# STATE OF MICHIGAN

# COURT OF APPEALS

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LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiff-Appellant,

v

RLI INSURANCE COMPANY,

Defendant-Appellee.

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UNPUBLISHED
September 15, 2000

No. 214487
Van Buren Circuit Court
LC No. 97-004370 CZ

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order denying its motion for summary disposition and granting defendant summary disposition. We reverse and remand for further proceedings.

Both plaintiff and defendant insured a pickup truck that in February 1996 struck seven year-old Kristen Weston while she waited for a school bus, causing very serious injuries. Under an automobile insurance policy, plaintiff provided Packer Foods, Inc. primary coverage with respect to the pickup involved in the accident, up to a one million dollar coverage limit.[1] Plaintiff additionally had provided to Packer Foods a comprehensive catastrophe policy, which represented an excess policy that provided additional coverage of two million dollars. Defendant also provided Duane Packer a "personal umbrella liability policy" with a two million dollar limit above plaintiff's primary policy.

In early April 1997, after plaintiff and the Westons' representatives settled the Westons' claims against Packer Foods for $1,625,000, plaintiff ascertained that the two million dollar excess policy it had issued Packer Foods was canceled at some point before the accident occurred, and therefore did not provide coverage regarding the injured girl's claim. Plaintiff filed the instant suit in June 1997, after

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[1] Packer Foods, Inc. apparently was owned by Duane and Bernice Packer, whose daughter Valary drove the pickup at the time of the accident.

unsuccessfully seeking defendant's reimbursement of the $625,000 above the primary automobile policy limit that plaintiff had paid the Westons.[2]

Both parties moved for summary disposition.[3] The trial court concluded that plaintiff had no cause of action against defendant, explaining in relevant part as follows:

> There was a settlement made in which Defendant was not actively involved and did not have the opportunity to assert their viewpoint of what this case was worth because of the mistaken assumption that their coverage was irrelevant at that point and that there was enough coverage on the part of Plaintiff in their policies, which included the policy that had been canceled. . . . And under Defendant's policy and its provisions, its liability is contingent upon their ability to consent to these things to litigate, to take over the defense if they have to. . . .
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> . . . And my conclusion is there is not a viable cause of action stated here by the Plaintiff . . . because it was the oversight of the Plaintiff that created the situation that prevented the Defendant from doing what it can never do now, and that is approach this and settle this in consent or not consent, take over the defense or not take over the defense of this action, look at the case like it would have been looked at back then. That's impossible and I don't think any of the theories that are set forth in the Plaintiff's complaint of contractual subrogation or equitable subrogation or unjust enrichment are viable in this case.

The trial court concluded that plaintiff prevented defendant's participation in the settlement conference by failing to timely advise defendant of the conference and by indicating that defendant's participation in the settlement conference was not necessary, and therefore ordered summary disposition for defendant, which order plaintiff appeals.

This Court reviews de novo a trial court's summary disposition ruling. In reviewing a decision on a motion under MCR 2.116(C)(10), we must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 219-220; 600 NW2d 427 (1999).

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[2] Plaintiff alleged that defendant breached its excess policy (Count I), sought a declaratory judgment finding defendant responsible for the $625,000 (Count II), argued that defendant was unjustly enriched by plaintiff's payment of the $625,000 (Count III), and averred that it "is entitled, under principles of equitable subrogation, to recover from" defendant (Count IV).

[3] Plaintiff sought summary disposition pursuant to MCR 2.116(C)(10). Although neither defendant's motion nor the trial court's order cited a subrule warranting defendant's entitlement to summary disposition, in light of the parties' references to and the court's consideration of documentary evidence beyond the pleadings, it appears that the court ordered summary disposition pursuant to MCR 2.116(C)(10). *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 219-220, n 2; 600 NW2d 427 (1999).

The parties do not dispute their insured's liability in striking Kristen Weston. The parties also do not now dispute that plaintiff was liable for up to one million dollars of the Westons' claims, and that defendant's excess umbrella policy represents the only policy potentially responsible for any amount of the Westons' claims up to an additional two million dollars. Despite that defendant did not contest its insured's liability in the Westons' underlying suit and that the Westons' claims settled for $625,000 more than the limits of plaintiff's primary policy, defendant denied responsibility for the $625,000 on the basis that its policy prohibited "any legal action . . . against us unless you have complied with the policy provision, []or until your obligation has been set by final judgment or agreement with us." Defendant asserted that because it did not agree to the settlement amount, this policy language relieved it from any obligation to contribute to the settlement.

Deposition testimony of the parties' employees seems to call into question the reasonableness of defendant's failure to participate in the settlement negotiations. Carma Slaymaker, defendant's claims specialist who initially handled the Westons' claims, evaluated the case in March 1996 and set a two million dollar reserve, meaning "the amount of indemnity that you . . . believe you will require to resolve the case." The reserve remained at this amount until after a March 1997 settlement conference. The testimony of Slaymaker and Brian Casey, defendant's representative who handled the claim as of June 1996, indicates that from the time the Westons filed their claims until the day before the settlement conference, Casey and David Dark, an attorney defendant hired to review the Westons' claims, believed that defendant's policy represented the only excess policy potentially liable for the amount of the Westons' claims above one million dollars. Casey further explained that he had "no reservations with respect to the applicability of [defendant's] policy" to the Westons' claims.

In April 1996, Slaymaker forwarded to Dark the Weston claim materials defendant had received, and requested that he evaluate the case's potential settlement value. John Moyer, one of plaintiff's executive claims specialists who handled the Westons' claims, alleged that defendant was mailed Weston case correspondence, and Dark acknowledged that in August or September 1996 he received materials concerning the Westons' underlying case against the Packers, including a pretrial scheduling order. Dark also received on March 11, 1997, one week prior to the settlement conference, a settlement brochure and three videos provided by the Westons and an additional medical report. Casey testified that he knew from September 1996 that plaintiff intended to attempt a settlement of the Westons' underlying lawsuit.

Moyer testified that on the day prior to the settlement conference he spoke with Casey and informed him that plaintiff would attempt to settle the case for under two million dollars. According to Moyer, Casey opined that a settlement under two million dollars represented a "terrific result for this case," which Moyer alleged that Casey "thought . . . was worth substantially more than $2 million." Moyer informed Casey that he believed that a jury might return a verdict on the Westons' claims amounting to more than three million dollars. Moyer mistakenly informed Casey that plaintiff's parent company Kemper had issued a two million dollar excess policy that covered the Westons' claims, and testified that he and Casey discussed "the issue of whose money is it going to be: Kemper's money or RLI's money or both." The issue of who would be responsible for what amount of the Westons' recovery above one million dollars remained "an open question" because defendant "was not willing, at that point in time, to concede anything on the other insurance issue; neither was [Moyer]." Moyer

alleged that Casey "didn't want to participate in the settlement negotiations, and indicated he wasn't coming," and Moyer denied telling Casey not to attend the settlement conference.

Plaintiff contends that the trial court erroneously failed to find that defendant waived reliance on its policy's "no action" clause by failing to participate in the settlement negotiations. While clauses prohibiting an insured from voluntarily settling a claim without the insurer's consent give the insurer the opportunity to contest liability, to participate in settlement negotiations and to have input as to the value of the claim, *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989), "[l]ogically, the insurer may so unreasonably delay its participation in, or approval of, a settlement that the insured will have no realistic option but to settle without the insurer." 7 Couch, Insurance, 3d, § 105:18, pp 105-31. See also *Alyas, supra* ("When an insurer breaches its own policy of insurance by refusing to fulfill its duty to defend the insured, the insurer is bound by any reasonable settlement entered into in good faith between the insured and the third party.").

In light of the existence of some evidence indicating defendant's knowledge until the day before the settlement conference of its liability for any amount of the Westons' claims in excess of one million dollars, we cannot conclude as a matter of law that defendant reasonably failed to attend the settlement conference. Even considering that on the day before the settlement conference defendant mistakenly was informed that Kemper also had an excess policy amounting to two million dollars, Moyer alleged that an issue existed whether Kemper and defendant would share responsibility for any settlement amount above one million dollars. While the trial court apparently accepted Casey's and Dark's denials that any coverage issue existed because Moyer and plaintiff's attorney informed them that plaintiff's and Kemper's policies would cover the full extent of any settlement and that defendant need not attend the settlement conference, in doing so the court rendered a credibility determination impermissible in the context of a motion based on MCR 2.116(C)(10). *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994) ("[W]here the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted.").

Because material issues of fact existed concerning the reasonableness of defendant's failure to attend the March 18, 1997 settlement conference, we conclude that the trial court erred in granting defendant summary disposition pursuant to MCR 2.116(C)(10) on the basis that the "no action" clause in defendant's insurance contract prevented plaintiff's instant action. In light of our conclusion that the fact finder must determine whether defendant effectively waived its right to assert the "no action" clause, we need not address plaintiff's alternative arguments on appeal.[4] We note, however, that to the extent

[4] Plaintiff additionally contends (1) that defendant cannot rely on the "no action" clause without demonstrating that plaintiff's settlement in defendant's absence prejudiced defendant, and (2) that despite defendant's nonparticipation in the settlement negotiations, defendant remained liable for the amount over plaintiff's primary policy limits because the settlement was reasonable. We note that the trial court expressly declined to make a finding regarding the settlement's reasonableness. The resolution of these issues is not yet required absent a finding whether defendant may invoke its "no action" clause. Furthermore, because it remains unclear whether defendant is responsible for the $625,000 pursuant to its contract for insurance, we need not consider plaintiff's unjust enrichment claim.
(continued…)

the issue becomes relevant on remand, we find no abuse of discretion in the trial court's ruling that plaintiff's computer jury verdict projection evidence was inadmissible.[5] *Lopez v General Motors Corp*, 224 Mich App 618, 634; 569 NW2d 861 (1997).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

(…continued)

*Everett v Nickola*, 234 Mich App 632, 637; 599 NW2d 732 (1999) ("[A]n equitable remedy is neither necessary nor appropriate where a resolution under the law is available.").

To the extent that defendant contends that plaintiff lacks standing to bring the instant action, we note that should defendant be found to have an obligation to pay the $625,000 over plaintiff's one million dollar policy limit, plaintiff's payment of the $625,000 in satisfaction of defendant's rejected obligation to the insured entitles plaintiff, under the theory of equitable subrogation, to seek reimbursement of the amount from defendant. *Citizens Ins Co of America v Buck*, 216 Mich App 217, 226; 548 NW2d 680 (1996).

[5] Contrary to plaintiff's contention, the projection was not admissible under MRE 703 because plaintiff's expert did not rely on the projection in reaching his conclusion regarding the reasonableness of plaintiff's settlement. Furthermore, plaintiff failed to lay a proper foundation demonstrating the reliability of its computer program. *Duke v American Olean Tile Co*, 155 Mich App 555, 560; 400 NW2d 677 (1986).