STATE OF MICHIGAN

COURT OF APPEALS

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Plaintiff-Appellant,

v

ELEX CAGLE, as Personal Representative of the Estate of FRANCES ARLENE CAGLE and WAYNE FITZGERALD, as Personal Representative of the Estate of SHERRY LEE FITZGERALD,

Defendants-Appellees,

and

STEVEN JACOB NIKKEL, STEVEN JOHN NIKKEL and BLUE WATER CONTRACTING, INC.,

Defendants.

UNPUBLISHED
December 30, 1997

No. 195936
Macomb Circuit Court
LC No. 95-001423

Before: White, P.J, and Bandstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals the trial court's opinion and order denying plaintiff's motion for summary disposition and granting defendants' motion for summary disposition, which determined that defendant Steven John Nikkel's personal family automobile insurance policy provided coverage for his son Steven Jacob Nikkel in the underlying action. We affirm.

On October 1, 1993 Steven Jacob Nikkel ("Steven Jacob") was involved in a serious automobile accident while driving a 1988 Chevrolet pick-up truck owned by Blue Water Contracting, Inc. ("Blue Water"). Steven John Nikkel ("Steven John") was the president and sole shareholder of Blue Water, and is Steven Jacob's father. The truck was insured by plaintiff under a commercial automobile insurance policy. While driving the truck, Steven Jacob lost control and rear-ended an

automobile in which decedents Frances Cagle and Sherry Fitzgerald were riding. The automobile was forced into oncoming traffic. Decedents were struck by an oncoming car, resulting in their deaths. At the time of the accident, Steven Jacob was sixteen years old and living with his parents. Steven Jacob's parents owned two automobiles insured by plaintiff under a family automobile insurance policy.

Plaintiff filed the present action seeking a declaration that the truck driven by Steven Jacob was neither "owned" nor "non-owned" under the terms of the family automobile insurance policy, because it was "furnished for the regular use of either the named insured or any relative," and, thus, plaintiff was not required to provide coverage in the underlying wrongful death action filed by the personal representatives of the decedents' estate. The policy provisions at issue are as follows:

> Persons Insured: The following are insureds under Part I:
>
> (a) with respect to the owned automobile,
>
> (1) the named insured and any resident of the same household,
>
> (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
>
> (3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;
>
> (b) with respect to a non-owned automobile,
>
> (1) the named insured,
>
> (2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and
>
> (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above.
>
> * * *
>
> Definitions: Under Part 1:
>
> * * *

"owned automobile" means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,

(b) a trailer owned by the named insured,

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and (2) the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile;

* * *

"non-owned automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile.

Both plaintiff and defendants sought summary disposition. The trial court denied plaintiff's motion and granted defendants' motion, ruling that the pertinent policy language was ambiguous and, thus, the family automobile insurance policy provided coverage for the wrongful death actions without regard to whether the truck was furnished for the regular use of Steven John or Steven Jacob.[1]

We review a trial court's grant or denial of summary disposition de novo. *Industrial Machinery & Equipment Co, Inc v Lapeer Co Bank & Trust*, 213 Mich App 676, 678; 540 NW2d 781 (1995). The party moving for summary disposition pursuant to MCR 2.116(C)(10) is entitled to judgment as a matter of law only if there is no genuine issue of any material fact. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 196-197; 534 NW2d 491 (1995). When reviewing a motion pursuant to MCR 2.116(C)(10), this Court considers all the pleadings, affidavits and admissions, granting the benefit of the doubt to the non-moving party. *Id*. at 197.

We conclude that the trial court did not err in finding that the family automobile policy provisions at issue are unenforceable in the instant case.

The validity of substantially identical insurance contract provisions defining "non-owned automobile"[2] in the definition section of various insurance policies was addressed in *Powers v DAIIE*,

427 Mich 602, 623; 398 NW2d 411 (1986). The plurality opinion in *Powers* stated that it would hold that while the owned automobile exclusion was not repugnant per se to the no-fault act, in the cases before it:

> the insurers' method of exclusion—by the definition of terms at variance with their common meaning, which most policyholders would consider clear without definition—renders it invalid as (a) ambiguous, (b) not made clear, (c) a technical construction, and (d) contrary to the reasonable expectations of the insured reading the insurance contract. [427 Mich at 611.]

Because the *Powers* plurality opinion was signed by only two justices, it is not binding precedent. *VanDyke v League General Ins Co*, 184 Mich App 271, 274; 457 NW2d 141 (1990); *DeMaria v Auto Club Ins Ass'n* (*On Remand*), 165 Mich App 251; 418 NW2d 398 (1987). Nevertheless, two additional justices concurred in the result only, thus agreeing with the outcome, and a fifth justice, focusing on the doctrines of unconscionability and reasonable expectations, filed a separate opinion concurring in part and dissenting in part, concluding the provision was unenforceable under the specific facts presented in three of the five consolidated cases.[3]

The plurality opinion focused on six essential rules of insurance contract interpretation:

> 1) "[E]xceptions in an insurance policy to the general liability provided for are to be strictly construed against the insurer."
>
> 2) An insurer may not "escape liability by taking advantage of an ambiguity. . . ." '"[W]herever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted.'"
>
> 3) An insurer must "so . . . draft the policy as to make clear the extent of nonliability under the exclusion clause."
>
> 4) An insurer may not "escape liability by taking advantage of ... a forced construction of the language in a policy. . . ." . . . "[T]echnical constructions of policies of insurance are not favored. . . ."
>
> 5) "The courts have no patience with attempts by a paid insurer to escape liability by taking advantage of an ambiguity, a hidden meaning, or a forced construction of the language in a policy, when all question might have been avoided by a more generous or plainer use of words."
>
> 6) "[N]ot only ambiguous but deceptive." "[T]he policyholder must be protected against confusing statements in policies. . . ." [Mich at 623-624 (citations omitted).]

