# STATE OF MICHIGAN

# COURT OF APPEALS

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FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Plaintiff/Counterdefendant-Appellant,

v

NELSON LEE KNIPPLE,

Defendant/Counterplaintiff-Appellee,

and

NANCY KNIPPLE,

Counterplaintiff-Appellee.

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UNPUBLISHED
May 12, 2000

No. 216444
Livingston Circuit Court
LC No. 98-016745-CZ

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff Farm Bureau Mutual Insurance Company of Michigan appeals by leave granted from an order of the trial court denying plaintiff's motion for summary disposition of plaintiff's claim seeking a declaratory judgment that Nelson and Nancy Knipple are not entitled to underinsured motorist coverage under their insurance policy with plaintiff. Furthermore, plaintiff appeals the trial court's order denying plaintiff's summary disposition motion to dismiss the Knipples' four-count countercomplaint pursuant to MCR 2.116(C)(8) and (10). We reverse.

I

This case arises out of a March 15, 1996, automobile accident in which the Knipples' vehicle was rear-ended by a vehicle occupied by Stephen Dyer and Bernard John Robinson. It was reported initially that Dyer was operating the vehicle that rear-ended the Knipples' vehicle. Subsequent investigation revealed that Dyer and Robinson switched seats after the crash and that Robinson was actually driving the vehicle when the collision occurred.

The Knipples notified plaintiff, their automobile insurance carrier, of the accident, and by March 29, 1996, a senior claim representative employed by plaintiff conducted a preliminary investigation of the accident and prepared a written report. The Knipples also filed a lawsuit alleging that Dyer and Robinson were liable for the Knipples' injuries. The Knipples subsequently amended the complaint to include Glen Oaks, Inc., doing business as Glen Oaks Bar, as a dramshop defendant.

As the Knipples' suit progressed, it became apparent that the alleged tortfeasors were underinsured. In a January 27, 1997 letter, the Knipples' attorney notified plaintiff that Nelson Knipple was making a demand for the $100,000 limits of uninsured motorist coverage under his policy, which contained the following provisions:

> 3. The company shall not be obligated to make any payment because of bodily injury to which this insurance applies and which arises out of the ownership, maintenance, or use of an underinsured automobile until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements.
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> 5. Consent to Settlement: The insured may not settle with anyone responsible for the accident without the Company's written consent. The Company shall be obligated to respond within thirty (30) days of receiving an insured's written request to settle. If an insured agrees to settle with the person(s) responsible for the accident for an amount which does not exhaust the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident, the coverage under this endorsement shall be void.
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> 6. Subrogation: In the event of any payment under this policy, the Company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights**.** The insured shall do nothing after loss to prejudice such rights.

Following the Knipples' request for underinsured motorist coverage, various correspondence occurred between the Knipples' counsel, plaintiff, and plaintiff's retained counsel. The letters on behalf of plaintiff outlined the above policy provisions and plaintiff's position that it would not authorize settlement with the defendants in the Knipples' lawsuit unless the defendants' insurance policy limits were exhausted, and an assets examination proved the defendants to be uncollectible beyond their policy limits. In response, the Knipples' attorney acknowledged plaintiff's position and indicated that he would immediately notify plaintiff's counsel of any pending settlement at policy limits to allow plaintiff to take asset depositions.

More than fourteen months passed before the parties discussed the case again. On Friday, June 5, 1998, five days before the Knipples' suit was scheduled for trial, their attorney faxed a letter to

plaintiff's adjuster, stating that defendant Robinson had offered a settlement at his insurance policy limit of $35,000, and requesting plaintiff's permission to settle. The letter indicated further that Robinson was currently serving a nine-month jail sentence for his involvement in the accident and that Robinson was otherwise uncollectible. The letter requested that plaintiff respond as soon as possible.

According to plaintiff's attorney's uncontroverted affidavit, he responded that same afternoon, leaving two messages for the Knipples' attorney, asking about the status of settlement negotiations and an assets examination. These calls were not returned. In a follow-up letter on June 10, 1998, plaintiff's attorney reiterated his inquiries.

Subsequently, plaintiff learned that the Knipples' lawsuit was resolved at a settlement conference on June 5, 1998. Robinson tendered his policy limits of $35,000, Glen Oaks Bar was to pay $30,000 (of its $50,000 policy limit) and Dyer was to pay $5,000 (of a $20,000 policy limit). On June 8, 1998, the trial court entered an order of dismissal with prejudice as to Dyer, Robinson, and Glen Oaks, Inc. pursuant to a stipulation between the Knipples and the named defendants to dismiss the case with prejudice. The Knipples also signed a release in favor of Glen Oaks on June 23, 1998.

Plaintiff filed the instant action seeking a declaratory judgment that Nelson Knipple was not entitled to underinsured motorist benefits under the terms of his policy because he breached the insurance contract by settling the underlying lawsuit without plaintiff's consent, thereby prejudicing plaintiff's subrogation rights against the named tortfeasors. The Knipples responded with a four-count counterclaim, which alleged that plaintiff breached the insurance contract by denying underinsured motorist coverage, that plaintiff acted in bad faith in denying coverage, that plaintiff violated the Racketeer Influenced and Corrupt Organizations Act[1], and that plaintiff was liable for intentional infliction of emotional distress.

Before discovery was concluded, plaintiff moved for summary disposition of its complaint for declaratory judgment pursuant to MCR 2.116(C)(10). Plaintiff also sought summary disposition as to the countercomplaint pursuant to MCR 2.116(C)(8) and (10). In an opinion and order, entered on December 1, 1998, the trial court denied plaintiff's motion. Without further explanation, the trial court stated that the Knipples had "sufficiently stated facts of bad faith which raised questions of fact sufficient to preclude summary disposition as to [plaintiff's] Complaint and the Counter-Complaint."

II

On appeal, plaintiff first argues that the trial court erroneously denied its motion for summary disposition as to its declaratory judgment action. Plaintiff asserts that there is no genuine issue of material fact regarding whether the Knipples agreed to a settlement of the underlying lawsuit without plaintiff's consent and without exhausting all available insurance.

An order granting or denying summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id*. A court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence submitted by the parties.

*Id*. If the party opposing the motion fails to present evidentiary proofs creating a genuine issue of material fact, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999).

Underinsured motorist insurance protection is not required by law, and therefore, is optional insurance offered by some Michigan automobile insurance companies. Because such insurance is not mandated by statute, the scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts. *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 10-11; 512 NW2d 324 (1993). "Where the language of an insurance policy is clear and unambiguous, it must be enforced as written." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). A contract is ambiguous if "its words may reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982).

The insurance policy is not ambiguous. Under its plain terms, the policy provides that an underinsured motorist claim will not be covered if the resulting lawsuit is settled for less than applicable policy limits without plaintiff's written consent. Clear and specific exclusions contained in policy language must be given effect. *Allstate Ins Co v Keillor*, 450 Mich 412, 417; 537 NW2d 589 (1995). This Court has considered the issue regarding "consent to settle" clauses in earlier cases. In *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 674, 676; 554 NW2d 610 (1996), this Court held that similar language in a "consent to settle" policy provision "is unambiguous and does not contravene Michigan law or public policy." This Court stated:

> Michigan courts have consistently upheld policy exclusions barring recovery of benefits where the insured party releases a tortfeasor from liability without the insurer's consent, recognizing that such a release of liability destroys the insurance company's right to subrogation. *Flanary v Reserve Ins Co*, 364 Mich 73, 75; 110 NW2d 670 (1961); *Stolaruk v Central Nat'l Ins Co of Omaha*, 206 Mich App 444, 448-450; 522 NW2d 670 (1994); *Adams v Prudential Property & Casualty Ins Co*, 177 Mich App 543, 544-545; 442 NW2d 641 (1989), *Poynter v Aetna Casualty & Surety Co*, 13 Mich App 125, 128-129; 163 NW2d 716 (1968). A plaintiff's settlement with a negligent motorist or other responsible party destroys the insurance company's subrogation rights under the policy and bars the plaintiff's action for uninsured motorist benefits unless the insurer somehow waives the breach of the policy conditions. [*Lee*, *supra* at 675.]

Plaintiff contends that it is undisputed that the Knipples did not "exhaust" all insurance which was available to them for their injuries from the tortfeasors. We agree. The relevant policy language states that the insurer "shall not be obligated to make any payment … until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements." Furthermore, the policy states that "[i]f an insured agrees to settle with the person(s) responsible for the accident for an amount which does not exhaust the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident, the coverage under this endorsement shall be void."

