STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE MUTUAL INSURANCE COMPANY and PIZZA CZARS, INC., d/b/a JET'S PIZZA, Plaintiffs-Appellants, v FARMERS INSURANCE EXCHANGE, Defendant-Appellee, and ANTHONY NICOLAS ALCINI, Defendant.	UNPUBLISHED May 4, 2004 No. 243085 Wayne Circuit Court LC No. 02-205791-CK
FARMERS INSURANCE EXCHANGE, Plaintiff-Appellee, v PIZZA CZARS, INC., doing business as JET'S PIZZA, Defendant-Appellant, and ANTHONY NICHOLAS ALCINI, Defendant, and DONALD LEASE, as Next Friend of DON EDWIN LEASE,	No. 243105 Wayne Circuit Court LC No. 02-205005-CK

Defendant-Not Participating.

Before: Neff, P.J. and Wilder and Kelly, JJ.

PER CURIAM.

In these consolidated cases, Amerisure Mutual Insurance Company and Pizza Czars, Inc. appeal as of right an order granting Farmers Insurance Exchange's motion summary disposition, denying Amerisure's motion for summary disposition and dismissing Amerisure's declaratory action. We affirm.

I. Basic Facts and Procedural History

This case arises from an automobile accident in which a vehicle driven by Anthony Nicholas Alcini, while he was delivering pizzas for Pizza Czars, struck and injured Don Edwin Lease. The vehicle was insured by Farmers under Alcini's mother's insurance policy. Farmers denied Alcini's claim under a business-use exclusion because the accident occurred while Alcini was carrying property for a charge. Pizza Czars was insured by Amerisure with "covered autos" including employees' vehicles used in the course of Pizza Czars' business. Lease ultimately sued Alcini and Pizza Czars.

Farmers filed a declaratory action against Alcini, Pizza Czars and Lease seeking a declaration that it was not required to defend or indemnify Alcini. A few days later, Amerisure and Pizza Czars filed a separate declaratory action against Farmers and Alcini seeking a declaration that Farmers was obligated to defendant and indemnify Alcini and Pizza Czars. On Amerisure's motion, the trial court consolidated the two cases. Both Farmers and Amerisure filed motions for summary disposition. Farmers argued, pursuant to MCR 2.116(C)(10) that there was no genuine issue of fact as to whether it owed a duty to defend Alcini. Amerisure argued pursuant to MCR 2.116(C)(8) and (10) that Farmers, the primary insurer, had the duty to defend. The trial court granted Farmers' motion, denied Amerisure's motion and dismissed Amerisure's declaratory action.

II. Analysis

Amerisure argues that the trial court erred in granting Farmers' motion for summary disposition and denying Amerisure's motion for summary disposition. We disagree.

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions and other documentary evidence in a light most favorable to the nonmoving party and determines whether the moving party was entitled to judgment as a matter of law. *Id.* at 120. MCR 2.116(C)(8) tests the "legal sufficiency of the complaint" and permits dismissal of a claim where the opposing party has failed to state a claim on which relief can be granted. *Id*. at 119. Only the pleadings

are examined; documentary evidence is not considered. *Id.* Where the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery," the motion should be granted. *Id.*

B. Farmers' Policy Exclusion

1. Ambiguity

Amerisure first argues that Farmers' exclusion for vehicles used to "carry persons or property for a charge" supported two interpretations and was therefore ambiguous. We disagree.

Whether the language of a contract is ambiguous is a question of law that is reviewed de novo. *Farm Bureau Mut Ins Co v Nikkel,* 460 Mich 558, 563; 596 NW2d 915 (1999). An insurance policy is construed according to ordinary principles of contract construction. *Henderson v State Farm Fire and Casualty Co,* 460 Mich 348, 353-354; 596 NW2d 190 (1999). Where a contract is unambiguous, the intent of the parties must be gleaned from the contract itself. *Id.* at 354. When an exclusion is unambiguous, and the insured's actions fall within that exclusion, coverage is precluded. *Auto-Owners Ins v Harrington,* 455 Mich 377, 381-386; 565 NW2d 839 (1997).

Based on the plain language of the Farmers policy, we conclude that the unambiguous business-use exclusion precludes Farmers' coverage. We previously held that when a person is hired to deliver pizzas, the delivery of the pizzas is for consideration. *Amerisure Ins Co v Graff Chevrolet, Inc,* 257 Mich App 585, 596; 669 NW2d 304 (2003), rev'd in part on other grounds ___ Mich ___ (Docket No. 124426, decided January 29, 2004). Accordingly, the exclusion at issue precludes coverage because the accident occurred when the vehicle is used to carry "persons or property for a charge."

2. Compulsory Insurance Provisions

Amerisure next argues that the Farmers' exclusion violated compulsory insurance provisions of the no-fault insurance act and should have been declared void. We disagree.

The purpose of the no-fault insurance act, MCL 500.3101 *et seq.*, is to protect those who are injured because of the "ownership, maintenance, or use of an automobile." *Clevenger v Allstate Ins Co,* 443 Mich 646, 651; 505 NW2d 553 (1993). A policy exclusion that conflicts with the mandatory requirements of the no-fault act is void as contrary to public policy. *Citizens Ins Co v Federated Mut Ins Co,* 448 Mich 225, 232; 531 NW2d 138 (1995). Nevertheless, an insurer may exclude from coverage certain items as long as the unambiguous exclusion does not violate the no-fault insurance act. *Id.* at 238. The essential insurance act, MCL 500.2101 *et seq.*, specifically permits a business-use exclusion. *Husted v Auto-Owners Ins Co,* 459 Mich 500, 506; 591 NW2d 642 (1999), citing MCL 500.2118(2)(f), 516. Because the essential insurance act and the no-fault insurance act are in pari materia, and the essential insurance act was enacted later and specifically addresses business-use exclusions, it is treated as an exception to the no-fault act. *Id.* at 516. Accordingly, Farmers' business-use exclusion does not violate the no-fault insurance act.

3. Estoppel

Amerisure next argues that because Farmers did not raise an exclusion as a defense before summary disposition, it should have been estopped from raising the exclusion. We disagree.

Generally, after an insurance company denies coverage to an insured and states its defenses, it is estopped from raising new defenses. *Smit v State Farm Ins Co*, 207 Mich App 674, 679-680; 525 NW2d 528 (1994). But an insurance company is not estopped from raising defenses where the effect of estoppel would require the insurance company to cover a loss it never agreed to cover. *Id.* at 680. While there are two exceptions to this narrowed scope, neither is applicable here, and Farmers is not estopped from proffering the exclusion as a defense. *Id.* at 684.

C. Assumption of Risk

Amerisure next claims that Alcini was not an insured under its policy. We disagree.

An insurance company may not be held liable when it did not assume a risk. *Graff, supra* at 594, citing *Kaczmarck v La Pierre*, 337 Mich 500, 506; 60 NW2d 327 (1953). But Amerisure's policy specifically covers employees' vehicles used in the course of business. Because Alcini was delivering pizzas within the scope of his employment, Amerisure's policy covers the vehicle that he drove at the time of the accident.

D. Excess "other insurance"

Amerisure next argues that its policy was an excess "other insurance policy" with respect to non-owned automobiles, and that Farmers, as the primary insurer of the employee's car, was responsible for the underlying settlement to the limits of its policy coverage. We disagree.

Because Farmers' policy specifically excluded coverage for accidents occurring while property was being delivered for a charge, there was no other primary insurance. An excess "other insurance" clause only becomes effective when there is other primary insurance; otherwise the policy is primary, even for non-owned automobiles. *Bosco v Bauermeister*, 456 Mich 279, 292; 571 NW2d 509 (1997). Because Farmers policy did not provide primary coverage in this case, Amerisure's coverage was not an excess "other insurance policy."

E. Discovery

Amerisure next argues that the trial court should not have granted summary disposition where the discovery cut-off in its declaratory action was several months away. We disagree.

Generally, summary disposition is premature if granted before complete discovery on a disputed issue. *Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Nevertheless, when it is not likely that additional discovery will support a nonmoving party's position, summary disposition may be proper. *Id.* Amerisure argues that it suffered unfair prejudice because it was unable to explore all relevant issues regarding coverage, but does not demonstrate how additional discovery might have supported a denial of summary disposition when Farmers' business-use exclusion precluded coverage and Amerisures' policy covers the vehicle Alcini drove for Pizza Czars' business purposes.

Therefore, we conclude that the trial court did not err in granting summary disposition to Farmers and denying Amerisure's motion for summary disposition.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly