STATE OF MICHIGAN

COURT OF APPEALS

BRITTNEY HANBACK,

Plaintiff-Appellee,

v

MEMBERSELECT INSURANCE COMPANY, d/b/a AAA INSURANCE,

Defendant-Appellant.

UNPUBLISHED
March 24, 2022

No. 355098
Washtenaw Circuit Court
LC No. 19-001379-NI

Before: CAVANAGH, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the order denying its motion for summary disposition. We reverse.

I. FACTUAL BACKGROUND

On June 8, 2018, plaintiff's vehicle was stopped at a traffic signal, when a vehicle driven by Sidy Mbaye rear-ended her vehicle. Mbaye had an automobile insurance policy, issued by State Farm Insurance Company, with a $20,000 per person liability limit for bodily injury. Plaintiff's vehicle was insured under an automobile insurance policy, issued by defendant, that included optional uninsured/underinsured motorist (UM/UIM) coverage with a policy limit of $100,000 per person. Plaintiff settled her auto-negligence claim against Mbaye for Mbaye's $20,000 policy limit amount. Plaintiff then tendered a demand to defendant for $80,000. Defendant denied plaintiff's request because plaintiff failed to obtain defendant's written consent to settle with Mbaye, as was required by her policy documents.

Plaintiff thereafter filed a complaint against defendant, alleging breach of contract for defendant's failure to pay UIM benefits under the insurance policy. Defendant moved the trial

[1] *Hanback v MemberSelect Ins Co*, unpublished order of the Court of Appeals, entered January 27, 2021 (Docket No. 355098).

court for summary disposition in its favor under MCR 2.116(C)(10), arguing that plaintiff was barred from recovering any UIM under *Lee v Auto-Owners Ins Co*, 218 Mich App 672; 554 NW2d 610 (1996), because she failed to obtain defendant's written consent to settle with Mbaye. The trial court concluded that a letter from defendant's adjuster, sent to defendant on July 27, 2018

> . . . constitutes either a waiver of the . . . requirement of written . . . permission to settle or an advance . . . permission to settle on certain conditions being met. And once the Plaintiff . . . met the condition . . . [—]after the limits of liability . . . have been exhausted by payment of judgments or settlements[—] . . . once that condition is met, . . . it triggers the permission that is given . . . in the July 27, 2018 letter. And for that reason, I'll deny the motion for summary disposition.

This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a summary disposition motion de novo. *Bernardoni v City of Saginaw*, 499 Mich 470, 472; 886 NW2d 109 (2016). In doing so, we "consider[] all affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. at 472-473. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the evidence shows there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

"Contract interpretation and statutory interpretation involve issues of law that are subject to de novo review by this Court. We reverse a trial court's findings of fact only if they are clearly erroneous." *Sands Appliance Servs v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000) Citations omitted).

III. LAW AND ANALYSIS

Defendant argues the trial court erred in denying its motion for summary disposition because plaintiff settled her claim against Mbaye without obtaining defendant's consent. As a result, plaintiff was not entitled to UIM benefits. We agree.

UIM (underinsured) benefits are distinct from both personal injury and property benefits and uninsured motorist benefits and are not required by Michigan law. *Dawson v Farm Bureau Mut Ins Co*, 293 Mich App 563, 568; 810 NW2d 106 (2011). "Because underinsured motorist benefits are not statutorily mandated, we must look to policy interpretation to determine under what circumstances benefits are to be provided." *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 10-11; 512 NW2d 324 (1993).

Michigan courts have long held that insurance policy provisions, like all contract terms, are to be enforced as written. "Where the language of an insurance policy is clear and unambiguous, it must be enforced as written." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). "Clear and specific exclusions contained in policy language must be

given effect." *Lee*, 218 Mich App at 676, citing *Allstate Ins Co v Keillor*, 450 Mich 412; 537 NW2d 589 (1995). "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995).

Here, in the UIM section of coverage, defendant's policy explicitly provided,

> **We** will pay under this coverage only after the Limits of Liability under all applicable **bodily injury** liability bonds and policies have been exhausted by payment of judgments or settlements.
>
> * * *
>
> The **insured person** may not settle with anyone responsible for the accident without **our** written consent. **We** shall be obligated to respond within thirty (30) days of receiving an **insured person's** written request to settle. If **we** fail to respond within the 30-day period, the consent provision shall be waived.

The policy thus unambiguously states that the insured may not settle with anyone without defendant's written consent.

The UIM provision in the policy also states:

> EXCLUSIONS.
>
> 1. Coverage under this Part does not apply to **bodily injury** sustained by an **injured person**:
>
> * * *
>
> e. if that **Insured Person** or their legal representative settles or prosecutes to judgment their **bodily injury** claim with the owner, operator or other person or organization legally responsible for an . . . **underinsured motor vehicle** without **our** written consent. This exclusion does not apply if the **insured person** makes a written request for our consent, and we fail to respond within 30 days of receipt of the written request.

As noted above, "[w]here the language of an insurance policy is clear and unambiguous, it must be enforced as written." *Harvey*, 219 Mich App at 469. "Clear and specific exclusions contained in policy language must be given effect." *Lee*, 218 Mich App at 676. The parties do not dispute plaintiff failed to obtain defendant's consent before settling with Mbaye. Therefore, under the clear and unambiguous language of the insurance policy, plaintiff breached the insurance contract and is not entitled to recovery of UIM benefits.

Lee, 218 Mich App 672, offers a helpful parallel. In *Lee*, the insured plaintiff, who was injured in an automobile accident, had a $50,000 UIM policy with the defendant, his insurer. *Id.* at 674. The insurance policy stated that coverage "shall not apply . . . to bodily injury to an insured . . . with respect to which such insured . . . shall, without written consent of the Company, make

any settlement with any person or organization who may be legally liable therefore." *Id*. The plaintiff settled with the at-fault driver for the driver's policy limit amount of $20,000 without the defendant's knowledge or consent. *Id*. at 675. We held that the plaintiff was barred from recovering UIM benefits from defendant because he failed to secure the defendant's approval before settling with the at-fault driver. *Id*. "A plaintiff's settlement with a negligent motorist or other responsible party destroys the insurance company's subrogation rights under the policy and bars the plaintiff's action for uninsured motorist benefits unless the insurer somehow waives the breach of the policy conditions." *Id*., citing *Adams v Prudential Prop & Cas Ins Co*, 177 Mich App 543, 544-545; 442 NW2d 641 (1989). Because the language of the defendant's policy was "unambiguous," there was no waiver and the plaintiff was not entitled to recovery. *Lee*, 218 Mich App at 676. The same is true in this case. Plaintiff settled with Mbaye for Mbaye's policy limit amount without obtaining defendant's consent and is therefore barred from recovering UIM benefits from defendant as a result.

Plaintiff, however, argues that the July 27, 2018 letter from defendant's insurance adjuster constitutes a waiver. Plaintiff is incorrect.

A waiver is an "intentional relinquishment of a known right." *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284 (2011). Waiver "may be shown by express declarations or by declarations that manifest the parties' intent and purpose." *Id*. In other words, "[a] waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance." *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718-719; 179 NW2d 252 (1970).

First and foremost, the July 27, 2018 letter explicitly states that defendant required specific information to establish her proof of loss and that "[t]he proof of loss is subject to all policy provisions and insuring agreements contained within your policy." Thus, plaintiff was put on notice that while defendant acknowledged receipt of plaintiff's notice of UIM claim, other steps were necessary and that *all* provisions of her policy (including the provision requiring written permission to settle) would apply to her claim.

Contrary to plaintiff's argument, there is no evidence of "intentional relinquishment" on the part of defendant. The letter at issue contains no "express declarations" or other statements suggesting an intent to waive the consent requirement. On the contrary, the letter was merely a vehicle for conveying facts already in the insurance policy. Specifically, it conveyed that (1) defendant's coverage would not come into play until all underlying policies had been exhausted through either a judgment or a settlement and that (2) "[t]he proof of loss is subject to all policy provisions and insuring agreements contained within your policy." This is nothing more than a recitation of certain provisions contained in the policy.

Plaintiff seems to believe that the reiteration of the first principle that defendant's coverage would not come into play until all underlying policies had been exhausted through either a judgment or a settlement essentially removed the consent requirement. There is no language in the insurance policy, however, stating a judgment or settlement obviates the consent requirement, nor is there anything in the letter stating or implying that plaintiff's compliance with the letter would allow them to bypass the consent requirement. Notably, Michigan courts have held that

mere silence cannot be the basis for waiver and that there must be clear and convincing evidence of a mutual agreement to a waiver. *Quality Prod and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372, 377-378; 666 NW2d 251 (2003). Where, as here, the letter is silent with respect to the specific policy provision requiring written consent to settle, a waiver of that provision cannot be found.

In addition, plaintiff argues that if defendant wanted to preserve its right to be included in settlement negotiations, it should have stated so in its correspondence with plaintiff's counsel. This argument is misleading in two ways. First, defendant has no need to preserve the consent requirement because it is already in the insurance contract. Second, plaintiff suggests and/or assumes defendant desired to be involved in the settlement negotiations. Defendant's policy states only that an insured must obtain defendant's written consent if they desire to settle—not that an insured must involve defendant in the negotiations.

Plaintiff's claim that the insurance adjuster orally indicated, on several occasions, that plaintiff must settle for the $20,000 policy limit leads to no different result. While the adjuster may have relayed to plaintiff the requirement that she exhaust all applicable policies before defendant's coverage would apply—information that was already in the insurance policy—that does not mean the consent requirement suddenly disappeared. Rather, a logical interpretation of the letter and the adjuster's comments would be that, if, in the process of exhausting all applicable underlying policies, the insured decides to settle, the remaining provisions of the policy still apply. Furthermore, the policy provides:

> This policy form, the Declaration Certificate and all endorsements include all agreements between the **principal named insured** and **us**. No change or waiver may be effected in this policy except by endorsement issued by **us**.

The above explicitly requires an endorsement issued by defendant in order to change any policy provision. There is no claimed endorsement issued by defendant which waives the consent to settle provision.

Finally, plaintiff's failure to obtain defendant's consent to settle with Mbaye's insurer was prejudicial to defendant. We have repeatedly stated that prejudice occurs whenever an insurer's subrogation rights are destroyed. *Smith v MEEMIC Ins Co*, 285 Mich App 529, 533-534; 776 NW2d 408 (2009). "A plaintiff[']s settlement with a negligent motorist or other responsible party destroys the insurance company's subrogation rights under the policy and bars plaintiff[']s action for uninsured motorist benefits unless the insurer somehow waives the breach of the policy conditions." *Lee* at 675 (internal citations omitted). Because no waiver occurred in this case, plaintiff's breach of the insurance contract prejudiced defendant and bars recovery by plaintiff. Thus, the trial court erred in denying defendant's motion for summary disposition.

Reversed and remanded for entry of summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Deborah A. Servitto