STATE OF MICHIGAN

COURT OF APPEALS

CHARLES KOVELLE and GENEVIEVE KOVELLE, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED December 11, 2003
v	No. 242749 Wayne Circuit Court
HARTFORD INSURANCE COMPANY, Defendant-Appellant/Cross-Appellee.	LC No. 01-117024-CK

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by right, and defendant cross-appeals by delayed leave granted, from the trial court's order granting in part plaintiffs' motion for summary disposition and granting in part defendant's cross-motion for summary disposition in this insurance action. We affirm in part and reverse in part.

The basic facts are not disputed. Plaintiffs purchased optional "underinsurance" coverage with their automobile insurance policy issued by defendant. The rider governing this coverage provides additional benefits if an insured is involved in an automobile accident and the other driver's insurance coverage is insufficient to cover the insured's damages. The policy purchased from defendant had a $100,000 policy limit for this coverage.

Both plaintiffs were severely injured in an automobile accident.[1] The other driver's insurance company paid $40,000. Plaintiffs submitted a claim to defendant for $100,000. Defendant applied the $40,000 plaintiffs already received against the policy limit of $100,000 and presented $60,000 to plaintiffs.

[1] It is not disputed that their damages exceeded $100,000.

Plaintiffs subsequently filed suit, claiming entitlement to the additional amount of $40,000, as well as attorney fees and interest. Their complaint alleged causes of action for breach of contract, misrepresentation under the Uniform Trade Practices Act (UTPA), MCL 500.2001 *et seq*., and misrepresentation under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.

With regard to underinsured motorists coverage, defendant's insurance policy provides, in pertinent part:

> LIMIT OF LIABILITY
>
> A. . . . However, the limit of liability shall be reduced by all sums paid because *or* the bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy.
>
> * * *
>
> C. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible. [Emphasis added.]

The trial court held that the apparent typographical error arising from the use of the word "or" rather than "of" in part A above rendered the policy ambiguous; therefore, it was required to construe the policy against defendant and in favor of the additional coverage. Accordingly, it awarded plaintiffs the remaining $40,000 of the policy limits.

Defendant argues that the trial court erred by treating the apparent typographical error in the policy as an ambiguity, and then construing that ambiguity against it. We agree with defendant that the word "or" in part A is easily recognized as a typographical error because its appearance renders the sentence meaningless. Moreover, from the surrounding context, it is apparent that "or" was intended to be "of." Because the error is obvious it is proper to read "of" instead of "or" into the sentence. See *Virginia & West Virginia Coal Co v Charles*, 251 F 83, 142 (WD Va, 1917).

Furthermore, even if we were to decline to read the word "or" as "of" and conclude that the word "or" creates an ambiguity, the trial court erroneously determined that it was required to decide the coverage issue in favor of plaintiffs under the rule that ambiguous provisions in an insurance policy are to be construed against the drafter, here, the insurer. An insurance contract is ambiguous if, after reading the entire contract, its language can be reasonably understood in differing ways. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566-567; 596 NW2d 915 (1999). Here, reading the clause as written (with "or"), it is not susceptible of two or more meanings. Rather, the use of the word "or" renders the sentence meaningless. It becomes a grammatical nullity. The trial court did not construe the contract or the clause against the drafter; it construed the request for relief against the drafter. The court did not identify a new or reformed meaning to the clause when it either effectuated or rejected the contract clause as written. If an ambiguity actually arose, the court should have selected one of the alternative meanings created by the ambiguity. Instead, it simply granted relief against the drafter rather

than determining whether either alternate meaning of the ambiguity compelled the relief requested.

In any event, the rule that contract language should be construed against the drafter only applies if all other conventional means of contract interpretation fail. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003). As previously indicated, we must determine whether the insurance contract is ambiguous from a fair reading of the entire contract. *Farm Bureau Mutual Ins Co*, *supra* at 566. Here, to the extent the word "or" renders part A ambiguous by itself, any ambiguity is eliminated when read in conjunction with part C. Viewed as a whole, the policy is unambiguous about a setoff for underinsured motorists coverage for payments received from or on behalf of persons legally responsible. Therefore, we reverse the trial court's order to the extent that it declares the insurance policy ambiguous and awards plaintiffs $40,000 and remand for entry of judgment in favor of defendant with respect to this claim.

In their cross-appeal, plaintiffs argue that the trial court erred by dismissing their claims of misrepresentation. Plaintiffs did not allege common-law claims of misrepresentation in their complaint. To the extent the trial court rejected plaintiffs' statutory claims of misrepresentation under the MCPA and the UTPA, we find no error.

The MCPA was amended before plaintiffs filed their complaint to abolish claims against insurance companies. Even if we were to credit plaintiffs' argument that a private cause of action survived the amendment of MCL 445.904(2) because plaintiffs' action accrued before the amendment, plaintiffs failed to establish a prima facie case of misrepresentation under the MCPA. Plaintiffs argue that the declarations page of defendant's policy misrepresented that they purchased underinsured motorists coverage of $100,000. They argue that this representation was false because coverage limits must be reduced by amounts paid on or behalf of the underinsured driver and because Michigan law requires that all insured drivers maintain at least $20,000 in coverage pursuant to MCL 500.3009(1), thus establishing a true coverage limit of $80,000. We disagree. Plaintiffs' argument is based on the assumption that accidents will only occur with Michigan drivers. Other states or provinces may impose lesser limits. In addition, even when a Michigan driver maintains the minimum required coverage, a lesser amount may be tendered in settlement of a claim—a situation contemplated by another section of the insurance policy. The insurance policy does not grant a setoff based on what another party might owe; it bases the setoff on amounts *actually paid* by or on behalf of a responsible party. Thus, plaintiffs' claim of misrepresentation must be rejected.

Plaintiffs' misrepresentation claim under the UTPA fails for the same reasons. Moreover, the courts of this state have consistently held that a private cause of action does not exist under the UTPA. *Crossley v Allstate Ins Co*, 155 Mich App 694, 697; 400 NW2d 625 (1986); *Safie Enterprises Inc v Nationwide Mutual Fire Ins Co*, 146 Mich App 483, 494; 381 NW2d 747 (1985); *Young v Michigan Mutual Ins Co*, 139 Mich App 600, 605; 362 NW2d 844 (1984); *Society of St Vincent de Paul v Mt Hawley Ins Co*, 49 F Supp 2d 1011, 1020 (ED Mich, 1999).

Having failed to present cognizable claims under the UTPA and the MCPA, plaintiffs are not entitled to attorney fees and interest under those statutes.

We affirm in part, reverse in part, and remand for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter