STATE OF MICHIGAN

COURT OF APPEALS

DANIELLE ROBERTS TEACHWORTH, formerly known as DANIELLE ROBERTS, Plaintiff-Appellee,	UNPUBLISHED May 17, 2016
v	No. 327699 Berrien Circuit Court
CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellant.	LC No. 13-000313-CK

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Defendant, Citizens Insurance Company of America, appeals as of right the trial court order granting summary disposition in favor of plaintiff, Danielle Roberts Teachworth (formerly known as Danielle Roberts), and requiring defendant "to purchase a fully equipped passenger van, modified for the use of plaintiff, as required by the contract entered into between Plaintiff and Defendant on January 30, 2006."[1] We reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 25, 2004, plaintiff was involved in a single vehicle accident, during which she sustained, among other things, spinal injuries resulting in permanent paraplegia. At the time

[1] Defendant filed its claim of appeal following the trial court's entry of the final judgment in the case, which is an order denying plaintiff's motion for penalty interest. See *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992) ("Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case."). This Court dismissed defendant's earlier claim of appeal from the trial court's order granting summary disposition in favor of plaintiff because the order did not dispose of plaintiff's claim that she was entitled to penalty interest. *Teachworth v Citizens Insurance Company of America*, unpublished order of the Court of Appeals, entered April 22, 2015 (Docket No. 326662).

of the accident, plaintiff resided with her mother, who held an insurance policy issued by defendant. Following negotiations not relevant to this appeal, plaintiff initiated a lawsuit against defendant in August 2005, which arose from her claim that she was entitled to a fully modified van to fulfill her transportation needs. The lawsuit was dismissed after the parties entered into a "Vehicle Accord and Satisfaction" agreement ("VAS Agreement") on January 30, 2006. Pursuant to the agreement, defendant purchased a modified van for plaintiff.

In 2013, plaintiff requested that defendant purchase a new fully modified van in accordance with the VAS Agreement. In July 2013, defendant rejected plaintiff's claim by letter, explaining that it "is not implicit" in the language of the VAS Agreement that defendant is required to purchase another van, and that defendant is not required to pay the purchase price of another van under *Admire v Auto-Owners Ins Co*, 494 Mich 10; 831 NW2d 849 (2013).

Subsequently, plaintiff filed a complaint against defendant in October 2013, alleging, in pertinent part, that the parties entered into a settlement agreement following a lawsuit that she initiated in August 2005 arising from her claim to no-fault benefits and, in conjunction with the settlement agreement, the parties entered in a VAS Agreement, under which defendant agreed to furnish transportation for plaintiff by purchasing an initial specially modified van as well as subsequent vans in the future. She alleged that defendant refused to purchase a replacement van as required under the agreement. Accordingly, plaintiff requested, *inter alia*, a judgment against defendant "[f]or whatever amount in excess of $25,000 plaintiff is found to be entitled [sic] for the purchase of a transportation van with reasonable accommodations" and a declaratory adjudication as to defendant's liability for future accommodations in the form of "handicap accessory equipped transportation vans."

In April 2014, while the parties were still in the process of completing discovery, plaintiff filed a motion for summary disposition under MCR 2.116(C)(9) and (C)(10), which the trial court denied. Then, in December 2014, plaintiff filed a renewed motion for summary disposition, which incorporated the arguments raised in her earlier motion and raised additional arguments. Most significantly, she argued that under paragraph 3 of the VAS Agreement, "defendant is to supply transportation accommodations consisting of a van with necessary modifications [for plaintiff] to use and operate the van," including a replacement van every six years. Additionally, although she contended that the terms of the VAS Agreement are clear and unambiguous, she argued that to the extent that the agreement includes any ambiguous provisions, (1) those provisions should be construed against defendant, who was the drafter of the agreement, and (2) the trial court should consider the extrinsic evidence, consisting of email correspondence between the parties' attorneys, attached to plaintiff's motion.[2] Accordingly, plaintiff asserted that the trial court should enter an order requiring defendant to comply with the terms of the VAS agreement and "furnish a fully handicapped equipped vehicle for plaintiff's use for her recovery, care and rehabilitation."

[2] At the motion hearing, however, plaintiff argued that there is no question of fact with regard to the contract, and that it is a matter of law with regard to whether defendant is required to purchase a new vehicle.

In January 2015, defendant filed a response to plaintiff's renewed motion for summary disposition requesting that the trial court deny plaintiff's motion and, instead, grant summary disposition in its favor pursuant to MCR 2.116(C)(8), (C)(10), and (I)(2). Defendant raised numerous arguments in opposition to plaintiff's claims. However, most relevant to this opinion, it contended that the VAS Agreement only resolved plaintiff's claims for a period of six years and the agreement expired after that time period passed. It also rejected plaintiff's claim that it was obligated under the terms of the agreement to furnish an additional van, arguing that it had already fulfilled its obligations under the contract and the agreement provides that all subsequent transportation-related claims are subject to negotiation. Defendant emphasized that it is only required to *consider* plaintiff's claim for a new vehicle after six years under the terms of the VAS Agreement. Defendant contested plaintiff's suggestion that any portion of the agreement is ambiguous, such that the trial court should consider parol evidence in determining the meaning of its terms, and rejected plaintiff's characterization of the extrinsic evidence proffered with her motion. Defendant also asserted that the agreement should not be construed against it, arguing that plaintiff's counsel played an active role in drafting the contract and that it should not be considered the sole drafter. Regardless, it argued that summary disposition is improper if the contract is, in fact, ambiguous because the meaning of an ambiguous contract is a question of fact.

In February 2015, the trial court held a hearing on plaintiff's motion for summary disposition. The trial court noted, in light of language in the VAS Agreement regarding the purchase of vehicles in the future, that "clearly the parties were intending that there may well be a need to purchase a subsequent vehicles [sic]. However[,] it would not be before six years and it would only be if medically necessary under [the] No-Fault Act and her condition." It also rejected defendant's claim that the parties intended for the contract to expire given the provisions in paragraph 7 indicating that defendant could repurchase the van if plaintiff dies or her condition improves to the extent that a modified van is no longer required for her transportation needs. The trial court later reasoned:

> I'm looking at it in terms of the entire agreement and for that against the drafter and I'm finding that this contract seems construed against the drafter, [sic] clearly envisions there will be subsequent purchases if medically necessary under the No-Fault Act but not for at least a period of 6 years.

It then concluded:

> I recognize the fact [that] . . . [the agreement] could have been drafted a little bit tighter but you can't sit her[e] in good faith and tell me that the parties could look at this and say it was contemplated that there may be additional needs for subsequent purchases and not for a period of less than 6 years and then again only if medically necessary in terms of her condition and pursuant to the obligations of Citizens under the first party benefits of [the] No-Fault Act. I understand that there might be an issue with Citizen's attorney who drafted this. I understand that if I were Citizens and I was trying to get out of paying 18, 20, or $9,000's [sic] I'd be making the argument but my responsibility is to look at this and given the fact that Citizens is not contesting, as I understand it from what you've told me today and from reading the brief[,] that it is in fact medically necessary to this date,

> there's no genuine issue of material fact that . . . it has been more than 6 years and as I look at this agreement it is to the Court's satisfaction that CICA obligated themselves to additional purchase of a van and given the undisputed fact of the medical necessity the Motion for Summary Disposition on behalf of Plaintiff is granted.

Accordingly, the trial court entered an order on February 17, 2015, granting plaintiff's renewed motion for summary disposition, and denying defendant's request for alternative relief, for the reasons stated on the record at the motion hearing. Additionally, it held that "[d]efendant is required to purchase a fully equipped passenger van, modified for the use of plaintiff, as required by the contract entered into between [p]laintiff and [d]efendant on January 30, 2006."

II. CONSTRUCTION OF THE PARTIES' AGREEMENT

Defendant first argues that the trial court erroneously granted summary disposition in favor of plaintiff because defendant is not obligated under the terms of the VAS Agreement to purchase a new modified van every six years into perpetuity. We agree that the trial court's grant of summary disposition was improper.

A. STANDARD OF REVIEW

We review *de novo* a trial court's grant or denial of summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Plaintiff moved for summary disposition under MCR 2.116(C)(9) ("The opposing party has failed to state a valid defense to the claim asserted against him or her.") and (C)(10) ("Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."). However, apart from citing MCR 2.116(C)(9), plaintiff made no argument in the trial court that defendant failed to state a valid defense to plaintiff's claims. Additionally, it is apparent from plaintiff's arguments at the motion hearing and the trial court's statements on the record that the court granted summary disposition under MCR 2.116(C)(10) because it found that there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law.

