STATE OF MICHIGAN

COURT OF APPEALS

BLAKE LEE,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant,

and

ABOOD, ABOOD & RHEAUME, P.C., and DAVID P. PASICHNYK,

Defendants-Appellees.

FOR PUBLICATION
September 10, 1996
9:15 a.m.

No. 175571
LC No. 89-63225 CK
ON SECOND REMAND

Before: Michael J. Kelly, P.J., and Marilyn Kelly and Taylor, JJ.

MICHAEL J. KELLY, P.J.

This case is before us the third time, on second remand. We initially reversed the trial court's denial of defendant Auto-Owners' motion for summary disposition and affirmed the trial court's dismissal of Auto-Owners' claim of release. *Lee v Auto-Owners Ins*, 201 Mich App 399; 505 NW2d 866 (1993), *vacated* 445 Mich 906 (1994).

On the first remand we determined that MCL 500.2254; MSA 24.12254 does not affect the insurance contract between plaintiff Lee and Auto-Owners, and that plaintiff was not entitled to arbitration under the policy. *Lee v Auto-Owners Ins (On Remand)*, 208 Mich App 207; 527 NW2d 54 (1994), *vacated* ___ Mich ___ (1996). In an order dated April 23, 1996, the Supreme Court, in lieu of granting leave to appeal, vacated our earlier judgment and remanded the case to this Court as on rehearing granted. Our Supreme Court now directs us to "consider and decide whether a condition of prejudice should be incorporated into the exclusionary clauses contained in the policy of insurance." We conclude that it should not, and reverse the trial court's denial of summary disposition in favor of defendant Auto-Owners.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff was a passenger in an automobile involved in an accident. He had underinsured/uninsured motorist coverage with defendant Auto-Owners for up to $50,000. Plaintiff's Auto-Owners policy provided that the uninsured motorist coverage "shall not apply...to bodily injury to an insured, or care or loss of services recoverable by 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." Plaintiff sued the driver and subsequently settled for $20,000, the limits of the driver's policy. Plaintiff entered into this settlement and discharged the driver from all future liability without the knowledge or approval of Auto-Owners.

Following the settlement, plaintiff sought PIP and underinsured motorists benefits from Auto-Owners. Auto-Owners paid plaintiff PIP benefits, but denied his claim for underinsured motorist coverage. Auto-Owners asserted that plaintiff's claim for underinsured motorist benefits was barred by his unauthorized settlement with the driver. Plaintiff moved for partial summary disposition to strike Auto-Owners affirmative defenses. The trial judge agreed with plaintiff's position that Auto-Owners would have to show prejudice in order to assert that plaintiff's breach of policy conditions barred him from recovering underinsured motorist benefits.

Michigan courts have consistently upheld policy exclusions barring recovery of benefits where the insured party releases a tortfeasor from liability without the insuror's consent, recognizing that such a release of liability destroys the insurance company's right to subrogation. *Flanary v Reserve Ins Co*, 364 Mich 73, 75; 110 NW2d 670 (1961); *Stolaruk v Central Nat'l Ins*, 206 Mich App 444, 448-450; 522 NW2d 670 (1994); *Adams v Prudential Ins Co*, 177 Mich App 543, 544-545; 442 NW2d 641 (1989); *Poynter v Aetna Casualty Co*, 13 Mich App 125, 128-129; 163 NW2d 716 (1968). 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. *Adams*, at 544-545.

The language of Auto-Owners' policy exclusion is unambiguous and does not contravene Michigan law or public policy. Michigan law recognizes that an insured's release of a potentially liable tortfeasor is prejudicial to the insurer because such a release destroys any possibility that the insurer could recoup some of the amounts paid via its right to subrogation. *Flanary*, at 75; *Adams*, at 544-545; *Poynter*, at 128-129. There is no need to require Auto-Owners to actually prove prejudice due to the loss of its right to subrogation. Clear and specific exclusions contained in policy language must be given effect. *Allstate Ins Co v Keillor*, 450 Mich 412, 417; 537 NW2d 589 (1995). The exclusion in Auto-Owners policy must be enforced as written, without incorporating a condition of prejudice.

We remand to the trial court for entry of an order of dismissal as to defendant Auto-Owners insurance company.

Reversed in part. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Clifford W. Taylor

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No. 175571
LC No. 89063225 CK
ON SECOND REMAND

Before: Michael J. Kelly, P.J., and Marilyn Kelly and Taylor, JJ.

MARILYN KELLY, J. (dissenting).

I respectfully dissent. The breach of a consent to settlement provision, like the breach of any other provision of a contract, must be material in order to adversely affect the parties' rights. *Walker & Co v Harrison*, 347 Mich 630, 634, 636; 81 NW2d 352 (1957).

In this case, plaintiff's failure to comply with the consent to settle clause was not material and did not defeat his right to recover underinsured benefits for which he had paid a premium unless defendant Auto Owners can show that it was prejudiced.

I would hold that a condition of prejudice should be incorporated into the exclusionary clause in the policy of insurance under consideration. Therefore, I would affirm the trial court's denial of summary disposition for defendant Auto Owners.

/s/ Marilyn Kelly