STATE OF MICHIGAN

COURT OF APPEALS

CRAIG D. VEUCASOVIC, and BARBARA VEUCASOVIC, Plaintiffs-Appellants/Cross-Appellees, v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee/Cross-Appellant.	UNPUBLISHED April 3, 2007 No. 271771 Wayne Circuit Court LC No. 05-505820-CK

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiffs Craig Veucasovic and his mother, Barbara Veucasovic, appeal as of right the trial court's grant of partial summary disposition in favor of defendant on the ground that Craig was not entitled to uninsured motorist coverage under an insurance policy issued to Barbara by defendant and, further, that plaintiffs were not entitled to attorney fees pursuant to § 11 of the Michigan Consumer Protection Act (MCPA), MCL 445.911. Defendant cross appeals the trial court's grant of summary disposition in favor of Barbara on the issue of collision benefits. We affirm in part and reverse in part.

I

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion under MCR 2.116(C)(10), the trial court must consider the pleadings, affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Id*.; *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

The proper interpretation of a contract is a question of law, which this Court reviews de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The de novo standard also applies to the question whether an ambiguity exists in an insurance contract. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

> 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). Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists. [*Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999) (citations omitted).]

II

This case stems from an accident on August 21, 2004, in which Craig was seriously injured when the 2004 Ford Ranger truck he was driving, owned by Barbara, was struck by a hit-and-run driver. The truck was insured under Barbara's automobile policy with defendant; however, Barbara had signed an "Excluded Driver Agreement" with defendant, which excluded coverage for Craig. Plaintiffs filed this action after defendant denied their insurance claim related to the accident.

Defendant filed a motion for summary disposition, contending that no insurance coverage existed for the accident because an excluded driver was operating the vehicle. The trial court granted defendant's motion in part, concluding that under the Agreement, Craig was not entitled to uninsured motorist coverage and plaintiffs were not entitled to attorney fees. However, the court granted partial summary disposition in favor of Barbara, pursuant to MCR 2.116(I)(2), with respect to her collision benefit claim, finding that the Agreement did not exclude collision coverage.

III

Plaintiffs argue that Craig is entitled to uninsured motorist benefits and that the trial court erred in reaching the contrary conclusion. We disagree.

The policy declaration page contains the following statement: "WARNING-- WHEN A NAMED EXCLUDED PERSON OPERATES A VEHICLE ALL LIABILITY COVERAGE IS VOID – NO ONE IS INSURED." This language is taken verbatim from MCL 500.3009(2), which states that "[i]f authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person." Craig is listed as an excluded driver on the declarations page.

As the trial court observed, nothing in the statute prohibits insurers from excluding coverages other than liability, and the Michigan Supreme Court has upheld exclusion agreements that exclude collision and comprehensive coverage. See *McMillan v Auto Club Ins Ass'n*, 450 Mich 557, 563-564; 543 NW2d 920 (1995). The driver exclusion agreement, which must be read as part of the insurance policy, explicitly provides that liability, uninsured motor vehicle and physical damage coverages do not apply if Craig drives the insured's vehicle. See *English v*

BCBSM, 263 Mich App 449, 471; 688 NW2d 523 (2004). Based on the unambiguous language contained in the policy declarations and the Driver Exclusion Agreement, we conclude that the trial court did not err by granting defendant summary disposition with regard to Craig's claim for uninsured motorist coverage benefits.

IV

Plaintiffs advance numerous challenges to the trial court's finding that the Driver Exclusion Agreement was ineffective at the time of the accident. They assert that the agreement was "invalid" because the font employed in the Agreement was so small as to violate MCL 500.2236(1), which provides, in relevant part:

> [A] printed rider or indorsement [sic] form . . . shall not be issued or delivered to a person in this state, until a copy of the form is filed with the insurance bureau and approved by the commissioner as conforming with the requirements of this act and not inconsistent with the law. . . . All such forms . . . shall be plainly printed with type size not less than 8-point unless the commissioner determines that portions of such a form printed with type less than 8-point is not deceptive or misleading.

Plaintiffs' argument fails. They have not shown that the insurance commissioner failed to approve the form. Moreover, our review of the Agreement reveals that the font used was not so small as to be either unreadable or deceptive.

Likewise, plaintiffs' argument that the Agreement was not in effect because Barbara repeatedly asked defendant's agents to cancel the exclusion agreement lacks merit. As the trial court observed, after an insurance policy has been purchased it cannot not be altered by a statement of the insurer's agent. *Kilburn v Union Marine & Gen Ins Co*, 326 Mich 115, 118; 40 NW2d 90 (1949). Accordingly, Barbara's requests to defendant's agent and defendant's agent's promises to remove the exclusion did not affect the status of the exclusion.

Also without merit is plaintiffs' argument that the Agreement was a contract of indefinite duration and, therefore, terminable at will. Contracts that include no provision concerning the term or duration of an agency, employment, or license agreement or the manner in which it may be terminated are often characterized as being for an "indefinite term." *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 236; 324 NW2d 732 (1982). Such agreements are construed to be terminable at the will of either party. *Id.* Plaintiffs have not shown that this rule of construction properly applies to the insurance policy at issue, and we decline to so apply it. The Driver Exclusion Agreement was not a contract of indefinite term because the policy specifically defined the duration of the Agreement.

