

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SHAREN W. WELLMAN,

Plaintiff-Appellee,

v

HARRY LEE MCCULLOUGH,

Defendant,

and

HOMEOWNERS INSURANCE COMPANY,

Defendant-Appellant.

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UNPUBLISHED

May 24, 2011

No. 294394

Lake Circuit Court

LC No. 09-007559-NI

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

In this case arising from a motorcycle accident, defendant Home-Owners Insurance Company appeals by leave granted the trial court's decision to deny its motion for summary disposition of plaintiff Sharen W. Wellman's claim for underinsured motorist benefits. On appeal, we must determine whether Home-Owners' no-fault insurance policy covering Wellman's Jeep Wrangler and motorcycle unambiguously excluded application of the underinsured motorist coverage for Wellman's motorcycle. We conclude that, when construed against the drafter, Wellman's policy with Home-Owners included underinsured motorist coverage for her motorcycle, notwithstanding that she did not specifically purchase underinsured coverage for her motorcycle. Accordingly, the trial court did not err when it denied Home-Owners' motion for summary disposition. Nevertheless, because the policy provided underinsured coverage for Wellman's motorcycle as a matter of law, the trial court erred to the extent that it determined that there was an ambiguity that must be submitted to the trier of fact; the trial court should have determined that there was coverage and entered summary disposition in favor of Wellman under MCR 2.116(I)(2). For these reasons, we affirm the trial court's decision to deny Home-Owners' motion, but remand for entry of summary disposition in favor Wellman.

## I. BASIC FACTS AND PROCEDURAL HISTORY

In her complaint, Wellman alleged that, in May 2007, she was driving her motorcycle—a Honda Rebel—along a public highway. At about the same time, defendant Harry Lee McCullough was driving his car along a private drive that intersected with the public highway. McCullough allegedly turned onto the public highway without notice and without yielding to Wellman. As a result, Wellman and McCullough collided.

At the time of the accident, Wellman had a no-fault insurance policy with Home-Owners. The policy covered both her Wrangler and her motorcycle. However, Wellman only purchased underinsured motorist coverage on her Wrangler. Nevertheless, Wellman asked Home-Owners to pay her underinsured motorist benefits under the policy. Home-Owners refused her request on the ground that the underinsured coverage only applied to her Wrangler, which was not involved in the accident.

In May 2009, Wellman sued McCullough for negligence and sued Home-Owners for breaching the insurance contract.

Home-Owners moved for summary disposition of Wellman's claim in June 2009. In its motion, Home-Owners argued that, although the applicable endorsement generally provided for underinsured motorist benefits, there was an exception stated for accidents involving the insured's automobiles for which the insured did not purchase underinsured motorist coverage. Because Wellman's motorcycle was listed as an automobile on the declarations page and did not have underinsured motorist coverage, Home-Owners maintained that it had no obligation to pay Wellman underinsured motorist benefits. In response, Wellman argued that the policy defined the terms automobile in such a way as to exclude motorcycles. Because her motorcycle was not an automobile as defined by the policy, the exclusion cited by Home-Owners did not apply and she was entitled to underinsured motorist benefits.

After a hearing on Home-Owners' motion, the trial court concluded that the policy terms, as modified by the endorsement for underinsured motorist coverage, was ambiguous. It determined that the proper interpretation of the contract was a matter for the finder of fact and, on that basis, denied Home-Owners' motion for summary disposition. The trial court entered an order denying the motion in September 2009.

In October 2009, Home-Owners applied for interlocutory leave to appeal the trial court's decision to deny its motion. This Court granted leave to appeal on February 10, 2010.

## II. UNDERINSURED MOTORIST COVERAGE

### A. STANDARDS OF REVIEW

On appeal, Home-Owners argues that the trial court erred when it denied its motion for summary disposition. Specifically, Home-Owners contends that the trial court erred when it determined that the definition of the term automobile was ambiguous. Because the term automobile plainly includes the motorcycle at issue, the trial court should have determined that the exclusion for automobiles that were not covered by underinsured motorist coverage applied to the motorcycle and barred Wellman's claim for underinsured motorist benefits as a matter of

law. This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of a contract. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

## B. ANALYSIS

Wellman purchased an insurance policy from Home-Owners that covered both her motorcycle and her Wrangler—that is, the complete package was an integrated whole that did not involve separate contracts for each vehicle. The complete contract included the main policy—called the insuring agreement, a no-fault endorsement, an uninsured motorist coverage endorsement, an underinsured motorist coverage endorsement (underinsured endorsement), a motorcycle endorsement, and several other independent provisions applicable to policies issued in Michigan.

The main policy provided that Home-Owners would pay “damages for bodily injury and property damage” for which Wellman becomes “legally responsible because of or arising out of [her] ownership, maintenance or use of [her] automobile . . . as an automobile.”<sup>1</sup> The main policy defined automobile to mean “a private passenger automobile, a truck, truck tractor, trailer, farm implement or other land motor vehicle.” The policy further defined a private passenger automobile as a “passenger or station wagon type automobile with four or more wheels” or a “pickup or van type automobile” or a “motorhome.”

On appeal, Home-Owners argues that the motorcycle at issue constituted an automobile within the meaning of the main policy because the main policy defines automobile to include any vehicle listed on the declarations page. Home-Owners relies on language contained in the preamble to the main policy rather than the actual definition of the term automobile. The preamble provides that the attached declarations “describe the automobile(s) we insure and the Coverages and Limits of Liability for which you have paid a premium.” Yet, in section one of the main policy, which provides definitions, Home-Owners explained that, in order to “understand this policy”, the reader must understand the terms defined in section one. Section one further provides that, when used in the policy, the defined terms will be in bold. The term “automobile(s)” appears in bold type in the preamble. Thus, the parties agreed that the term automobile would have the meaning provided by the definitions stated under section one. That is, the preamble cannot be understood to modify the definition provided under section one. Accordingly, we cannot construe the preamble to specifically modify the definition provided under section one to include any vehicle listed on the declarations page. Had it intended to do so, Home-Owners could have defined the term automobile under section one to include any vehicle listed on the declarations page, but it did not do so and we will not read such an expansion into the contract. *Zahn v Kroger Co*, 483 Mich 34, 41; 764 NW2d 207 (2009)

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<sup>1</sup> The policy emphasized defined terms by putting them in bold. When quoting the contract language, we have removed the emphases.

(“Courts may not make a new contract for parties under the guise of a construction of the contract, if doing so will ignore the plain meaning of the words chosen by the parties.”).

Wellman also purchased underinsured motorist coverage for her Wrangler. In the underinsured endorsement, Home-Owners agreed to pay Wellman “compensatory damages” that she was “legally entitled to recover or from the owner or operator of an underinsured automobile for bodily injury sustained while occupying an automobile that is covered” in section two of the main policy. The underinsured endorsement provided that, if the “first named insured” was an “individual,” which Wellman undisputedly was, the coverage would also apply when she was not “occupying an automobile” that was covered under section two of the main policy.<sup>2</sup> As such, Wellman’s underinsured motorist coverage applied without regard to whether she was injured while occupying an “automobile” for which she had coverage under section two of the main policy. However, the underinsured endorsement contained an important exclusion: the underinsured coverage would not apply to “any person injured while occupying or injured by any automobile” that Wellman owned and which was “not insured for Underinsured Motorist Coverage by the policy.” As such, under the plain language of this endorsement, if an insured suffered an injury while occupying an “automobile” that the insured owned, he or she would not be entitled to underinsured motorist benefits unless the automobile were specifically insured for underinsured motorist benefits.

Here, it is undisputed that Wellman suffered an injury while riding her own motorcycle and that this motorcycle was not specifically insured for underinsured motorist benefits. Accordingly, under the terms of the exclusion for owned automobiles in the underinsured endorsement, if Wellman’s motorcycle constituted an automobile within the meaning of the policy, then she would not be entitled to underinsured motorist benefits. If, however, the motorcycle was not an automobile within the meaning of the policy, then she was not occupying an automobile at the time of the accident and would be entitled to underinsured benefits even though she only purchased underinsured coverage for her Wrangler.

The underinsured endorsement provided definitions, which “apply in addition to those contained” in section one of the main policy. Hence, the definitions contained in the main policy clearly apply to the underinsured endorsement. As already noted, the main policy defined the term “automobile” to include a “private passenger automobile, a truck, truck tractor, trailer, farm implement or other land motor vehicle.” It is plain that a motorcycle is not a truck, truck tractor, trailer or farm implement. In addition, a motorcycle is clearly not a “passenger or station wagon type automobile with four or more wheels” or a “pickup or van type automobile” or a “motorhome.” Therefore, a motorcycle will only constitute an automobile within the meaning of the policy if it is an “other land motor vehicle.”

