STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY BOLAN and DOLORES BOLAN,

Plaintiffs-Appellants,

v

AUTO-OWNERS INSURANCE CO,

Defendant-Appellee.

UNPUBLISHED
December 11, 2007

No. 274927
Roscommon Circuit Court
LC No. 05-725328-CK

Before: Bandstra P.J, and Meter and Beckering, JJ

PER CURIAM.

Plaintiffs Timothy and Dolores Bolan appeal as of right the November 16, 2006, judgment in favor of defendant Auto-Owners Insurance Company. We affirm.

This case arises from plaintiffs' claim for coverage under a homeowner's insurance policy issued by defendant. In early 2005, plaintiffs noticed softening in the floor around their dishwasher. An appliance repairman determined that the dishwasher was leaking during the drain cycle and he recommended that the dishwasher pump be replaced. Plaintiffs acknowledged that the dishwasher had been leaking for "some time" before they noticed softening in the floor. On January 24, 2005, plaintiffs filed a claim under their homeowner's insurance policy for water damage to the floor around their dishwasher. Defendant denied the claim, asserting that the terms of plaintiffs' policy excluded coverage for the damage to their floor.

Section 3 of plaintiffs' policy covers exclusions to coverage under the policy. Section 3.b.(4) excludes loss resulting directly or indirectly from, among other things, an "inherent vice, latent defect or mechanical breakdown." The following unnumbered paragraph appears at the end of Section 3.b.(4), and the parties refer to it as "the exception to the exclusion" in subsection (4):

> If because of any of these, water escapes from a . . . domestic appliance, we cover loss caused by the water. We also cover the cost of tearing out and replacing any part of the covered building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which the water escapes.

Section 3.b.(6) excludes loss resulting directly or indirectly from "constant or repeated seepage or leakage of water or steam from within a . . . domestic appliance which occurs over a period of weeks, months or years."

Plaintiffs filed an action for declaratory judgment in May 2005, seeking coverage under the policy. Both parties subsequently filed motions for summary disposition. Plaintiffs relied on the "exception to the exclusion" in subsection (4), asserting that the exception covered loss caused by water escaping from a domestic appliance with an "inherent vice, latent defect or mechanical breakdown." Defendant relied on the exclusion in subsection (6) for loss caused by constant or repeated leakage from a domestic appliance occurring over a period of weeks, months or years. The trial court denied both parties' motions for summary disposition. In light of the exclusion in subsection (6), the court found that the only factual determination for the jury was the duration of the leakage from the dishwasher. Following a jury trial on the matter, the jury found that the damage to plaintiffs' floor occurred over of a period of at least two weeks and the trial court entered judgment in favor of defendant.

I.

Plaintiffs first argue that the trial court erred in denying their motion for summary disposition. Specifically, plaintiffs argue that because there was no material dispute about the cause of the damage to their floor, they were entitled to coverage under the "exception to the exclusion" in Section 3.b.(4) of their insurance policy. We disagree.

We review a grant or denial of summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all of the evidence submitted by the parties in the light most favorable to the non-moving party. *Id*. at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.

Insurance policies are interpreted according to the principles of contract construction. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). An insurance policy should be read as a whole, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003), and should be construed so as to give effect to every word, clause, and phrase, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Exclusions to coverage should be read with the insuring agreement and independently of every other exclusion. *English v BCBSM*, 263 Mich App 449, 471; 688 NW2d 523 (2004). If any exclusion applies to a claim, coverage is precluded. *Brown v Farm Bureau General Ins Co*, 273 Mich App 658, 661; 730 NW2d 518 (2007). Exclusions are strictly construed in favor of the insured, but clear and specific exclusions must be enforced as written. *Id*. An insurance policy is clear if it fairly admits of but one interpretation. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law that we review de novo. *Henderson*, *supra* at 353.

We find that the trial court properly construed plaintiffs' insurance policy in ruling on the parties' motions for summary disposition. The court considered the entirety of the policy,

including the exclusions to coverage articulated in Sections 3.b.(4) and 3.b.(6). The court found that plaintiffs could recover for loss caused by water escaping from a domestic appliance with an "inherent vice, latent defect or mechanical breakdown" under the "exception to the exclusion" in subsection (4). If, however, the loss resulted from constant or repeated leakage of water from a domestic appliance "over a period of weeks, months or years," recovery was excluded under subsection (6). Therefore, according to the trial court, while the cause of the damage to plaintiffs' floor was undisputed, the duration of the leakage from the dishwasher was a factual determination for the jury. In so construing the policy, the trial court gave effect to the exclusions articulated in both subsections (4) and (6), and reached the only fair interpretation of the policy. See *Klapp*, *supra* at 468 and *Farm Bureau Mutual Ins Co*, *supra* at 566. Because the exclusion in subsection (6) is clear and specific, it must be enforced as written, however inartfully worded or clumsily arranged the policy might be. *Id*.; *Brown*, *supra* at 661; *Van Hollenbeck v Ins Co of North America*, 157 Mich App 470, 477; 403 NW2d 166 (1987), quoting *Raska v Farm Bureau Mutual Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982).

