against Canever.

On April 11, 1997, Canever assigned to McClusky her rights to collect from plaintiff for damages arising out of plaintiff’s alleged bad faith breach of its duty to defend and indemnify Canever, and any other claim arising out of the car accident. On May 5, 1997, McClusky and Canever reached a consent judgment in favor of McClusky in the amount of \$2 million to compensate McClusky for his injuries. The consent judgment contained a provision that McClusky would not execute the consent judgment against Canever and would look to plaintiff to collect on the judgment.

In May 1997, both parties filed motions for summary disposition in the declaratory judgment action, which the trial court denied reasoning that whether Canever was operating the pick up truck was a question of fact. After the trial court denied plaintiff’s motion for reconsideration, this Court granted plaintiff’s application for leave to appeal. *Westfield Ins Co v Mitchell*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2000 (Docket No. 209558). In affirming the trial court’s decision, this Court held that it could not rule as a matter of law whether Canever’s action of taking hold of the steering wheel with Mitchell’s consent constituted Canever’s operation of the vehicle. *Id.*, slip op at 2-3. Because this Court found that a genuine issue of material fact existed regarding whether Canever was operating the vehicle, this Court affirmed the trial court’s denial of plaintiff’s motion for reconsideration and plaintiff’s motion for summary disposition. *Id.* at 3.

On October 24, 2001, after conducting a bench trial, the trial court entered a declaratory judgment, holding that Canever was not “operating” the pick up truck, and therefore, the

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<sup>1</sup> Mitchell, Allstate Insurance Company, and MIC General Insurance Corporation were also named defendants in the declaratory judgment action, but are not parties to this appeal.

<sup>2</sup> The insurance policy at issue excludes coverage for injuries and damage arising out of “the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured. . . .”

coverage exclusion did not apply and plaintiff breached its contractual duty to defend Canever in the McClusky action. The trial court also ruled that plaintiff had a duty to indemnify Canever in the McClusky action and breached this duty in failing to pay McClusky to satisfy the consent judgment.

On appeal, plaintiff argues that the trial court incorrectly relied on factually distinguishable case law in deciding that Canever was not “operating” the pick up truck. The trial court relied on this Court’s decision in *Farm Bureau General Ins Co v Riddering*, 172 Mich App 696; 432 NW2d 404 (1988), which offers a definition of “operation” in a similar context, to determine whether plaintiff was obligated to defend and indemnify Canever in the McClusky action. In *Riddering*, five individuals were riding home in a car from a party. *Id.* at 698. Riddering was sitting in the passenger seat while Mary Jaarsma was driving. *Id.* While the car was traveling, Riddering grabbed the top of the steering wheel away from Jaarsma with both hands and turned the steering wheel sharply to the left. *Id.* Riddering maintained her hold on the steering wheel for approximately thirty seconds until, as a result of Riddering’s actions, the car veered off the road and collided with a tree. *Id.*

The issue in *Riddering* was whether Riddering’s actions in taking hold of the steering wheel constituted “operation” of the vehicle under Riddering’s homeowner’s insurance policy. *Id.* at 701.<sup>3</sup> If Riddering was “operating” the car, then coverage under her homeowner’s insurance policy would be excluded. *Id.* In holding that Riddering’s actions did not constitute “operation” of the vehicle, this Court held:

Operation includes more than simple control. . . . While Ms. Riddering did exercise some control over the vehicle by grabbing the steering wheel, steering is only part of operating a vehicle. Operation necessarily includes the additional functions of controlling the gas and brake pedals and all other components necessary to make a vehicle run. Operation includes control over all the parts that allow the vehicle to move, not just the steering function. Obviously, one cannot operate a vehicle only with the steering—there must be acceleration to get anywhere and there must be braking to stop the vehicle, along with control over other key components, such as the engine. [*Id.* at 703.]

On appeal, plaintiff argues that the trial court should not have used this definition of “operation” because the facts of the present case are distinguishable from those of *Riddering*. However, while the facts of the present case and *Riddering* are not identical, this Court’s definition of “operation” was the controlling authority that the trial court was bound to follow. *Terra Energy Ltd v Michigan*, 241 Mich App 393, 399; 616 NW2d 691 (2000). The *Riddering* Court offered a lengthy discussion of what it means to “operate” a vehicle in a context similar to that found here, i.e., whether a passenger’s momentary control over a steering wheel constitutes “operation” of the vehicle for purposes of a coverage exclusion in the passenger’s homeowner’s insurance policy.

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<sup>3</sup> At issue in *Riddering* was also whether Riddering’s actions constituted “use” of the vehicle. *Id.* In the present case, however, neither party contests the trial court’s finding that Canever, as a passenger, was “using” the vehicle.

The definition of “operation” formulated by the panel in *Riddering* extends to factual scenarios other than when a passenger unexpectedly and by surprise grabs the steering wheel and jerks it. *Riddering* lists the numerous aspects of “operating” a vehicle, i.e., control over the gas and brake pedals, the gear shift, and other functions that allow a car to run. In the present case, the evidence established that Mitchell controlled the gas and brake, the gear shift, and the steering wheel, although Canever influenced Mitchell’s control of the steering wheel for a few seconds. Consequently, under *Riddering*, Canever was not “operating” the vehicle and the trial court therefore correctly applied the law to its factual findings. Because the trial court correctly applied the law to the facts, plaintiff’s argument that the trial court erred as a matter of law by using the wrong definition of “operation” fails. Thus, the trial court correctly determined that the homeowner’s insurance coverage applied to Canever’s actions in relation to the accident.

Plaintiff next argues that the trial court erred by failing to conduct further proceedings on or otherwise determine the issue of whether and the extent to which plaintiff was obligated to indemnify Canever in the McClusky action. Specifically, plaintiff argues that it should not be required to satisfy the \$2 million consent agreement reached by Canever and McClusky, for a number of reasons.

The pleadings and record below clearly show that plaintiff put the indemnity issue before the trial court. In its complaint for declaratory judgment, plaintiff requested that the trial court declare that plaintiff was not obligated to pay any judgment that might be entered against Canever in the McClusky action. Plaintiff also argued that it was not obligated to indemnify Canever in the McClusky action in a motion for summary disposition and in its trial brief. Thus, the trial court was presented with two issues: whether Canever was “operating” the vehicle for purposes of the homeowner’s insurance exclusion and, if not, whether plaintiff was obligated to indemnify her for the consent judgment she entered with McClusky. As plaintiff points out, whether this second question would be determined at the trial of the first question was raised by plaintiff before trial and the colloquy between counsel for the parties clearly suggested that, instead, the second question should be reserved for later proceedings.

Nonetheless, without any further proceedings and without any consideration of the arguments that plaintiff raised regarding the indemnity question, the trial court entered a declaratory judgment that requires that plaintiff indemnify Canever for the full amount of the consent judgment. We reverse the declaratory judgment in this regard and remand for further proceedings as may be necessary for the trial court to consider and decide the legal and factual arguments raised by plaintiff with regard to the indemnity issue.

We affirm the trial court’s decision that the homeowner’s insurance policy applied but reverse and remand for further proceedings on the indemnity issue. We do not retain jurisdiction.

/s/ Pat. M. Donofrio  
/s/ Richard A. Bandstra  
/s/ Peter D. O’Connell