We further reject plaintiffs' argument that the Driver Exclusion Agreement did not apply to the insurance policy covering the vehicle involved in the accident. At the time Barbara signed the Agreement, she owned and insured two vehicles with defendant. Subsequently, she leased the 2004 Ford truck that was involved in the accident, which she also insured through defendant. Plaintiffs claim that the Driver Exclusion Agreement applies only to the two vehicles insured at the time the Agreement was executed, which does not include the 2004 Ford truck. However, the Agreement provides that it is included in "any subsequent transfer, reinstatement, or renewal

of such policy or policies." Defendant presented the affidavit of its Underwriting Team Manager, stating that a "transfer" is a change to the policy contract that results in the issuance of a new policy declarations page. Further, a change of vehicle is a common transaction that results in a transfer. Barbara received a policy declarations page for the 2004 Ford truck that contained the exclusion warning. Accordingly, under the contract language, the Agreement applied to vehicles subsequently insured by Barbara. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). Additionally, the auto policy renewal that defendant mailed to Barbara for the 2004 truck, covering the policy period from June 30, 2004 to December 31, 2004, stated that Craig was an excluded driver.

We decline to address plaintiffs' remaining challenges to the validity of the Driver Exclusion Agreement because they were not preserved for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). In any event, we do not find them a basis for reversing the trial court's decision.

V

Plaintiffs argue that they are entitled to attorney fees for defendant's violations of §§ 3 and 11 of the MCPA, MCL 445.903 and MCL 445.911. Plaintiffs failed to establish their claim that defendant violated the MCPA. The trial court correctly determined that plaintiffs were not entitled to attorney fees.

VI

On cross-appeal, defendant argues that the trial court erred in concluding that Barbara was entitled to collision benefits and in granting her summary disposition on this ground pursuant to MCR 2.116(I)(2).[1] We agree that the grant of summary disposition under MCR 2.116(I)(2) was improper.

Insurance contracts are construed in accordance with the principles of contract construction. *Farmers Ins Exch, supra* at 417. Contract language must be given it its ordinary and plain meaning if such would be apparent to a reader of the instrument. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991). If a provision of a policy is clear, and does not contravene public policy, it must be enforced as written. *Farmers Ins Exch, supra* at 418. But when the language of a contract is susceptible to more than one reasonable interpretation, it is considered ambiguous and is therefore subject to interpretation. *Id*.

> Ambiguities in a contract generally raise questions of fact for the jury; however, if a contract must be construed according to its terms alone, it is the court's duty to interpret the language. [*Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003).] When the parties' intent in an

[1] MCR 2.116(I)(2) provides: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

> insurance contract cannot be ascertained from the evidence submitted, any ambiguities should be construed against the insurer. *Id*. at 472, 474, 477 n 16. [*Farmers Ins Exch, supra* at 418.]

In this case, defendant moved for summary disposition on the ground that an excluded driver was operating the vehicle and, therefore, there was no uninsured motorist, comprehensive, or collision coverage for either Craig or Barbara. Plaintiff argued that the policy excluded only "liability" coverage with respect to Craig, and because Barbara's claim was for "collision" coverage, the exclusion did not apply. Further, if the policy was ambiguous, it must be construed against the drafter, defendant.

The trial court concluded that collision coverage was not excluded because the Driver Exclusion Agreement specifically excluded "[a]ny physical damage coverage," and given the descriptions of coverage options on the back of the declarations page issued by defendant, "physical damage coverage," applied to recreational vehicles, not passenger vehicles. Accordingly, collision coverage, described under the options for passenger vehicle coverage, was not excluded.

On appeal, defendant argues that the court erred in granting summary disposition by considering only the back of the declarations page, and not the actual insurance policy language. Plaintiff responds that defendant should not be heard to complain that the court did not read the insurance policy when defendant did not provide the policy to the court. We find merit in both arguments, and therefore remand this case for further consideration.

An insurance policy must be read as a whole in order to discern and effectuate the intent of the parties, *Farmers Ins Exch, supra* at 418. However, in deciding a motion for summary disposition, a trial court is obliged to consider the evidence *submitted by* the parties. *Smith, supra* at 454; *Farmers Ins Exch, supra* at 417. Because the insurance policy was not provided to the trial court, the court cannot be faulted for failing to consider it.

Nonetheless, we conclude that whether the exclusion for "[a]ny physical damage coverage," includes "collision" coverage cannot be clearly and conclusively determined from the descriptions of coverage options on the back of the declarations page issued by defendant. The documentary evidence before the trial court was ambiguous, i.e., subject to more than one reasonable interpretation.[2] Considering that an insurance policy must be read as a whole in order to discern and effectuate the intent of the parties, *id.* at 418, and that the policy was not provided to the trial court, defendant's motion for summary disposition should simply have been denied with respect to the issue of collision coverage. The trial court therefore erred in granting summary disposition in favor of Barbara under MCR 2.116(I)(2).

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[2] Because collision coverage is a type of physical damage coverage available for recreation vehicles, it may also reasonably follow that the exclusion would operate to bar recovery of collision benefits.

We recognize that if a contract must be construed according to its terms alone, it is the court's duty to interpret the language. *Farmers Ins Exch, supra* at 418. And further, exclusions or exemptions from coverage are construed strictly against the insurer. *Fire Ins Exch v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996), overruled in part on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003). In this case, however, given that the motion for summary disposition was decided without oral argument, and that the parties did not raise or argue the issue whether coverage for "[a]ny physical damage" includes collision coverage, we conclude that a remand for further proceedings before the trial court is appropriate.

Affirmed in part and reversed in part. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra