STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL STOVER and CRYSTAL RAE DICKS, Plaintiffs-Appellees, v SECURA INSURANCE CO., Defendant-Appellant, and BROWN-PIXLEY INSURANCE AGENCY, INC. Defendant.	UNPUBLISHED June 9, 2005 No. 252613 Eaton Circuit Court LC No. 03-000343-CZ
MICHAEL STOVER and CRYSTAL RAE DICKS, Plaintiffs-Appellees, v Secura Insurance Co., Defendant-Appellee and BROWN-PIXLEY INSURANCE AGENCY, INC. Defendant-Appellant.	No. 252625 Eaton Circuit Court LC No. 03-000343-CZ

Before: Kelly, P.J., and Sawyer and Wilder, J.J.

PER CURIAM.

This claim arises from Secura Insurance Co.'s denial of automobile insurance coverage on a policy held by Crystal Rae Dicks. In docket number 252613, Secura appeals the trial

court's order granting Dicks's and Michael Stover's motion for summary disposition of their claims against Secura and the trial court's order awarding plaintiffs $27,620.00 plus twelve percent interest against Secura. In docket number 252625, Brown-Pixley Insurance Agency, Inc. appeals the trial court's order granting plaintiffs' motion for summary disposition on their claims against Brown-Pixley and ordering Brown-Pixley to pay plaintiffs' attorney fees. We affirm in part and reverse in part.

I. Facts

The undisputed facts of this case are that Stover and Dicks had been living together for several years. In May 2001, Stover bought a 2002 Acura and, on the same day, contacted Brown-Pixley to obtain insurance on the vehicle. Stover's discussion with a Brown-Pixley agent resulted in the Acura being added on to Dicks's insurance policy. Brown-Pixley caused an insurance binder to issue covering the Acura and provided the binder to Stover and the dealership. In July 2001, Dicks's insurance policy with Secura was renewed and the Acura was identified as an insured vehicle on the policy declarations. In May 2002, Stover was involved in an accident while driving the Acura resulting in a total loss of the vehicle. Secura initially agreed to pay for the loss, but later revoked its commitment on the grounds that Dicks did not have an insurable interest in the vehicle.

Plaintiffs filed a complaint including two counts against Secura. Count I alleged that Secura beached the insurance contract. Count II alleged that, under MCL 500.2006, Secura was liable for twelve percent interest on the benefits owed under the contract. Plaintiffs also alleged two counts against Brown-Pixley. Count III alleged that Brown-Pixley breached its fiduciary duties owed to plaintiffs as plaintiffs' insurance agent. Specifically, plaintiffs alleged that if Secura validly denied coverage, Brown-Pixley breached its duties to plaintiffs by:

> a. Failing to follow instructions to obtain insurance coverage for the [v]ehicle titled in Stover's name;
>
> b. Failing to timely advise Plaintiffs that it had not secured coverage as instructed;
>
> c. Failing to advise either Plaintiff that the lack of title interest of Dicks in the [v]ehicle would result in the lack of insurance coverage in the event of a loss;
>
> d. Failing to ensure that any policy issued pertaining to the Vehicle would be structured so that insurance coverage would be provided in the event of a loss;
>
> e. Failing to disclose to Plaintiffs that coverage under the policy secured pertaining to the [v]ehicle could be denied by Secura in the event of a loss.

In Count IV, plaintiffs alleged that Brown-Pixley was negligent listing the same breaches of duty listed in count III. Plaintiffs also alleged that Brown-Pixley was liable for plaintiffs' attorney fees because their breaches of duty forced plaintiffs to bring this action.

The trial court granted plaintiffs' motion for summary disposition of its claims against Secura and entered an order against Secura for $27,620.00 plus twelve percent interest. The trial court also granted plaintiffs' motion for summary disposition of its claims against Brown-Pixley

and entered an order against Brown-Pixley for $7,000 in attorney fees "for Plaintiffs prosecuting their claims against Secura Insurance Co."