The plurality opinion concluded that, between the insured's construction that "owned automobile" and "nonowned automobile" were terms in common use with unambiguous meanings, and

the insurer's construction that a proper reading of the policy would reveal a meaning to these terms which differed from the popular understanding of them, there was an ambiguity and the insured's construction should prevail. *Id.* at 625-626. The plurality opinion also concluded that the policy language constituted a forced, technical construction, and that this hidden and forced construction should not be adopted because the discrepancy could have been avoided by a more generous or plainer use of words, e.g., by merely placing a notice to see the definition section in the policy to alert the insured that the definition of "owned" and "non-owned" was different from the common understanding. *Id*. at 628-629.

The plurality further noted that the definition of a "non-owned" automobile constituted an impermissible attempt to deny coverage. *Id.* at 629-630. Exclusionary clauses limit the scope of coverage provided under an insurance contract. *Hawkeye Security Ins v Vector Construction Co*, 185 Mich App 369, 384; 460 NW2d 329 (1990). If an insurer intends to exclude coverage under certain circumstances, it should clearly state those circumstances in the section of its policy entitled "Exclusions." *Fragner v American Community Mutual Ins Co*, 199 Mich App 537, 540; 502 NW2d 350 (1993). Because the attempted exclusion was not made clear under the "Exclusions" section of the policy, the *Powers* plurality opinion concluded the insurer was attempting to exclude coverage based on a technical reading of a paragraph located in the definition section of the policy, which was not sufficient to eliminate coverage. 427 Mich at 627-628.

Additionally, the *Powers* plurality opinion concluded that the "non-owned" automobile exception violates the rule of reasonable expectations. *Id.* at 631-634. The rule of reasonable expectations is an adjunct to the rules of construction for insurance contracts. *Vanguard Ins Co v Clarke*, 438 Mich 463, 472; 475 NW2d 48 (1991). When applying the rule of reasonable expectations, a court looks at the policy language from an objective standpoint and determines whether an insured could have reasonably expected coverage. *Allstate Ins Co v Keillor*, 450 Mich 412, 417; 537 NW2d 589 (1995). The *Powers* plurality concluded that, as drafted, the policies defeated the insureds' reasonable expectations. 427 Mich at 631-634.

The separate opinion focused less on the language of the exclusion and more on the reasonable expectations of the insureds, concluding that, in three of the five consolidated cases, the insureds would reasonably expect coverage; in a fourth case, no coverage could reasonably be expected by the plaintiff insured, although it could probably be reasonably expected by the non-plaintiff driver; and that remand was necessary in the fifth case.

Guided by *Powers,* but recognizing its non-binding status, and placing primary importance on the facts of the instant case, we conclude that the trial court did not err. The truck driven by Steven Jacob was insured, so that plaintiff was not being asked to assume the risk on an uninsured vehicle for a single premium. *Powers*, 427 Mich at 610; *Van Dyke v League General Insurance*, 184 Mich App 271; 454 NW2d 141 (1990). Further, the limits of liability on the accident vehicle exceeded the limits of the instant policy, so that it cannot be said that the insured was attempting to obtain higher limits for a lesser premium. Nor is this a case where an insured who chose the level of coverage on the accident vehicle seeks to obtain coverage under a relative's policy as well. See discussion of one of the consolidated cases in *Powers*, *Deyarmond v Community Services Ins Co Powers*, 427 Mich at 654-

656 (Levin, J., concurring in part, dissenting in part). Further, the driver was not the owner of the accident vehicle, thus there were two possible bases of liability, the owner's liability and the driver's liability.

Accordingly, we conclude that under the facts of this case the trial court did not err in denying plaintiff's motion for summary disposition and in granting defendants' motion.

Affirmed.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

[1] The court did not reach the question whether there was a genuine issue of material fact regarding whether the truck was furnished for the regular use of Steven John of Steven Jacob.

[2] The definitions in the policies at issue in the five consolidated cases were substantially identical to the instant policy's definition. Some did not include the last phrase, e.g., "other than a temporary substitute automobile." *Id.* at 609 n 2, 626; see also *id.* at 653, 655 (Levin, J., concurring in part, dissenting in part).

[3] The instant case is most analogous to one of the consolidated cases in *Powers, Auto Club Ins Assn v Nicholson*, discussed at 427 Mich 602, 656-657 (Levin, J. concurring in part and dissenting in part), or the situation of William, the driver in *Deyarmond, id.* at 654-656.