STATE OF MICHIGAN

COURT OF APPEALS

THOMPSON CLAY,

Plaintiff-Appellant,

v

FERGUSON CLINIC FOR DIGESTIVE DISEASES, a/k/a FERGUSON CLINIC, P.C., and MANUEL M. CAMPOS,

Defendants,

and

AMERICAN CONTINENTAL INSURANCE COMPANY,

Garnishee Defendant-Appellee.

UNPUBLISHED
July 31, 1998

No. 202935
Kent Circuit Court
LC No. 92-076500

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of garnishee defendant American Continental Insurance Company pursuant to MR 2.116(C)(8) and (10). We affirm.

The facts and procedural history of the underlying medical malpractice action that culminated in the present garnishment action are succinctly set forth in *Clay v American Continental Ins Co*, 209 Mich App 644; 531 NW2d 829 (1995). In April 1992, plaintiff filed a medical malpractice action against defendants Ferguson Clinic and Manuel Campos, M.D. Both Ferguson Clinic and Dr. Campos were insured under a professional liability policy issued by Michigan Physicians Mutual Liability Company; the policy limits were $200,000. Ferguson Clinic and Dr. Campos subsequently offered to settle the case for the policy limits. In May 1993, Dr. Campos and Ferguson Clinic executed a consent judgment in plaintiff's favor for $1,200,000. The judgment was conditioned on plaintiff pursuing

enforcement of the consent judgment in excess of $200,000 only from American Continental, which insured Ferguson Clinic under a hospital liability insurance policy.

It is uncontroverted that American Continental had notice of plaintiff's cause of action as of March 1993. In May 1993, plaintiff filed a writ of garnishment based upon the consent judgment against American Continental. In October 1993, the trial court granted American Continental's motion for summary disposition on the ground that the covenant-not-to-collect contained within the consent judgment negated American Continental's obligation to satisfy the balance of the judgment. However, this Court reversed and remanded. See *Clay, supra*.

On remand, the trial court granted American Continental's amended motion for summary disposition on the ground that coverage was precluded by an exclusionary provision contained in Endorsement No. 5, which became effective on May 15, 1992, and covered the policy period of May 15, 1992, to May 15, 1993.[1] We affirm, albeit on different grounds.

This Court reviews summary disposition decisions de novo. *Omnicom of Mich v Giannetti Investment Co*, 221 Mich App 341, 344; 561 NW2d 138 (1997). The construction of insurance policies containing clear language presents a question of law that is reviewed de novo. *Auto Club Ins Ass'n v Lozanis,* 215 Mich App 415, 418-419; 546 NW2d 648 (1996). The court determines whether the policy is clear and unambiguous on its face. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206; 476 NW2d 392 (1991).

An insurance policy is a contract, and the court must determine what the parties agreed to in the policy in order to determine if a policy covers a particular occurrence. *Fire Ins Exchange v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996); *Vanguard Ins Co v* Racine, 224 Mich App 229, 232; 568 NW2d 156 (1997). Where policy language is clear, courts are bound by the specific language set forth in the policy. *Fire Ins Exchange, supra*.

American Continental's contractual obligation to Ferguson Clinic was governed by Hospital Liability Insurance Policy No. AU10034 (Ed. 1/88) (hereinafter the policy). Within the policy, the "coverage" section contained the following notice:

> This is a claims made Policy. Coverages A, B, C, & D apply only to claims arising out of occurrences taking place subsequent to the retroactive date stated in the Declarations for the particular coverage involved and *for which claim is first made against the insured and reported to us during this policy period* (emphasis added).

The same requirement of reporting a claim to American Continental during the applicable policy period appears in the insuring agreement for Coverage C, which provided coverage for damage resulting because of:

> bodily injury or personal injury to any person arising out of an occurrence resulting from a negligent act, error or omission in rendering or failing to render Professional Services subsequent to the retroactive date[2] stated in the Declarations for Coverage C, and *for*

which claim is first made against the insured and reported to us during this policy period (emphasis added).

"Policy period" is defined in the policy as "the period from the inception date of this policy to the policy expiration date as set forth in the Declarations or its earlier termination date, whichever occurs first." The Declaration defined the policy period as May 15, 1991, to May 15, 1992.

As a general proposition, a pure "claims made" policy is one in which indemnity is provided no matter when the alleged error or omission or act of negligence occurred, provided the misdeed complained of is discovered and the claim for indemnity is made against the insurer during the policy period. *Stine v Continental Casualty Co*, 419 Mich 89, 97; 349 NW2d 127 (1984).[3] In essence, in a "claims made policy," the event causing liability is a third party making a claim upon an insured. *Id.* at 105. Thus, in the "claims made" situation, notice to the insurer by the insured that a claim has been made against him is often required to be given during the policy period or within a specified amount of time after the period. *Id.* at 106. In *Stine*, the Court upheld both the validity of "claims made" policies and the requirement that notice of a claim be given by the insured to the insurer during the policy period.

Here, American Continental's "claims made" policy applied only to claims "for which claim is first made against the insured and reported to us *during this policy period (*emphasis added)."[4] This language clearly required Ferguson Clinic to report to American Continental during the policy period any claim made against it during the same policy period. Thus, the policy is more restrictive than a pure "claims made" policy in that the insured must notify the insurer of a claim made against the insured during the policy period in which the claim is made. In *Stine*, the Court upheld the validity of more restrictive "claims made" policies, concluding that "simply because the policy cannot be simplistically categorized as a pure "claims made policy" . .. does not render its meaning vague, obscure, uncertain or indefinite." *Id.* at 114. The policy language clearly states that coverage is provided for a claim first made against the insured and reported to the insurer during the same policy period. "Simply because the insurance contract is a "hybrid" does not mean that its meaning is unclear or ambiguous." *Id.* at 114. There is no dispute that plaintiff filed a claim against Dr. Campos and Ferguson Clinic on April 17, 1992. However, Ferguson Clinic failed to notify American Continental of the claim during the same policy period[5] as required by the plain language of the policy.[6] See *Schubiner v New England Ins Co*, 207 Mich App 330, 331; 523 NW2d 635 (1994). Thus, the trial court properly granted summary disposition on the facts presented.

Because of our resolution of this issue, we need not address plaintiff's second asserted claim of error.

Affirmed.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] Endorsement No. 5, which amended exclusion 6 of the policy, provided that the policy did not apply:

> To liability of the INSURED for damages resulting from an injury, harm, or loss if, prior to the inception of this POLICY PERIOD, any CLAIM has been made against the INSURED by anyone for such damages or if the INSURED could have reasonably foreseen that such injury, harm, or loss might result in a CLAIM for such damages.

In light of our conclusion that Ferguson Clinic failed to comply with the notice and reporting provisions of the policy in effect at the time that the claim was made against it, we need not consider any issues raised with respect to Endorsement No. 5, which became effective with the policy period commencing on May 15, 1992.

[2] The retroactive date was established as May 15, 1986.

[3] *Stine* provides a clear discussion of "claims made" policies.

[4] This language is consistent with the condition in the policy that provides in part: "If **claim** is made against the **insured**, the **insured** shall immediately forward to **us** every demand, notice, summons or other process received by him or his representatives."

[5] As earlier stated, the relevant policy period is May 15, 1991, through May 15, 1992.

[6] This is not a case in which a claim was made against the insured during the policy period, but notice could not reasonably have been given to the insurer during the policy period. The claim against the insured was made no less than twenty days before the policy expired.