II. Standard of Review

We review de novo a trial court's decisions on the motions for summary disposition. Because the parties and the trial court relied on matters outside the pleadings, review under 2.116(C)(10) is appropriate. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). Summary disposition under MCR 2.116(C)(10) is appropriate if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

III. Claims Against Secura

A. Count I—Breach of Contract

1. Insurable Interest

Secura first argues that the trial court erred in granting plaintiffs' motion for summary disposition on their breach of contract claim against Secura because Dicks's lack of an insurable interest resulted in the policy being void.[1] Whether a party has an insurable interest is a question of law for the court to decide. See *Clevenger v Allstate Ins Co*, 443 Mich 646, 661; 505 NW2d 553 (1993); *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 730-731; 635 NW2d 52 (2001); *Allstate Ins Co v State Farm Ins Co*, 230 Mich App 434, 440-441; 584 NW2d 355 (1998).

Under Michigan law, the named insured must have an insurable interest to support the existence of a valid automobile liability insurance policy. *Allstate Ins Co, supra* at 439-440. "Policies of insurance founded upon the mere hope and expectation and without some interest in the property, or the life insured or objectionable as a species of gambling, an so have been called wagering policies." *Crossman v American Ins Co*, 198 Mich 304, 308; 164 NW2d 428 (1917). However, "[a]n insurable interest does not, of necessity, depend upon ownership of the property. It may be a special interest entirely disconnected from any title, lien, or possession. If the holder of an interest in property will suffer direct pecuniary loss, by its destruction, he may indemnify himself therefrom by a contract of insurance. The question is not what is his title to the property, but rather, would he be damaged pecuniarily by its loss." *Id.* at 308. One may have an insurable interest in a motor vehicle without having title to the vehicle. *Clevenger, supra* at 661-662.

Applying these principles to this case, we conclude that there is no evidence demonstrating Dicks's insurance policy was a wagering, gambling contract prohibited by public policy. On the contrary, the record demonstrates that Dicks had a pecuniary interest in the Acura. Dicks and Stover had commingled their funds for several years. Shortly before Stover

---

[1] It is undisputed that only Dicks, not Stover, is a named insured on the insurance policy in question.

purchased the Acura, Dicks and Stover remortgaged their jointly owned home and Stover used those funds to pay for the Acura. Specifically, the proceeds from the mortgage amounted to $34,287.93. The check was written to Dicks and Stover. Dicks endorsed the check and Stover deposited the funds in his checking account on May 24, 2001. On May 25, 2001, Stover wrote a check to Ricardo Technologies for $29,054.82, the amount that Ricardo Vargas had loaned Stover to pay for the Acura. Dicks also used the vehicle for both business and personal purposes and conducted regular maintenance on the Acura such as carwashes and oil changes. The record establishes that Dicks would suffer direct pecuniary loss by destruction of the Acura, and, therefore, the law permits her to indemnify herself from this loss with an insurance contract. The facts raised by Secura, i.e., that Varga initially "fronted" payment for the Acura, that Dicks was not present when the Acura was purchased, and that Dicks's name was not on the payment made to the dealership, do not undermine this conclusion. Therefore, we conclude that there is no genuine issue of material fact as to whether Dicks had an insurable interest in the Acura.

2. Contract Terms

Secura also argues that the terms of the policy preclude coverage under the circumstances presented in this case. We disagree.

Plaintiffs assert that because Secura denied the claim for loss of the Acura only on the grounds that Dicks did not have an insurable interest in the Acura, it cannot now defend plaintiffs' claim on the grounds that the policy does not provide coverage for the loss of the Acura. Secura's letter denying coverage states in pertinent part:

> Under Michigan law, a policy of insurance issued to an insured who does not have an insurable interest is void.
>
> Accordingly, SECURA Insurance, A Mutual Company, hereby denies coverage under the family car policy issued to you, policy number FC 225 71 63. Reliance upon the above-cited authority in no way waives any of the subject policy provisions, terms or exclusions and SECURA Insurance expressly reserves any and all rights under the subject policy.

Secura correctly states that generally "'once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses.'" *South Macomb Disposal Authority v American Ins Co (On Remand),* 225 Mich App 635, 653; 572 NW2d 686 (1997), quoting *Lee v Evergreen Regency Cooperative,* 151 Mich App 281, 285; 390 NW2d 183 (1986). However, this doctrine may not be used to broaden policy coverage to protect an insured against risks not included in the policy or expressly excluded from the policy. This restriction is based on the rule that the insurer should not be required, through waiver and estoppel, to cover a loss for which no premium was charged. *Id.*

In this case, Secura denied coverage on the basis that Dicks had no insurable interest in the Acura. After plaintiffs initiated this lawsuit, Secura defended on the grounds that the policy terms did not cover the loss of the Acura. According to *South Macomb Disposal Authority,* waiver does not apply to Secura's policy defense if the risk of losing the Acura is not included in the policy.

Accordingly, we next address whether the risk of losing the Acura was included in Dicks's insurance policy. "An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Thus, "the court looks to the contract as a whole and gives meaning to all its terms." *Id.* An unambiguous contract must be construed according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "[A]ny ambiguities are strictly construed against the insurer to maximize coverage." *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 448; 550 NW2d 475 (1996).

Here, the policy declarations name Dicks as the policyholder. The insurance policy defines "You" and "your" as "the policyholder named in the Declarations and spouse if living in the same household." "Your insured car" is defined as "A *car* or *utility trailer* described in the Declarations." Under "Car Damage Coverage," the policy provides: "We will pay for *loss* to *your insured car*" caused by collision or not caused by collision. "Loss" is defined as the direct and accidental loss of or damage to "your insured car." The Acura is listed in the declarations. Therefore, under the plain language of the insurance contract, the Acura is covered. However, because Stover is not a named insured, he is not the policyholder or a spouse living in the same household, and he cannot maintain a breach of contract action against Secura. Only Dicks, the named insured, may pursue a breach of contract claim against Secura on this insurance policy.

3. Misrepresentation

With respect to Secura's argument that plaintiffs' made misrepresentations, Secura has cited no evidence whatsoever that Stover or Dicks made any misrepresentation of fact regarding the Acura. Therefore, Secura failed to meet its burden of showing a genuine issue of fact. Additionally, Secura did not raise this argument in the lower court and, therefore, it is not preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

4. Conclusion

In sum, we conclude that the trial court erred in granting summary disposition in Stover's favor on count I against Secura because there is no genuine issue of fact as to whether Stover had a contract with Secura: Stover was not a named insured and, therefore, cannot maintain a breach of contract action against Secura. With regard to Dicks, we conclude that Secura has failed to establish a genuine issue of fact as to whether Dicks had an insurable interest in the Acura. Additionally, after reviewing the plain terms of the policy, we conclude that it clearly covers the loss of the Acura. Therefore, the trial court did not err in granting summary disposition in Dicks's favor on count I against Secura.

B. Count II—Statutory Interest

Secura also argues that the trial court erred in granting plaintiffs' motion for summary disposition of count II of their complaint, in which they alleged that Secura was liable under MCL 500.2006 to pay interest on the benefits withheld. We disagree.

MCL 500.2006 provides in relevant part:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.

Here, the evidence demonstrates that Secura denied coverage on the basis of its determination that Dicks did not have title to the Acura. Plaintiffs argue, however, that Michigan law is clear that title alone does not dictate whether a party has an insurable interest in a vehicle and, therefore, Secura should have further investigated whether Dicks had any pecuniary interest in the Acura that would have given rise to an insurable interest. We agree. Because title alone does not determine insurable interest and further investigation would have revealed that Dicks had a substantial pecuniary interest in the Acura, the claim was not reasonably in dispute at the time Secura denied coverage. Therefore, the trial court did not err in ordering Secura to pay twelve percent interest under MCL 500.2006.

IV. Counts III and IV--Claims Against Brown-Pixley

Brown-Pixley contends that the trial court erred in granting plaintiffs' motion for summary disposition on counts III and IV—claims that Brown-Pixley breached their fiduciary duties to plaintiffs and committed ordinary negligence. We disagree.

A. Plaintiffs' Claims Against Brown-Pixley Are Not Dependant on Whether Secura Validly Denied Coverage

First, Brown-Pixley contends that plaintiffs' claims against it are dependant on the validity Secura's denial of coverage: thus, if the trial court correctly determined that Secura denied improperly denied coverage, then there could be no breach of duty on Brown-Pixley's part. Plaintiffs alleged:

> 33. *If the denial of coverage by Secura is valid*, Brown-Pixley breached the fiduciary duty owed to Plaintiffs by:
>
> a. Failing to follow instructions to obtain insurance coverage for the [v]ehicle titled in Stover's name;
>
> b. Failing to timely advise Plaintiffs that it had not secured coverage as instructed;
>
> c. Failing to advise either Plaintiff that the lack of title interest of Dicks in the [v]ehicle would result in the lack of insurance coverage in the event of a loss;

> d. Failing to ensure that any policy issued pertaining to the Vehicle would be structured so that insurance coverage would be provided in the event of a loss;
>
> e. Failing to disclose to Plaintiffs that coverage under the policy secured pertaining to the [v]ehicle could be denied by Secura in the event of a loss.

In their ordinary negligence claim, plaintiffs alleged: "*If denial of coverage by Secura is valid,* Brown-Pixley breached the duty of reasonable care owed to Plaintiffs and was negligent by . . . (emphasis added)." Plaintiff then listed the same breaches in the breach of fiduciary duty claim.

Plaintiffs clearly alleged that Brown-Pixley breached their duties to plaintiffs in the enumerated ways *only if* the denial of coverage by Secura is valid. However, in paragraph 34 of their complaint, plaintiffs alleged:

> As a result of Brown-Pixley's breach of fiduciary duties owed to Plaintiffs, the Plaintiffs have been injured, in that Secura denied any coverage for the total loss of the Vehicle and Plaintiffs have been forced to incur costs and attorney fees in this action.

In paragraph 38, plaintiffs alleged:

> Brown-Pixley's negligence proximately caused injuries to Plaintiffs, in that coverage for the loss of the Vehicle has been denied and Plaintiffs have been forced to bring this action and incur the costs and attorney fees associated with doing so.

We read paragraphs 34 and 37 of plaintiffs' complaint to state claims that are not dependant on whether Secura validly denied insurance coverage.

B. Brown-Pixley Owed a Duty to Plaintiffs

Brown-Pixley next argues that it owed no duties to plaintiffs. "Whether a duty exists is a question of law for the court to decide." *Harts v Farmers Insurance Exchange,* 461 Mich 1, 6; 597 NW2d 47 (2001). Brown-Pixley points out that *Harts* held that an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage. *Id.* at 7. However in *Harts,* it was uncontested that the insurance agent was an agent of Farmers Insurance Exchange, not the insureds. *Id.* at 6. Whereas, in this case, Brown-Pixley admitted that it was plaintiffs' agent. In paragraph 28 of their complaint, plaintiffs alleged, "At all pertinent times, Brown-Pixley was the insurance agent of each of the Plaintiffs." In response, Brown-Pixley answered "this Defendant offers no contest." Further, it is well-established that when an insurance policy is "facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *West American Ins Co v Meridian Mutual Insurance Co,* 230 Mich App 305, 310; 583 NW2d 548 (1998), citing *Auto-Owners Ins Co v Michigan Mut Ins Co,* 223 Mich App 205, 215; 565 NW2d 907(1997), quoting *Harwood v Auto-Owners Ins Co,* 211 Mich App 249, 254; 535 NW2d 207 (1995). Therefore, we conclude that Brown-Pixley owed duties to plaintiffs as their agent. As plaintiffs' agent and holding themselves out as having expertise in the filed of

insurance, Brown-Pixley owed a duty to ascertain the relevant facts even though they were not initially revealed by Stover.

C. Brown-Pixley Breached its Duties to Plaintiffs

The next question is whether there is a genuine issue of fact as to whether Brown-Pixley breached its duties in the manners alleged by plaintiffs. According to the evidence presented in the trial court, Stover called a Brown-Pixley agent and relayed that "the lease on the '98 Camry was expiring, and I was buying this car." The agent never asked Stover how the Acura was being titled. Additionally, Secura's notes on this file indicate:

> Reviewed 1993 application signed by named insured. The question was asked if any vehicle shown on this application nor [sic] registered to the applicant was checked "no". The vehicle in question was requested to be added in 2001 so it would not have shown up on the application. The request to add the vehicle simply states a request to add the vehicle to policy FC225-71-63. Round tabled this with market manager Bruce Defouw since agency admits they failed to ask the question but request an accommodation.

Brown-Pixley contends that other evidence creates a genuine issue of material fact as to whether it breached any duties owed to plaintiffs. Brown-Pixley asserts that there is a dispute about whether Stover spoke to Don Read or another agent of Brown-Pixley. However, this is not a material fact. The claim does not depend in any way upon whom Stover spoke with when he asked for coverage for the Acura. It is undisputed that Stover spoke with a Brown-Pixley agent when he requested coverage for the Acura. Brown-Pixley also asserts that there is a question of fact regarding whether Stover asked for coverage on the 1998 Camry to be deleted from Dicks's policy. However, the evidence clearly demonstrates that two days after Stover called the Brown-Pixley agent, the coverage on the Camry was deleted. There is no evidence that a subsequent call was placed by either Stover or Dicks. Therefore, there is no genuine issue with respect to this fact. Brown-Pixley also contends that there is a dispute regarding whether Stover informed the Brown-Pixley agent who was paying for the Acura or who had title to the Acura. However, there is no dispute in this regard. Stover testified that he did not recall informing the agent on these matters. There has been no evidence to the contrary. Therefore, there is also no genuine issue with respect to this fact.

Therefore, we conclude that the evidence demonstrates beyond dispute that the Brown-Pixley agent obtained coverage based on the incomplete information provided by Stover instead of ensuring that he had all of the relevant information necessary to obtain proper coverage. Accordingly, we conclude there is no genuine issue of fact as to whether Brown-Pixley breached its duty to plaintiffs to properly handle Stover's request for insurance on the Acura.

D. Damages

Finally, we conclude that there is no genuine issue of fact as to whether Brown-Pixley's breach of its duty to properly handle Stover's request for insurance on the Acura caused plaintiffs to have to file a lawsuit challenging Secura's denial of coverage. As an element of damages for these breaches, plaintiffs incurred costs and attorney fees prosecuting this claim. Because there was no genuine issue of fact with regard to these claims, the trial court did not err

in granting summary disposition in plaintiffs' favor and ordering Brown-Pixley to pay plaintiffs' attorney fees. We disagree with Brown-Pixley's characterization of the attorney fees as a discretionary award of attorney fees that are not ordinarily recoverable unless a statute, court rule, or common-law exception permits otherwise. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). Because plaintiff claimed the attorney fees as an element of damages incurred as a result of Brown-Pixley's breaches of duty, the trial court did not award the attorney fees as a matter of discretion, but rather, because Brown-Pixley failed to establish a genuine issue of material fact as to whether it breached its duties to plaintiffs. Therefore, the trial court did not err in granting summary disposition in plaintiffs' favor on their claims against Brown-Pixley and ordering Brown-Pixley to pay $7,000 in damages to plaintiffs.

Affirmed in part and reversed in part.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder