STATE OF MICHIGAN

COURT OF APPEALS

MARY YAKLIN, Personal Representative of the Estate of MARGARET TINKER, Deceased, and ROXANNE CHAPMAN,

Plaintiffs-Appellees,

v

SECURA INSURANCE,

Defendant/Third-Party Plaintiff-Appellant,

and

DENNIS ALLEN PARISH,

Third-Party Defendant.

UNPUBLISHED
May 24, 2005

No. 253442
Genesee Circuit Court
LC No. 01-072233-CK

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant Secura Insurance appeals as of right from the trial court's judgment awarding each plaintiff $90,000. We affirm.

This case concerns plaintiffs' entitlement to coverage for uninsured motorists benefits under an automobile insurance policy issued by defendant to plaintiff Roxanne Chapman. In May 2000, Chapman's vehicle was struck by a motor vehicle operated by Dennis Parish. Chapman was injured in the accident and Margaret Tinker, a passenger in Chapman's vehicle, was killed. Parish was uninsured at the time of the accident. Chapman and Mary Yaklin, the Personal Representative of Margaret Tinker's Estate, thereafter filed a dramshop action against Parish and two dramshop defendants, Lee Ann, Inc., and Rebel Enterprises, Inc.

Plaintiffs' claims against Lee Ann, Inc., were resolved after each of those parties accepted a $10,000 case evaluation. Plaintiffs then filed this action against defendant, seeking uninsured motorist benefits under Chapman's policy. The trial court granted plaintiffs' motion for summary disposition under MCR 2.116(C)(10), with regard to defendant's liability for uninsured motorists benefits. The parties subsequently stipulated that each plaintiff was entitled to the policy limit of $100,000, less a setoff for the $10,000 amount that each plaintiff received

from Lee Ann, Inc., in the dramshop action, resulting in a net judgment of $90,000 for each plaintiff. Defendant was subsequently awarded a judgment against Parish, which included any amount that defendant was required to pay each plaintiff.

On appeal, defendant challenges only the trial court's decision with regard to plaintiffs' entitlement to uninsured motorist benefits.[1]

"It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). The contractual language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

In "Part III – Uninsured Motorists Coverage and Underinsured Motorists Coverage," the policy provides that:

> We will pay damages which an *insured person* is legally entitled to recover from an owner or operator of an *uninsured motor vehicle* because of *bodily injury* sustained by an *insured person* and caused by an accident. "Damages" do not include punitive, exemplary, or statutory multiple damages.
>
> The owner or operator's liability for these damages must result from the ownership, maintenance or use of the *uninsured motor vehicle*.
>
> If any suit is brought by an *insured person* to determine liability or damages, the owner or operator of the *uninsured motor vehicle* must be made a defendant, and you must notify us of the suit. Without our written consent, we are not bound by resulting judgment.

The policy later provides for, "B. Exclusions," which states: We do not cover *bodily injury* to a person" . . . "if that person or the legal representative of that person makes a settlement without our written consent."

Plaintiff argues the above exclusion is ambiguous. However, even strictly construing this exclusion in favor of the insured, *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001), we nonetheless conclude that it fairly admits of but one interpretation. *Hellebuyck v Farm Bureau General Ins Co*, 262 Mich App 250, 254; 685 NW2d 684 (2004). The exclusion clearly applies to persons claiming bodily injury under the policy who make a

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[1] We reject plaintiffs' claim that defendant's judgment against Parish renders the instant appeal moot, given that defendant will still be harmed if it is unable to collect the judgment amount from Parish. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

settlement without defendant's written consent. Clear and specific exclusions must be enforced as written. *McKusick, supra*. Thus, we conclude that the exclusion is not ambiguous.

However, we conclude the trial court did not clearly err in finding that the October 18, 2001, letter from defendant's claims representative, John Winans, to plaintiffs' attorney, Jules Olsman, constituted the necessary written consent for plaintiffs to settle. The letter provides, in pertinent part, that:

> It was my understanding pursuant to our conversation that you may engage in settlement discussions regarding the dram shop issues. Please be advised that our Subrogation [sic] rights against the dram shop and owner/driver of the at fault motor vehicle must be preserved at all times. Should any settlement be negotiated with the dram shop and at fault owner/driver for less than $100,000 [sic] our subrogation must be expressly preserved. Secura Insurance in no way will waive it's right of subrogation against the dram shop carriers or owner/driver of [sic] vehicle.

As opposed to merely recognizing that plaintiff may engage in settlement negations with the dram shop defendants, the letter plainly indicates that defendant would accept any settlement so long as its subrogation rights were protected. Moreover, the letter earlier reaffirms that defendant's "policy entitles [them] to a reduction, dollar to dollar, of amounts paid by, or on, behalf of, persons or organizations who may be legally responsible." Defendant's expressed interest in plaintiffs settling with those "who may be legally responsible," further supports the conclusion that defendant intended to provide plaintiff's consent to settle. Here, plaintiffs entered into settlement with Lee Ann, Inc., and this amount was deducted from the amount that defendant was otherwise obligated to pay. We cannot conclude that the trial court erred in finding the letter provides sufficient written consent to settle.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette