STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v

LLOYDS LONDON ENGLAND/CERTAIN INTERESTED UNDERWRITERS,

Defendants-Appellees,

UNPUBLISHED
September 17, 2009

No. 287396
Eaton Circuit Court
LC No. 06-001064-CK

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting defendants' motion for summary disposition. We affirm.

The facts and circumstances underlying this action are not in dispute. During the fall of 1997, Boyd and Anne Mathews were the named insureds on an automobile policy issued by plaintiff, which also covered their daughter, Kelly, when driving a car owned by Boyd or Anne. On October 7, 1997, Kelly was driving a car owned by her parents when she struck her roommate, Lea Urezzio, in a parking lot, causing Urezzio serious and lifelong injury. At the time of the accident, Kelly was intoxicated, was operating the vehicle without her corrective lenses and, her right foot being injured, was driving while using her left foot on the pedals.

On November 14, 1997, Urezzio's attorney sent plaintiff a proposed settlement letter advising plaintiff that Kelly's negligence had caused or contributed to causing Urezzio to sustain serious injuries and demanding that plaintiff provide certain information, including the limits of liability coverage, any other coverage that may be available, and a certified copy of all policies of insurance issued to the Mathews family. Urezzio's attorney sent plaintiff a second letter, on November 25, 1997, asserting that plaintiff was not responding to his request appropriately, threatening to commence suit against the Mathews family, and asserting that plaintiff's inaction and "gross and blatant bad faith in handling this claim" had the potential to subject the Mathews family to a multi-million dollar verdict that would "unquestionably cause their financial collapse."

On or about December 1, 1997, plaintiff tendered the personal bodily injury liability limit to Urezzio's counsel, who rejected that tender on the basis that plaintiff did not comply with the

additional terms for settlement set forth in his November 14, 1997 letter. On December 12, 1997, Urezzio filed suit against Kelly, Boyd and Ann Mathews. On July 21, 1998, Urezzio's counsel filed a proposal for settlement and offer of judgment in Urezzio's lawsuit against the Mathews family in an amount of $3,750,000. That proposal was rejected. Additional settlement efforts were undertaken, without success, and in August 2002, a jury verdict was rendered against Boyd and Kelly Mathews well in excess of the bodily injury liability limits of their automobile policy.

In August 2004, Boyd and Kelly Mathews filed suit against plaintiff and several of its claims handlers or adjusters, alleging in part that plaintiff's bad faith and negligence, breach of contract, and breach of fiduciary duty in the handling of the Urezzio action resulted in a judgment against them far in excess of the policy limits. Plaintiff settled this action, and sought coverage for the amount of that settlement under the insurance policy at issue here. Defendants denied coverage. Plaintiff then filed the instant action, alleging that defendants' denial of this claim constituted a breach of the insurance contract. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that there was no writing meeting the criteria for a "claim" against plaintiff, as defined by the policy, within the policy period and consequently, that no coverage was available to plaintiff for the claim as a matter of law. Plaintiff asserted in response that it was permitted to aggregate writings together to constitute a "claim" and that, under this approach, a "claim," within the meaning of the policy, was first made arising from the Urezzio matter as of July 21, 1998. The trial court granted defendants' motion, rejecting plaintiff's "aggregation theory" and holding instead that the policy requires that a "claim" consist of a single writing, containing both a written demand for relief and an allegation of a wrongful act by plaintiff, within the policy period, to permit coverage. It is from this determination that plaintiff takes exception.

This Court reviews de novo both a trial court's decision on a motion for summary disposition and questions of the construction and interpretation of an insurance contract. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

> A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and if the moving party does so, the burden then shifts to the nonmoving party to establish a genuine issue of disputed fact. *Quinto*, 451 Mich at 362; see also MCR 2.116(G)(3) and (4). . . . If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is property granted. *Id.* at 363. "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." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider

> substantively admissible evidence actually proffered when deciding a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). [*Berkeypile v Westfield Ins Co*, 280 Mich App 172, 177; 760 NW2d 624 (2008).]

An insurance policy is subject to the same rules and principles of interpretation applicable to any other contract. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id*. at 464. Courts are required to enforce insurance contracts in accordance with their terms as written unless there is ambiguity in the contract, and are to construe such contracts so as to give effect to every word or phrase contained therein in so far as it is practicable to do so. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003); *Henderson, supra* at 354. An insurance contract contains ambiguity only when its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).

The insurance policy at issue in this case is a claims made policy that extends several different coverages to plaintiff, including the Errors and Omissions (E&O) coverage at issue here. The Insuring Clause of the E&O Coverage Section provides in relevant part:

> Underwriters shall pay on behalf of the **Assureds Loss** resulting from any **Claim** *first made during the Policy Period* for a **Wrongful Act**
>
> (a) in the performance of, or failure to perform **Professional Services.** [Bold in original, italics added.]

The E&O Coverage Section defines "Professional Services" as

> the performance or failure to perform insurance services by the **Assureds**, or by persons or entities for whose actions the **Assureds** are legally liable for or on behalf of a client of such **Assureds**, pursuant to an agreement between such customer or client and such **Assureds**, for a fee, commission, remuneration or other consideration which inured to the benefit of **Assureds.** [Bold in original.]

Additionally, the policy's General Terms and Conditions contains the following pertinent definitions:

> C. **Claim** means a written demand:
>
> (1) for money, services or other monetary or non-monetary relief including, without limitation, any civil, criminal, regulatory, governmental or administrative investigation or proceeding, including Arbitration proceedings, and appeals therefrom, and
>
> (2) which alleges a **Wrongful Act** on the part of an **Assured** or act, error or omission misstatement misleading statement neglect or breach of duty of any person or entity for whom the **Company** is legally liable.

* * *

M. **Wrongful Act** means any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by any **Assured.** [Bold in original.]

Finally, the policy defines the "policy period" as from "20th May, 1998 to 20th May 2001 both days at 12:01 a.m. Standard Time" at plaintiff's principal address in Lansing, Michigan. According to its plain and ordinary meaning, then, the policy in question provides insurance coverage to plaintiff for any written demand for relief alleging any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by plaintiff in the performance or failure to perform insurance services pursuant to an agreement between a customer or client and plaintiff, first made between May 21, 1998 and May 21, 2001.

Plaintiff argues that the correspondence from Urezzio's counsel in November 1997, together with Urezzio's July 21, 1998 offer of judgment in her action against the Mathews family, establishes that a "claim," within the meaning of the policy, was first made against plaintiff as of July 21, 1998, during the policy period. We disagree.

By its plain terms, the policy provides coverage only for loss resulting from a claim "first made during the policy period." Plaintiff did not proffer below, and does not proffer here, documents *within the policy period* that may be aggregated to constitute a claim. Rather plaintiff points only to correspondence from Urezzio's counsel *before the policy period* as satisfying the requirement of a written allegation of a wrongful act by plaintiff, and seeks to aggregate those pre-policy writings with a July 21, 1998 written offer of judgment to constitute a claim. Even if plaintiff is permitted to aggregate multiple writings to constitute a claim, an issue we need not resolve, the plain language of the policy would require that all writings relied on to constitute the claim be from the period May 21, 1998 to May 21, 2001. Otherwise, there is no basis on which plaintiff may assert that a "claim" – consisting of a written demand for relief and an allegation of a wrongful act – was first made *within the policy period*. Plaintiff simply did not proffer writings made within the policy period that, even if aggregated together, would constitute a "claim" under the policy.

Further, the writing made during the policy period upon which plaintiff relies made no demand upon plaintiff whatsoever. Instead, it was an offer of settlement made to another party, the Mathews family, based on an alleged culpability (Kelly's driving negligently) having nothing to do with the 'bad faith' culpability later alleged against plaintiff.

We affirm.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra