STATE OF MICHIGAN

COURT OF APPEALS

KATHERINE MOWREY, Personal Representative of the Estate of ANTHONY MICHAEL BARONE,

Plaintiff-Appellee,

v

WESTFIELD INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 2, 2004

No. 246173
Branch Circuit Court
LC No. 02-002120-NI

Before: Judges Whitbeck, CJ, and Owens and Schuette, JJ

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying defendant's cross-motion for summary disposition. We reverse.

Plaintiff's son, Anthony Michael Barone, was killed in an automobile accident when Robert E. Henson, the person operating the motor vehicle in which Barone was a passenger, failed to stop at a stop sign and collided with another vehicle. The other vehicle had the right of way, and Henson was at fault. Plaintiff later entered into a settlement agreement with Henson's insurance carrier for $50,000, the full amount of liability insurance coverage available to Henson under his policy. As part of the terms of this settlement, plaintiff signed a release of Henson and his privies. The parties do not dispute that defendant was not given written notice of plaintiff's having entered into the settlement and release agreement before plaintiff had entered into it.

Barone was covered by plaintiff's automobile insurance policy with defendant. The policy provided underinsured motorist benefits in the amount of $100,000. After entering into the settlement agreement with Henson's insurer, plaintiff demanded that defendant remit payment of $100,000 pursuant to the underinsured motorist provision of plaintiff's policy. After defendant refused to remit payment, plaintiff filed suit alleging that defendant had breached its contract with plaintiff by failing to remit the $100,000 of coverage pursuant to the underinsured motorist provision. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff was barred from recovering benefits because she had breached her contract with defendant by failing to provide defendant with written notice before entering into the settlement agreement. After the trial court denied defendant's motion, plaintiff herself moved for summary disposition pursuant to MCR 2.116(C)(10) asserting that, because of the

circuit court's ruling that she was not required to provide notice, the only question remaining was the amount of benefits she was entitled to recover. Defendant filed a countermotion pursuant to MCR 2.116(I)(2), again asserting that plaintiff was not entitled to recover benefits because she had breached her contract with defendant by failing to provide written notice of the settlement agreement. After the parties stipulated that defendant's liability in the present case would be $50,000, the trial court reaffirmed its order that plaintiff was not required to provide defendant with written notice of the settlement agreement, granted plaintiff's motion for summary disposition, and denied defendant's countermotion.

Defendant argues that plaintiff is precluded from recovering underinsured motorist benefits because she entered into a settlement and release agreement with the insurance company for the party at fault in the automobile accident without providing defendant notice of the tentative settlement and, thus, the court erred by granting plaintiff summary disposition. We agree.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 644 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). A motion for summary disposition is appropriately granted under MCR 2.116(C)(10) when, viewed in the light most favorable to the nonmoving party, the submitted evidence fails to establish a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (citations omitted).

Interpretation of insurance contracts is also a question of law that is subject to de novo review. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Unlike personal protection and property protection benefits, underinsurance benefits are not mandated by the Michigan no-fault automobile insurance act, MCL 500.3101 *et seq.* *Morley v Automobile Club of Michigan*, 458 Mich 459, 461; 581 NW2d 237 (1998); *Mate v Wolverine Mutual Ins Co*, 233 Mich App 14, 19; 592 NW2d 379 (1998). Therefore, because it is contractual rather than mandated by statute, "the scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts." *Mate, supra* at 19. Thus, whether plaintiff's failure to provide defendant with notice of her tentative settlement with the third-party tortfeasor precludes her recovery requires consideration of the policy's provisions. The contract must be read as a whole to determine whether the policy is clear and unambiguous on its face. *Linebaugh v Farm Bureau Mutual Ins Co*, 224 Mich App 494, 503; 569 NW2d 648 (1997).

We note initially that the insurance policy in question contained several endorsements. Each endorsement contained a clause indicating that the terms of the original policy applied unless modified by the endorsement. The original policy stated that defendant had no duty to provide coverage unless plaintiff complied with part E – Duties After An Accident Or Loss. One of the many endorsements contained the following provision:

ADDITIONAL DUTIES

A person seeking coverage under this endorsement must also promptly:

1. Send us copies of the legal papers if a suit is brought; and

2. Notify us in writing of a tentative settlement between the insured and the insurer of the underinsured motor vehicle and allow us 30 days to advance payment to that insured in an amount equal to the tentative settlement to preserve our rights against the insurer, owner or operator of such underinsured motor vehicle.

The trial court found that the first subpart only required compliance if a suit was brought, and the word "and" unambiguously joined[1] the two subparts; thus, neither subpart required compliance unless a suit was brought. If the provision were drafted so that "if a suit is brought" modified both subparts as the trial court determined, it would read as follows:

ADDITIONAL DUTIES

If a suit is brought, a person seeking coverage under this endorsement must also promptly:

1. Send us copies of the legal papers; and

2. Notify us in writing of a tentative settlement between the **insured** and the insurer of the **underinsured motor vehicle** and allow us 30 days to advance payment to that **insured** in an amount equal to the tentative settlement to preserve our rights against the insurer, owner or operator of such **underinsured motor vehicle**.

However, as a general rule of grammatical construction, a modifying clause is confined to the last antecedent unless a different interpretation is required by the subject matter. *Haveman v Kent Co Rd Comm'rs*, 356 Mich 11, 18; 96 NW2d 153 (1959), citing *Kales v Oak Park*, 315 Mich 266, 271; 23 NW2d 658 (1946). Thus, as written in the policy, the phrase "if a suit is brought" only modifies "send us copies." Therefore, although the "and" that joined the two subparts indicated that both subparts required compliance, the first subpart only required compliance if the condition precedent – if a suit was brought – was satisfied. This did not affect the requirement to comply with the second subpart. In other words, plaintiff was required to provide written notice of a tentative settlement under the unambiguous terms of the policy regardless whether a suit was bought. Moreover, because the original policy indicated that

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[1] We agree that the contract's use of the term "and" between the two requirements does not render it ambiguous. Contractual language is to be given its ordinary and plain meaning, and technical or constrained constructions should be avoided. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Given this principle, the word "and" is defined as "with; as well as; in addition to," "added to; plus," "then," "also, at the same time," "also, then," "but; on the contrary," or "an added condition, stipulation, or particular." *Random House Webster's College Dictionary* (1997), 49. The relevant purpose of "and" is "to connect grammatically coordinate words, phrases, or clauses." *Id.*

coverage was precluded unless plaintiff complied, the exclusion was clear. Clear and specific exclusions within a policy that bar the recovery of benefits where an insured releases a tortfeasor from liability, thereby destroying the insurer's right to subrogation, must be given effect regardless whether the insurer has shown prejudice. *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 675-676; 554 NW2d 610 (1996).

Nevertheless, plaintiff argues that the "additional duties" provision in the endorsement had be read in conjunction with the "insuring agreement" provision. However, the "insuring agreement" provision cited by plaintiff is included in the portion of the agreement that defines the scope of coverage. And defining the scope of coverage is a different question from whether an exclusion negates coverage. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172-173; 534 NW2d 502 (1995). An exclusion is based on the presumption that the insured has already established coverage under the policy. *Id.* at 173. Thus, because the provisions serve different purposes, they do not conflict. When a contract is subject to only one interpretation, it is unambiguous. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). If a contract is unambiguous, it must be enforced as written. *Morley, supra* at 465.

Reversed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette