STATE OF MICHIGAN

COURT OF APPEALS

WILLINA MCINTOSH and ROBERT L. MCINTOSH, Plaintiffs-Appellants,	UNPUBLISHED March 11, 2021
v	No. 351339 Crawford Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 18-010387-CK

Before: REDFORD, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs, Willina McIntosh and her son Robert L. McIntosh, appeal as of right the trial court's dismissal of their breach of contract lawsuit against defendant, Auto-Owners Insurance Company (Auto-Owners), for its denial of coverage for their claim of loss arising from damage to the roof of Willina's house. We affirm.

I. FACTUAL BACKGROUND

Since 1965, Willina has owned and occupied a house located at 221 Dale Street, Grayling, Michigan, which she insures under an insurance policy issued by Auto-Owners. During the winter of 2017, she escaped the harsh weather to warmer climes. In the spring and early summer of 2017, Robert observed that the house appeared to have suffered damage to the roof system and trusses which prompted him in mid-August to hire a contractor to inspect the roof. The contractor concluded in his later report that the roof system had been compromised from the weight of ice and snow. Robert sought coverage under the insurance policy in September 2017. Auto-Owners' adjustor, Robert Wright, inspected the house on September 14, 2017, and recommended that Robert make an insurance claim and Robert submitted a sworn statement in proof of loss on October 30, 2017. In it he stated that the casualty loss occurred on September 14, 2017, caused by roof trusses caving due to ice and snow. On December 14, 2017, Auto-Owners denied the claim because the engineer it hired to inspect the house determined that the damage to the roof and ceiling resulted from long-term creep deflection that occurred over a period of many years and not from accidental direct physical loss.

Plaintiffs' Auto-Owners homeowners insurance policy provided in relevant part as follows:

WHAT TO DO IN CASE OF LOSS-AMENDATORY

It is agreed:

a. give us or our agency immediate notice.

* * *

d. send to us, within 60 days after you notify us or our agency of the loss, a proof of loss signed and sworn to by the insured, including:

(1) the time and cause of loss

AMENDATORY ENDORSEMENT

It is agreed:

* * *

g. SUIT AGAINST US

We may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year after the loss or damage occurs. The time for commencing a suit is tolled from the time you notify us of the loss or damage until we formally deny liability for the claim.

On September 13, 2018, Willina and Robert sued Auto-Owners for breach of contract because it denied coverage for damage to the roofing system which they alleged arose from accumulation of ice and snow. Auto-Owners answered by denying that the property suffered a loss covered under the policy and asserted as an affirmative defense that discovery might reveal that plaintiffs failed to timely file suit according to the terms of the policy. Auto-Owners later moved for summary disposition under MCR 2.116(C)(8) and (10). Plaintiffs opposed the motion and submitted Robert's affidavit in which he testified that he incorrectly identified the date of loss as September 14, 2017, when in fact, the loss occurred during the winter of 2017, and Robert observed the roof damage during the spring and summer of 2017. The trial court held a hearing at which Auto-Owners argued that plaintiffs failed to timely file their lawsuit under the policy's one-year lawsuit limitation period. The trial court adjourned the hearing and required the parties to brief the limitation period issue and scheduled a later date to hear arguments. Auto-Owners argued that the policy specified when and how a party must notify it of a loss and that the express terms of the policy required filing any lawsuit within one year of the date of loss subject only to the contractually agreed tolling from the date of notice until it formally denied the claim. Auto-Owners asserted that plaintiffs failed to timely file their lawsuit which barred their claims. Plaintiffs argued that the common law discovery rule applied making their filing timely because they did not know of the loss until September 14, 2017, when Wright told them to submit a claim for coverage. Auto-Owners argued that *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378;

738 NW2d 664 (2007), fully abrogated the common law discovery rule in Michigan precluding plaintiffs from relying upon it to extend the contractual limitation period. Plaintiffs argued that the *Trentadue* holding only applied to preclude the application of the common law discovery rule to extend statutes of limitations with few exceptions.

The trial court took the matter under advisement and later issued a written opinion and order granting Auto-Owners summary disposition and dismissing the case. The trial court enforced the policy's contract terms as written upon finding, based upon Robert's affidavit testimony, that plaintiffs failed to fully comply with the terms of the policy and also failed to timely file their lawsuit under the policy's contractual one-year limitation period, both of which barred the lawsuit. Plaintiffs now appeal.

II. ANALYSIS

A. FAILURE TO PRESERVE ISSUES FOR APPEAL

As a preliminary matter, we note that plaintiffs raise three issues in this appeal, one which they preserved, two of which they did not. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014) (quotation marks and citation omitted). In this case, plaintiffs failed to raise before the trial court the issue that the conduct or representations of Auto-Owners or its agent tolled the contractual limitation period, and they never raised the issue that they were deprived of due process because they claim that the trial court incorrectly applied the *Trentadue* holding.

Michigan generally follows a raise or waive rule of appellate review. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). Although the Michigan Supreme Court has held that this Court must review unpreserved errors in criminal cases for plain error affecting the defendant's substantial rights, see *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), it has not established a similar rule for civil cases. *Walters*, 481 Mich at 387-388.

In *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192-193; 920 NW2d 148 (2018) (quotation marks, alteration, and citations omitted), this Court explained:

> Although this Court need not review issues raised for the first time on appeal, this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. However, while an appellate court has the inherent power to review an unpreserved claim of error, our Supreme Court has emphasized the fundamental principles that such power of review is to be exercised quite sparingly and that the inherent power to review unpreserved issues is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a criminal defendant a fair trial.
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> * * *

> [T]he fundamentals of appellate-preservation law . . . require parties to first raise issues in the lower court to be addressed in that forum. Therefore, plaintiffs have waived appellate review of this issue. Plaintiffs may not remain silent in the trial court and then hope to obtain appellate relief on an issue that they did not call to the trial court's attention. A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.

This Court has discretion to review unpreserved issues in civil cases if review would prevent manifest injustice, or is necessary for proper resolution of the case, or the issue involves a question of law and the facts necessary for determination have been presented. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). This Court has reviewed forfeited issues when declining to do so would result in a miscarriage of justice. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). This Court, however, must exercises its discretion sparingly and only where exceptional circumstances warrant review. *Booth v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n. 23; 507 NW2d 422 (1993).

This case does not present exceptional circumstances that warrant review of the two unpreserved claims of error which plaintiffs waived. Accordingly, we decline to exercise our discretion to review those issues.

B. APPLICABILITY OF THE COMMON LAW DISCOVERY RULE

Plaintiffs argue that the trial court erred by dismissing their lawsuit as untimely filed because plaintiffs relied on the common law discovery rule to extend the contractual limitation period. Plaintiffs argue that, because *Trentadue*, 479 Mich 378, only abrogated application of the common law discovery rule to statutes of limitations, the trial court erred by applying the *Trentadue* holding in this case when it should have applied the common law discovery rule and found that they timely filed their lawsuit, regardless of the terms of the subject policy requiring that they file their suit within one year after the damage occurred. Plaintiffs' argument lacks merit, however, because the trial court did not interpret *Trentadue* as having abrogated the common law discovery rule outside the context of statutes of limitation. We agree that the *Trentadue* holding did not apply to the contractual limitation period at issue in this case. Nevertheless, plaintiffs' contention that the trial court erred lacks merit because the record establishes that the trial court did not apply the *Trentadue* holding to this case but rather enforced the terms of the policy as written as required under Michigan law.

We review de novo questions of law which include the proper interpretation of a contract, *In re Smith*, 274 Mich App 283, 285; 731 NW2d 810 (2007), as well as the interpretation and application of an insurance policy. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001). We also review de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists "when reasonable minds could

differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008) (citation omitted). Summary disposition is appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group, Inc,* 466 Mich 453, 461; 646 NW2d 455 (2002).