It is undisputed that the Knipples settled with Dyer and the dramshop for a sum less than the limits of each of the alleged tortfeasor's liability insurance policy. The Knipples contend that "[a]ny settlement between [themselves] and the Glen Oaks Bar is irrelevant to these proceedings." However, within the context of uninsured motorist coverage, this Court has held that an insured's failure to obtain the insurer's consent to settle with a dramshop defendant precludes an insured's claim for benefits pursuant to terms of an uninsured motorist policy. *Adams, supra* at 544-545. We conclude that this Court's holding in *Adams* also applies within the context of an underinsured motorist protection policy.

In the instant case, the policy language provides that "[t]he insured may not settle with anyone responsible for the accident without the Company's written consent." Michigan's dramshop act imposes liability on a dramshop owner, which is entirely dependent upon the conduct and liability of the intoxicated tortfeasor, MCL 436.22(4) and (7); MSA 18.993(4) and (7). *Adams, supra* at 545. In this case, the intoxicated tortfeasor is the underinsured motorist. Accordingly, under the terms of the policy, the dramshop is a party who is "responsible for the accident." Therefore, a settlement with the dramshop is relevant to this case, and the Knipples' failure to exhaust the dramshop's liability insurance policy limit renders the underinsured motorist endorsement void.

III

Next, plaintiff argues that the trial court erroneously denied its motion for summary disposition regarding the Knipples' counterclaim for breach of contract. We agree.

A

An implied covenant of good faith and fair dealing arises from an insurance policy contract between the insurer and the insured. *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 116; 393 NW2d 479 (1986). The Knipples have presented no evidence indicating that plaintiff breached this duty or the contract. The record reveals that the accident occurred on March 15, 1996, and by March 29, 1996, plaintiff's senior claim representative had completed an investigation of the accident and documented his findings in a written report. Furthermore, the file reveals that plaintiff continued to monitor the status of the file and held the file open with a reserve of $25,000 for a potential underinsured motorist claim.

The written correspondence between the parties shows that plaintiff timely communicated its position regarding the underinsured motorist claim. It appears that the delays in the lawsuit were due to criminal charges against Robinson arising out of the accident. The insurance contract required only that plaintiff respond within thirty days after receiving a written settlement request. In this case, the written settlement request was received via facsimile transmission on June 5, 1998. It is undisputed that upon receipt of the written request, plaintiff's attorney immediately responded to the Knipples' attorney by telephone, but the calls were not returned. Plaintiff's attorney sent a follow-up letter on June 10, 1998, but the Knipples had already agreed to settle.

B

Plaintiff argues that the trial court erroneously denied its motion under MCR 2.116(C)(8) to dismiss the Knipples' counterclaim alleging that plaintiff is liable for "bad faith" for failing to reasonably honor the insured's claim for underinsured motorist coverage. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

We find that the trial court should have dismissed this count because the Knipples have failed to state a claim upon which relief can be granted. The claim of "bad-faith refusal to pay an insurance claim [is] an action that is not recognized by the courts of this state." *Taylor v Blue Cross/Blue Shield of Michigan*, 205 Mich App 644, 657-658; 517 NW2d 864 (1994), citing *Runions v Auto-Owners Ins Co*, 197 Mich App 105, 110; 495 NW2d 166 (1992) (footnote omitted).

C

Finally, plaintiff argues that the trial court erroneously denied its motion for summary disposition of the Knipples' counterclaim for intentional infliction of emotional distress. We agree. The elements of a prima facie case of intentional infliction of emotional distress are: (1) extreme or outrageous conduct, (2) which intentionally or recklessly, (3) causes, (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594; 374 NW2d 905 (1985); *Taylor*, *supra* at 657. As a matter of law "[f]ailure to pay a contractual obligation does not amount to outrageous conduct, even if it is wilful or in bad faith." *Id*. The Knipples cite *McCahill v Commercial Union Ins Co*, 179 Mich App 761; 446 NW2d 579 (1989), to support their claim of emotional distress. However, even in *McCahill*, this Court explained that an insurer's conduct must be something more than a mere bad-faith breach of an insurance contract. *Id*. at 768. Furthermore, the facts in the instant case are clearly distinguishable from the facts in *McCahill*, and nothing in the record suggests any example of extreme or outrageous conduct by plaintiff.

We remand to the trial court for entry of an order of summary disposition for plaintiff in the declaratory judgment action and a dismissal of the Knipples' counterclaim.

Reversed. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] Count III of the Knipples' counterclaim is not part of this appeal and has subsequently been dismissed by a stipulation and order in the trial court.