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 411; 875 NW2d 242 (2015). When reviewing such a motion, we may only consider, in the light most favorable to the party opposing the motion, the evidence that was before the trial court, which consists of "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties.' " *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Additionally, we review *de novo*, as questions of law, whether contract language is ambiguous and the proper interpretation of a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

B. ANALYSIS

In *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007), we reiterated the general principles of contract interpretation, including when a court may conclude that a contract is ambiguous:

> That contracts are enforced according to their terms is a corollary of the parties' liberty to contract. This Court examines contractual language and gives the words their plain and ordinary meanings. [A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law, and [i]f the language of the contract is unambiguous, we construe and enforce the contract as written. Courts may not impose an ambiguity on clear contract language. A contract is ambiguous when two provisions irreconcilably conflict with each other, or when [a term] is equally susceptible to more than a single meaning. Whether a contract is ambiguous is a question of law. Only when contractual language is ambiguous does its meaning become a question of fact. [Quotation marks, citations, and footnotes omitted; alterations in original.]

Stated differently, "if a contract is unambiguous, its meaning is for the court to decide," *id*. at 503 n 2, but if a contract is ambiguous, meaning that its "language is unclear or susceptible to multiple meanings," its interpretation is a question of fact, as its meaning cannot be stated as a matter of law, *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). See also *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010); *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 320; 565 NW2d 915 (1997).

Notably, "courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity. Instead, contracts must be construed so as to give effect to every word or phrase as far as practicable." *Klapp*, 468 Mich at 467 (quotation marks and citations omitted); see also *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005) ("This Court is required to read contracts as a whole, giving harmonious effect, if possible, to each word and phrase."). In sum,

> Although the construction of the terms in a contract is generally a question of law for the court to determine, where [a contract's] meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions.
>
> Hence, in the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are *not* ambiguous. . . . In an instance of contractual ambiguity, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate.

> [*D'Avanzo*, 223 Mich App at 319 (quotation marks and citations omitted; alteration in original).]

Here, the trial court erred in concluding, as a matter of law, that defendant was obligated under the plain language of the contract to purchase a new van for plaintiff. In so finding, the trial court focused on the first and second clauses of paragraph 3. In its entirety, paragraph 3 states:

> 3. It is further agreed that subsequent to purchase of additional vehicles in accordance with the provisions of this agreement, CICA will not be obligated to consider the purchase and/or modification of any additional vehicles for a period of 6 years, and no claim shall be made for the purchase or lease of substitute transportation for the undersigned before one or the other stipulation is met.

In considering this provision in isolation, it does appear that the contract contemplates the purchase of additional vehicles, but the plain language includes no indication that defendant was *required* to purchase a new vehicle. Rather, the sentence specifically states that defendant will not be obligated to *consider* the purchase of an additional vehicle for a period of six years *subsequent to the purchase of additional vehicles in accordance with this agreement*. The ordinary meaning of "consider," which is not defined in the agreement, is "to think about carefully," "to think of especially with regard to taking some action," or "to take into account." *Merriam-Webster's Collegiate Dictionary* (11th ed). Accordingly, paragraph 3 does not plainly require defendant to purchase a new van every six years; it merely indicates that defendant will not be obligated to *think about* purchasing a new van for six years following the purchase of the initial van. Further, there are no terms in the VAS Agreement specifying when defendant will purchase additional vehicles or the terms governing such additional purchases, so there is no indication as to how a vehicle may be purchased "in accordance with [the] agreement." Moreover, the agreement also includes no explanation of the "one or the other stipulation" that must be met before plaintiff may make a claim for substitute transportation, and the trial court made no finding that plaintiff met one of the required stipulations. Likewise, apart from paragraph 3, none of the provisions in the agreement reference the purchase of additional or substitute vehicles under the contract or indicate that the terms of the agreement apply to vehicles other than the specific van identified at the beginning of the contract.

Most significantly, however, the trial court failed to recognize that other provisions of the VAS Agreement directly contradict the language in paragraph 3. See *Klapp*, 468 Mich at 467; *Royal Prop Group, LLC*, 267 Mich App at 719. The first section of the agreement states that in consideration for defendant's purchase of a van with a specific vehicle identification number, "[plaintiff] does hereby acknowledge that [defendant] has met its responsibilities under the Michigan No-Fault Act and the applicable insurance policy, and hereby releases [defendant] from further liability for transportation or other costs associated with transporting [plaintiff] subject to the following conditions[.]" The first sentence of paragraph 2 reiterates this release of liability: "It is further agreed between [plaintiff] and [defendant] that the purchase of *this van* will satisfy all of [defendant's] responsibilities for providing transportation for Claimant." (Emphasis added.) A release of further liability following the purchase of "this van" directly contradicts the language in paragraph 3 indicating that additional vehicles may be purchased in accordance with the agreement. Moreover, paragraphs 1 through 7 repeatedly refer to the

particular van purchased under the agreement in specific terms, referring to the vehicle as "this van," "the vehicle," "said van," "said vehicle," and "the above described van."

Finally, paragraph 7 provides:

> 7. In the event that Danielle Roberts dies, or her condition improves to the extent that her transportation needs no longer need to be met through the use of a special van, then Danielle Roberts hereby grants to Citizens the option to purchase the above described van back at the cost of $1.00, plus any and all costs associated with the transfer of the van to Citizens. It is further agreed that this provision applies to the van referenced herein with all subsequent transportation issues after the expiration of this agreement being subject to negotiations.

Contrary to defendant's claim, there is no indication that the agreement expired on a particular date or upon the occurrence of a particular event, although it appears that the parties may have intended to include an expiration date or a circumstance triggering expiration based on the language in paragraph 7. Nevertheless, even though the trial court also relied, in its rejection of defendant's claim that the agreement expired after six years, on the language in this paragraph discussing defendant's option to purchase the van in the event that plaintiff no longer needs a special van, the language in paragraph 7 includes no indication that defendant was *required* to purchase a new vehicle for plaintiff.

Accordingly, given these equivocal and conflicting terms, it seems equally possible that the parties intended to release defendant from further liability following its purchase of the initial van and fulfillment of the terms of the agreement, that defendant is obligated to *consider* the purchase of additional or substitute vehicles for plaintiff every six years, or that the agreement was intended to expire and only apply to the purchase of one specific van, so that "all subsequent transportation issues after the expiration of [the] agreement [are] subject to negotiations." See *Coates*, 276 Mich App at 503-504. Likewise, given the lack of any terms pertaining to the purchase of additional vehicles, it is impossible to discern the specific circumstances under which defendant may be obligated to purchase a replacement vehicle for plaintiff "in accordance with the provisions of [the] agreement." See *id*. Therefore, we conclude that the VAS Agreement is ambiguous.

As stated *supra*, the meaning of an ambiguous written instrument is a question of fact, *Klapp*, 468 Mich at 459, and summary disposition is inappropriate if the terms of a written instrument are ambiguous, *D'Avanzo*, 223 Mich App at 319. Thus, the trial court erred in granting summary disposition in favor of plaintiff, as she was not entitled to judgment as a matter of law.[3]

[3] Defendant also raises numerous other arguments in support of its position that the trial court's grant of summary disposition was in error. Given our conclusion that summary disposition was improper on the basis that the VAS Agreement is ambiguous, we need not consider these claims.

III. CONCLUSION

Because the VAS Agreement is ambiguous, the trial court's grant of summary disposition was in error. We reverse the trial court's order granting summary disposition in favor of plaintiff and remand for further proceedings consistent with this opinion. On remand, it will be necessary for the trier of fact to determine the intent of the parties, including (1) whether defendant is obligated to purchase a replacement van for plaintiff under the terms of the VAS Agreement, and, if so, (2) whether a modified van must be reasonably necessary for plaintiff's medically related transportation, in accordance with MCL 500.3107(1)(A), in order for such an obligation to arise under the agreement. See *Admire*, 494 Mich at 32; *ZCD Transp, Inc*, 299 Mich App at 340-343.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey

Nevertheless, we note that the trial court expressly found that defendant drafted the agreement and, as a result, applied the rule of *contra proferentem* in considering plaintiff's motion for summary disposition. The trial court's application of that rule was in error. A trier of fact may construe a contract against the drafter only if it first determines that the language of the contract is ambiguous. See *Klapp*, 468 Mich at 470-472, 474; *Holland*, 287 Mich App at 527-528. Cf. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60-61; 664 NW2d 776 (2003); *Nabozny v Burkhardt*, 461 Mich 471, 477 n 8; 606 NW2d 639 (2000). The trial court made no such finding here. Regardless, summary disposition was improper because the VAS Agreement is ambiguous. *D'Avanzo*, 223 Mich App at 319. Further, application of the rule of *contra proferentem* is only appropriate "if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the [trier of fact] unable to determine what the parties intended their contract to mean." *Klapp*, 468 Mich at 471.