"The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000), lv den 463 Mich 1015 (2001). "To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Id*. "The language of the contract is to be given its ordinary, plain meaning and technical, constrained constructions should be avoided." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001) (citation omitted). In *Hunt v Drielick*, 496 Mich 366, 372-373; 852 NW2d 562 (2014) (quotation marks, alteration, and citations omitted), our Supreme Court summarized:

> An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to determine what the agreement was and effectuate the intent of the parties. We employ a two-part analysis to determine the parties' intent. First, it must be determined whether the policy provides coverage to the insured, and, second, the court must ascertain whether that coverage is negated by an exclusion. While it is the insured's burden to establish that his claim falls within the terms of the policy, the insurer should bear the burden of proving an absence of coverage[.] Additionally, exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, it is impossible to hold an insurance company liable for a risk it did not assume, and, thus, clear and specific exclusions must be enforced[.]

Our Supreme Court held in *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005), "that an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy." The Court analyzed the contractual limitation period provision in an insurance contract and ruled that neither Michigan law nor public policy prevented parties from contracting in insurance contracts for shortened limitation periods for filing suit against an insurer. *Id*. at 470-473.

In this case, the insurance policy expressly required that plaintiffs give Auto-Owners or its agency notice of loss or damage immediately. Within 60 days after such notification, the policy required the insured to submit a sworn statement of proof of loss that identified among other things the time and cause of loss. The policy specified that Auto-Owners could not be sued unless its insured fully complied with the terms of the policy and the policy limited the period to file any lawsuit to within one year after the loss or damage occurred, subject to tolling for any period from the time of giving notice to Auto-Owners' formal denial of the insured's claim. There is nothing ambiguous in these provisions of the subject insurance policy. Accordingly, the trial court had to apply the plain language of the policy to the facts of this case.

The record reflects that the parties actually did not dispute the facts once clarified by Robert via his affidavit testimony. Initially, Auto-Owners challenged the date of loss identified by Robert in the sworn statement in proof of loss subscribed and sworn to before a notary on October 30,

2017, because it averred that the roof trusses suffered caving on September 14, 2017, because of ice and snow which could not have happened on that date. Robert testified in his affidavit that he incorrectly identified the September date as the date of loss because Wright, Auto-Owners' agent, told him to state that date. Robert corrected his error by clarifying that he observed the damage to the roof trusses during the spring and early summer of 2017, and specified that the loss occurred during the winter of 2017. Auto-Owners did not dispute Robert's corrected date of loss.[1]

The record reflects that the trial court considered Robert's affidavit and accepted his uncontroverted testimony as true. The trial court did not err in this regard because its review of Auto-Owners' motion for summary disposition under MCR 2.116(C)(10) required it to consider the affidavit and other documentary evidence and view such in a light most favorable to the nonmovants to determine whether a genuine issue of material fact existed. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). The trial court, therefore, could properly rely upon Robert's undisputed affidavit testimony's correction and clarification of when the loss occurred.

Robert's correction of the date of loss generally established the date of loss necessary for applying the unambiguous terms of the insurance policy. Robert attested that he saw the roof damage in spring 2017 and attributed the loss's occurrence to the 2017 winter. The 2017 winter in Michigan started officially on December 21, 2016 and ended on March 20, 2017. Accepting Robert's undisputed testimony as true, March 20, 2017, constituted the last date on which the loss could have occurred during the 2017 winter and triggered plaintiffs' obligations to immediately notify Auto-Owners or its agency of the loss and submit within 60 days after notifying Auto-Owners or its agency a sworn statement in proof of loss. The date of loss also commenced the running of the contractual one-year lawsuit limitation period.

The record does not indicate the actual date that plaintiffs contacted Auto-Owners about the loss but suggests that it occurred in September 2017. Plaintiffs asserted to the trial court that Wright inspected the house on September 14, 2017, and although no documentary evidence supports that date, Auto-Owners did not dispute plaintiffs' assertion. The record indicates that Auto-Owners had a formal property loss notice form dated September 21, 2017, for Claim No. 300-0266178-2017. Robert submitted his sworn statement in proof of loss bearing that claim number around October 30, 2017. Auto-Owners denied the claim on December 14, 2017. Robert's testimony established that plaintiffs failed to immediately notify Auto-Owners or its agency of the loss. Instead, Robert waited a few months in violation of the terms of the policy. After notifying Auto-Owners, however, Robert submitted his sworn statement in proof of loss within 60 days in compliance with the terms of the policy. Nevertheless, Robert's violation of the immediate notification provision constituted failure to fully comply with the terms of the policy, and barred plaintiffs from suing Auto-Owners as specified under the terms of the policy.

[1] Auto-Owners also presented to the trial court plaintiffs' responses to interrogatories in which they specifically stated that the damage first occurred during the third quarter of 2016 and that Robert discovered it. Robert's affidavit testimony changed the time of the damage or loss and when he observed it.

Assuming that March 20, 2017, constituted the latest date of loss commencing the contractual one-year lawsuit limitation period, and assuming further that Robert gave Auto-Owners notice of the loss on September 14, 2017 (as represented to the trial court), because Auto-Owners denied plaintiffs' claim on December 14, 2017, the one-year lawsuit limitation period was tolled for approximately 91 days. Consequently, plaintiffs had until June 18, 2018, to file suit against Auto-Owners. Plaintiffs, however, filed their suit on September 13, 2018, well over one year plus the tolling period. Accordingly, irrespective of their failure to comply with the terms of the policy, under the policy's contractual lawsuit limitation period, plaintiffs failed to timely file their lawsuit. The trial court, therefore, could properly enforce the contract and dismiss it both because of plaintiffs' failure to comply with the notice requirement and also for their untimely lawsuit filing.

The policy does not provide tolling of the contractual limitation period for insureds to discover loss or damage. The trial court, therefore, had no obligation to consider or apply the common law discovery rule to toll the contractual limitation period. Accordingly, the trial court could properly grant Auto-Owners summary disposition because no genuine issue of material fact existed.

Analysis of the trial court's opinion reveals that the trial court did not apply the *Trentadue* holding in this case. After stating that *Trentadue* abolished the use of the common law discovery rule to avoid the commencement of the running of a statute of limitations, the trial court merely remarked that this case is analogous to a case in which a plaintiff seeks to toll a statute of limitations by use of the common law discovery rule. The trial court, however, did not declare that *Trentadue*'s holding governed this case to preclude the application of the common law discovery rule to a contractual limitation period. Rather, the trial court's opinion indicates that it reflected upon the express language of the subject insurance policy and enforced it as written. The trial court found irrelevant plaintiffs' purported discovery of the roof damage because Robert admitted unequivocally in his affidavit that the damage occurred during the winter of 2017. The trial court considered the action Robert failed to take, i.e., his lack of giving Auto-Owners notice immediately, and found that such conduct failed to comply with the terms of the contract barring plaintiffs' lawsuit as specified in the contract. The trial court also considered plaintiffs' delay in filing suit until September 13, 2018, despite knowing that the roof damage occurred during the winter of 2017. The trial court correctly found no merit to plaintiffs' argument that they "discovered" the loss or damage on September 14, 2017, because Robert testified in his affidavit that the loss occurred in the winter of 2017 and that he observed it in the spring and summer of 2017. The trial court granted Auto-Owners summary disposition because Robert's undisputed affidavit testimony established the facts on which the trial court relied when it applied the policy's terms as written.

The record reveals no justifiable reason why plaintiffs did not file suit until September 13, 2018. The record indicates that, after the illogical nature of Robert's sworn statement in proof of loss became apparent because Auto-Owners pointed out that the date of loss or damage resulting from snow and ice could not have happened on September 14, 2017, because the temperature had been 80 degrees that day, Robert submitted his affidavit testimony to correct his error and to clarify that the loss or damage actually occurred during the winter of 2017 and not during September 2017. The truth required enforcement of the policy's terms as written and necessitated the finding that plaintiffs not only failed to immediately provide Auto-Owners notice, but they also failed to

timely file suit against Auto-Owners, both of which barred their suit. Moreover, plaintiffs lacked entitlement to tolling under the common law discovery rule or any other equitable tolling doctrine because the terms of the policy specified the only condition for tolling and did not permit noncontractually defined tolling of the contractual limitation period. Accordingly, the trial court did not err by enforcing the terms of the policy, and therefore, properly granted Auto-Owners summary disposition.

Affirmed.

/s/ James Robert Redford
/s/ David H. Sawyer
/s/ Mark T. Boonstra