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<sup>2</sup> Given this language, we reject Home-Owners’ contention that Wellman would not be entitled to any underinsured motorist coverage unless she suffered an injury while occupying an automobile that she owned.

The main policy did not provide a definition for “other land motor vehicle.” The phrase “land motor vehicle” would, in common understanding, include a motorcycle. After all a motorcycle is a vehicle—a device designed to carry goods or passengers—that is powered by a motor and that one drives on land. Thus, if the term “land motor vehicle” were undefined, we would be compelled to give it its ordinary meaning, see *Citizens Ins Co v Pro-Seal Service Gp, Inc*, 477 Mich 75, 82-83; 730 NW2d 682 (2007), and would conclude that the exclusion for automobiles that Wellman owned and for which she did not purchase underinsured motorist coverage applied to exclude underinsured motorist coverage. However, the term “motor vehicle” is not an undefined term. Although the main policy did not provide a definition for the term “other land motor vehicle”, the contract included endorsements and provisions that did define the term “motor vehicle.”

In a special tort liability exclusion provision, Wellman and Home-Owners agreed that a definition for “motor vehicle” applied “in addition to those contained” in section one of the main policy. This provision defined motor vehicle to mean “a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. Motor vehicle does not include a motorcycle or a moped . . . .” The parties agreed to a substantial similar definition in the motorcycle endorsement and agreed in that endorsement that the definitions “apply in addition to those contained” in section one of the main policy. These definitions unequivocally provide that a motorcycle is not a motor vehicle. And, if these definitions apply to the main policy, one must necessarily conclude that a motorcycle is not an “other land motor vehicle.” Because we must read the contract as a comprehensive whole, see *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), we must determine whether the parties agreed to modify the meaning of the phrase “other land motor vehicle” with the special tort provision and motorcycle endorsement.

By agreeing that the definitions contained in these provisions “apply in addition to those contained” in section one of the main policy, the parties clearly agreed to apply the definitions stated in the main policy to the special tort provision and motorcycle endorsement. One might also reasonably construe these provisions to conclude that the parties intended to modify the main policy to include the definition of “motor vehicle” stated in the special tort provision and motorcycle endorsement. Indeed, we note that Home-Owners, as the drafter of the policy at issue, clearly understood that the definitions stated in an endorsement might be interpreted to modify the meaning of terms in the main policy. In the no-fault endorsement, which contains a similar definition for “motor vehicle,” the parties agreed that the defined terms apply only to “this endorsement” and that the definitions in the main policy “do not apply to the coverage provided by this endorsement.” The fact that Home-Owners specifically addressed whether the definitions in a particular endorsement should apply only to that endorsement tends to suggest that, where it did not specifically limit application of the definitions contained in the endorsement, it intended those definitions to apply generally. Accordingly, we conclude that it is just as plausible that the parties intended the definition of “motor vehicle” contained in the special tort exclusion and motorcycle endorsement to modify the main policy as it is that the parties intended only to incorporate the main policy’s definitions by reference. Because the policy is equally susceptible to either interpretation when read as a whole, the trial court did not err when it concluded that the provision was ambiguous. *Lansing Mayor v Public Service Comm’n*, 470 Mich 154, 166; 680 NW2d 840 (2004).

Typically, an ambiguous contract provision is a question of fact that must be determined by a jury after considering relevant extrinsic evidence. *Klapp*, 468 Mich at 469-470. If the jury is unable to determine what the parties intended after considering all relevant extrinsic evidence, the jury should apply the rule that ambiguities should be construed against the drafter—the rule of contra proferentem—to resolve the issue against the drafter. *Id.* at 472. However, where there is no extrinsic evidence that might shed light on the proper interpretation of the provision, courts will apply the rule of contra proferentem as a matter of law. See *id.* at 476-477.

Here, the parties did not present any extrinsic evidence tending to establish how the ambiguous provision should be interpreted. Accordingly, the trial court should have applied the rule of contra proferentem as a matter of law and construed the contract in favor of coverage for the insured. See *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982) (“If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter in favor of coverage.”). Consequently, although the trial court did not err to the extent that it denied Home-Owners’ motion for summary disposition, the trial court erred when it determined that the ambiguity must be resolved by the finder-of-fact. The trial court should have granted summary disposition in favor of Wellman under MCR 2.116(I)(2).

Affirmed, but remanded for entry of summary disposition in favor of Wellman. We do not retain jurisdiction. As the prevailing party, Wellman may tax costs. MCR 7.219(A).

/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray  
/s/ Michael J. Kelly