The trial court properly denied plaintiffs' motion for summary disposition.

II.

Plaintiffs next argue that the trial court erred in rejecting their proposed jury instructions and verdict forms. The use of the proper verdict form is an instructional issue. See *Hammack v Lutheran Social Services*, 211 Mich App 1, 10; 535 NWd 215 (1995). Claims of instructional error are generally reviewed de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). Jury instructions should not omit material issues, defenses, or theories that are supported by the evidence. *Id*. at 83-84. Reversal is not required if, on balance, the applicable law and the parties' theories were adequately and fairly presented to the jury. *Bordeaux v Celotex Corp*, 203 Mich App 158, 169; 511 NW2d 899 (1993).

Before trial, plaintiffs submitted proposed jury instructions and verdict forms to the court. Plaintiffs requested that the jury be asked to determine if the water damage resulted from an "inherent vice, latent defect or mechanical breakdown," and whether the water damage occurred "over a period of weeks, months, or years." The trial court rejected plaintiffs' proposed instructions and verdict forms. Instead, the court asked the jury to determine whether the water damage occurred "over a period of less than two weeks," and, if so, to determine the amount of plaintiffs' damages.

In light of the trial court's interpretation of plaintiffs' insurance policy, we cannot conclude that the court erred in rejecting plaintiffs' proposed jury instructions and verdict forms. As previously described, subsection (6) excluded coverage for constant or repeated leakage from a domestic appliance occurring "over a period of weeks, months or years." Because it was undisputed that the damage to plaintiffs' floor resulted from a leak in their dishwasher, the only factual determination for the jury was the duration of the leakage. It was unnecessary for the jury to consider whether the damage to the floor resulted from an "inherent vice, latent defect or mechanical breakdown." Furthermore, it was proper for the jury to consider whether the damage occurred "over a period of less than two weeks." Under subsection (6), leakage occurring over a "period of weeks," i.e., a period of two weeks or more, was excluded from coverage. Therefore, it was unnecessary for the jury to consider whether the damage to plaintiffs' floor occurred "over a period of weeks, months, or years."

The jury instructions and verdict form provided by the trial court fairly and adequately presented the issues to be decided by the jury, and the jury did not find that the damage to plaintiffs' floor occurred over a period of less than two weeks. Therefore, reversal is not warranted. See *Ward*, *supra* at 83-84; *Bordeaux*, *supra* at 169.

III.

Finally, plaintiffs argue that the trial court erred in dismissing their claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Plaintiffs claim on appeal that the insurance policy at issue violates the MCPA because the language in subsections (4) and (6) "causes or tends to cause confusion as to [plaintiffs'] rights under the policy." We disagree. The applicability of a statute to a particular case is a question of law that we review de novo. *Fowler v Doan*, 261 Mich App 595, 598-599; 683 NW2d 682 (2004).

The MCPA prohibits "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). In their complaint, plaintiffs alleged several violations of the MCPA. The trial court found that the MCPA was inapplicable to this case by adopting the analysis set forth in the federal district court case *Hardy v United of Omaha Life Ins Co*, 87 F Supp 2d 766 (1999). In *Hardy*, the insurer's denial of coverage under an accidental duty death benefits policy did not violate the MCPA, even though the beneficiary ultimately prevailed on the coverage issue. *Id*. at 771. The *Hardy* court found that as a matter of law, "the parties had a genuine legal dispute over the scope of coverage under the policy" and that the beneficiary failed "to specify any 'unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce' as required under the MCPA." *Id*. Likewise, in the instant case there was a genuine legal dispute as to whether defendant was liable to plaintiffs under the policy, and defendant's alleged violations of the MCPA were based on the language of the policy itself. Defendant's failure to pay benefits based on a genuine dispute regarding the interpretation of the policy language does not violate the MCPA.

Furthermore, even if the trial court found that defendant committed "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce," the MCPA is no longer applicable to insurance companies. Although MCL 445.904(2) formerly authorized parties to pursue MCPA claims against insurance companies under MCL 445.911, see *Smith v Globe Life Ins Co*, 460 Mich 446, 467-468; 597 NW2d 28 (1999), the Legislature subsequently amended MCL 445.904 through 2000 PA 432, eliminating the ability to enforce the provisions of the MCPA against insurance companies through MCL 445.911.[1] MCL 445.904(3) now provides that the MCPA "does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956," which is the Uniform Trade Practices Act (UTPA), MCL 500.2001 *et seq*. The purpose of the UTPA is to regulate the trade practices of insurance companies in

[1] We find this Court's reasoning persuasive in *Milhouse v Michigan Basic Prop Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2005 (Docket No. 257701) and *Rodgers v North American Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2005 (Docket No. 251926).

Michigan by prohibiting "unfair methods of competition or unfair or deceptive acts or practices." MCL 500.2002.

Accordingly, the trial court did not err in finding the MCPA inapplicable to this case and in rejecting plaintiffs' proposed instructions and verdict form regarding the MCPA.

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering