

STATE OF MICHIGAN
COURT OF APPEALS

MARK GIFFORD and TAMMY GIFFORD,

Plaintiffs/Appellees-Cross-
Appellants,

v

MHA INSURANCE CO,

Defendant/Appellant-Cross-
Appellee,

and

CHRISTOPHER ABOOD, MD,

Defendant.

UNPUBLISHED

July 5, 2012

No. 301759

Ingham Circuit Court

LC No. 08-000700-NH

MARK GIFFORD and TAMMY GIFFORD,

Plaintiffs-Appellees,

v

CHRISTOPHER ABOOD, MD, and LANSING
NEUROSURGERY ASSOCIATES, PC

Defendants,

and

MHA INSURANCE CO,

Garnishee Defendant-Appellant.

No. 303157

Ingham Circuit Court

LC No. 08-00700-NH

Before: M.J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 301759, garnishee defendant MHA Insurance Co. (“MHA”) appeals by leave granted an order that compelled the production of documents from its claim file. Plaintiffs Mark and Tammy Gifford, husband and wife, cross-appeal the portion of the same order that protected other documents in the claim file from discovery. While the interlocutory portion of this appeal was pending, the trial court denied MHA’s motion to quash and granted summary disposition in favor of plaintiffs under MCR 2.116(C)(9) and MCR 2.116(C)(10). In Docket No. 303157, MHA appeals that order as of right. In these consolidated appeals, we affirm the grant of summary disposition in plaintiffs’ favor in Docket No. 303157, which renders the appeal in Docket No. 301759 moot.

I. BASIC FACTS

On January 3, 2006, Dr. Christopher Abood performed a microdiscectomy on Mark Gifford at Ingham Regional Medical Center (“Ingham Regional”) on January 3, 2006. Multiple disk fragments were removed, and Abood advised Mark’s wife, Tammy, that the surgery went well with no complications. Mark was released the same day. That night, after discharge, Mark’s pain greatly increased, and he lost control over his bladder. He also had problems with his left leg being weak and giving out on him.

Tammy called Abood’s office the next morning to report Mark’s condition and seek medical advice. Abood’s office was located at Lansing Neurosurgery, which was not part of Ingham Medical. She was told that the doctor would be informed. When Abood did not return the call, Tammy continued calling. On January 13, 2006, after what she said was her sixth call, she was told that Abood was very busy but that they would attempt to move up Mark’s follow-up appointment, which had been initially set for 30 days after surgery. Mark ultimately was seen by Abood on January 26, 2006, where Abood told him that he needed a second spinal surgery to correct a re-herniated disc. This surgery was performed on January 31, 2006, at Ingham Medical. Mark’s bladder-control problems gradually improved after the second surgery, but the bulk of his lower extremity problems remained. Mark was diagnosed with cauda equina syndrome and was rendered permanently and totally disabled.

In their complaint, plaintiffs alleged that Abood was professionally negligent in his treatment of Mark before surgery, during surgery, and after surgery. Abood sought insurance coverage for plaintiffs’ claims under two different policies: one issued by McLaren Insurance Company, LTD (“McLaren”) that had a \$200,000 policy limit and a second, issued by MHA to Edward W. Sparrow Hospital Association (“Sparrow”) that had a maximum policy limit of \$1,000,000. When Abood tendered the claim to MHA, the company refused to provide a defense. In a letter dated November 10, 2009, MHA asserted that coverage as to any and all of plaintiffs’ claims, including the post-surgical office-based claims, was precluded because the initial surgery took place at Ingham Regional. Specifically, MHA relied on language in Special Endorsement 14 of the policy that stated, “No coverage is provided for professional medical services rendered at Ingham Regional Medical Center.”

Subsequently, Abood moved for summary disposition as to plaintiffs’ malpractice claims. On December 11, 2009, the trial court granted the motion in part and denied the motion in part. The trial court first concluded that plaintiff had not submitted proofs that Abood’s performance of the surgery was negligent given that plaintiffs’ own expert testified that the surgery itself was

performed within the standard of care. However, as to plaintiffs' post-surgical negligence claims, the trial court denied summary disposition, finding that there were genuine issues of material fact for resolution by a trier of fact given plaintiffs' expert testimony. Plaintiffs' expert testified that after the Giffords' calls to the office of post-surgical bladder dysfunction and leg weakness and pain, Abood should have directed them to immediately go to an emergency room given the possibility of acute spinal cord compression requiring immediate surgery. Plaintiffs' expert further testified that if this had been done, Mark would have had surgery within the critical 24-hour window to successfully treat cauda equina syndrome.

After the trial court's ruling granting Abood's summary disposition motion as to any pre-surgical or surgical malpractice, the only claims of malpractice still at issue were those concerning the alleged post-surgical, office-based errors. At that point, Abood retendered the claim to MHA, which again declined to provide any coverage.

On June 17, 2010, following MHA's second refusal to defend him, Abood, without advising MHA, agreed with plaintiffs to entry of a consent judgment in the amount of \$1,200,001. The settlement agreement prohibited plaintiffs from collecting the judgment personally from Abood and assigned plaintiffs all of Abood's rights under Abood's insurance policies. The consent judgment was partially satisfied by McLaren hospital's payment of its \$200,000 policy limits. Plaintiffs then filed a writ of garnishment, seeking \$1,000,000 from MHA to satisfy the remainder of the consent judgment.

Plaintiffs, now standing in Abood's shoes vis-à-vis MHA, moved for summary disposition against MHA on December 13, 2010. In opposing the motion, MHA continued to argue that coverage was precluded under the policy language. On March 10, 2011, the trial court granted summary disposition in plaintiffs' favor under MCR 2.116(C)(9) and MCR 2.116(C)(10). The court found that the insurance policy was unambiguous and provided coverage because the medical incident at issue occurred at Abood's office, not at Ingham Regional. MHA appealed.

II. ANALYSIS

On appeal, MHA argues that the trial court erred when it awarded summary disposition in favor of plaintiffs. For reasons different than those relied on by the trial court, we conclude that summary disposition in favor of plaintiffs was warranted, and we affirm.

A

We review a trial court's decision to grant summary disposition de novo. *Greene v A P Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). Likewise, the interpretation of the language in an insurance contract is also reviewed de novo. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007). Documentary evidence must be viewed in the light most favorable to the nonmoving party when summary disposition is sought under MCR

2.116(C)(10).¹ *Id.* A trial court properly grants summary disposition “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Rose v Nat’l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

An insurance policy is much the same as another contract; it is an agreement between the parties. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). The primary goal in the interpretation of a contract is to honor the intent of the parties. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003). When presented with a dispute, a court must determine what the parties’ agreement was and enforce it. *Shefman v Auto Owners Ins Co*, 262 Mich App 631, 637; 687 NW2d 300 (2004). Insurance contracts are construed in accordance with the principles of contract construction. *Citizens Ins Co*, 477 Mich at 82. “The language of the contract is to be given its ordinary, plain meaning and technical, constrained constructions should be avoided.” *Singer v Am States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). “If the question is whether the exclusionary provisions of a policy avoid the asserted liability, the exclusionary language is strictly construed . . . to favor insurance.” *Shelby Mut Ins Co v US Fire Ins Co*, 12 Mich App 145, 149; 162 NW2d 676 (1968); see also *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431(1992) (“Exclusionary clauses in insurance policies are strictly construed in favor of the insured.”). Furthermore, the specific wording of a contract is not to be read in isolation; instead, such meaning must be gleaned within the context of the contract as a whole. *Fresard v Mich Millers Mutual Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982); see also *Trader v Comerica Bank*, 293 Mich App 210, 216; 809 NW2d 429 (2011).

B

The MHA policy provides that “[t]he company will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of injury to which this insurance applies caused by a medical incident.” The policy also provides the following definition of medical incident:

“medical incident” means any act or omission:

1. in the furnishing of professional health care services including the furnishing of foods, beverages, medications or appliances in connection with such services and the postmortem handling of human bodies, or
2. arising out of service by any persons as members of a formal accreditation, standards review or similar professional board or committee of the named insured, or as a person charged with executing the directives of such board or committee.

¹ Even though the trial court granted summary disposition under MCR 2.116(C)(9) as well, because the trial court looked beyond the pleadings in granting summary disposition, MCR 2.116(C)(9) is not applicable, and we will review the motion under MCR 2.116(C)(10) only. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582; 794 NW2d 76 (2010).

Any such act or omission, together with any and all related acts or omissions, or series of related acts or omissions in the furnishings of such services to any person or persons . . . shall constitute a single medical incident.

Special Endorsement 14 provides the following in pertinent part:

In consideration of the additional premium charged, it is understood and agreed that coverage, under this Part, is extended to include, as an additional insured, each physician listed on the Roster of Designated Physicians, subject to the following provisions:

* * *

B. No coverage is provided for professional medical services rendered at Ingham Regional Medical Center.

* * *

D. If the medical incident occurs at the office, or clinic of the additional insured, or other non-hospital environment, and does not involve the named insured, a limit of liability of \$1,000,000 per medical incident/\$1,000,000 shall apply to each additional insured and no deductible shall apply.

MHA argues that the entirety of Mark's care by Abood constituted a single medical incident. It further argues that although the only negligence alleged was post-surgery and occurred solely at Abood's office (which was not part of Ingham Regional), the language in ¶ B of Special Endorsement 14 barring coverage for services rendered at Ingham Regional excludes coverage for Mark's post-surgical, office-based care by Abood because the initial surgery had taken place at Ingham Regional. We disagree that coverage is excluded because the ¶ B exclusion should not be read as expansively as MHA contends. Paragraph B simply exempts coverage for any "professional medical services *rendered at* Ingham Regional Medical Center." On its face, then, the ¶ B exemption does not extend to services rendered *outside* of Ingham Regional. There is no dispute that the only "professional medical service" rendered at Ingham Regional was the surgery, which was not the subject of the consent judgment, and that the negligent professional medical services resulting in the consent judgment were not *rendered at* Ingham Regional. Because we construe exclusionary language strictly in order to favor insurance, *Churchman*, 440 Mich at 567, we must reject MHA's argument that we should interpret its narrow exclusion for services rendered at Ingham Regional in such a way that bars coverage for incidents of office-based negligence, anytime some aspect of the course of care, even if not negligent, was rendered at Ingham Regional. The contract certainly could have

limited or excluded claims arising from injuries *related to* medical services rendered at Ingham Regional, but it plainly did not.²

Next, MHA argues that it is not bound by the consent judgment that Abood reached with plaintiffs. We disagree. An insurance company's duty to provide a defense to its insured depends on whether the loss falls within the scope of the policy. *Citizens Ins Co*, 477 Mich at 84. "If the policy does not apply, there is no duty to defend." *Am Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996). But when the policy does apply, "an insurer breaches its own policy of insurance by refusing its duty to defend the insured [and] is bound by any reasonable settlement entered into in good faith between the insured and the third party." *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989); see also *Clay v Am Continental Ins Co*, 209 Mich App 644, 647-650; 531 NW2d 829 (1995).

MHA claims that the trial court erred when it found that MHA was liable for the consent judgment because it wrongfully refused to defend Abood. However, this misconstrues the trial court's decision. The trial court first held that, as a matter of law, plaintiffs' claim fell within the coverage afforded the insurance policy. It then went on to conclude that Abood was released from any agreement not to settle without MHA's consent because MHA had refused to defend an action *that was covered by the insurance policy*. Thus, MHA was liable for the consent judgment even though it was not a party to the agreement. The policy provided coverage for plaintiffs' claim, so MHA was obligated to indemnify Abood up to its \$1,000,000 limit. Applying *Alyas* and *Clay*, the trial court's decision was correct.

For the reasons stated, the trial court's order granting summary disposition in plaintiffs' favor is affirmed. Having decided the above issues as we do, the appeal regarding discovery errors alleged in Docket No. 301759 is rendered moot. Plaintiffs, the prevailing parties, may tax costs for Docket No. 303157 pursuant to MCR 7.219.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro

² In light of our analysis, we need not determine whether the trial court was correct in concluding that Mark's pre-surgery, surgical, and post-surgery care did not constitute a single medical incident.