

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA FELDKAMP,

Plaintiff-Appellee,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

January 15, 2009

No. 272855

Washtenaw Circuit Court

LC No. 03-000642-NI

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

In this insurance coverage dispute, defendant Farm Bureau Insurance Company (“Farm Bureau”) appeals from the trial court’s denial of Farm Bureau’s second motion for summary disposition (after remand). This Court denied plaintiff’s application for leave to appeal from that denial, and the Supreme Court remanded the appeal to this Court for consideration as on leave granted. *Feldkamp v Farm Bureau Ins Co*, 480 Mich 916; 739 NW2d 870 (2007). We reverse.

I

The automobile accident at issue occurred in 2002. Farm Bureau provided automobile no-fault insurance to plaintiff’s vehicle. The policy included underinsured motorist (UIM) coverage. Rachel Kobish, who allegedly caused the accident, drove the other vehicle involved. Plaintiff made a residual bodily injury claim against Kobish by starting negotiations with Kobish’s no-fault insurer (GMAC Insurance).

In June 2003, plaintiff filed the instant complaint against Farm Bureau, seeking underinsured motorist coverage under the Farm Bureau policy. On September 10, 2003, plaintiff’s attorney wrote a letter to Farm Bureau’s attorney indicating that GMAC Insurance had offered its policy limits to plaintiff to settle plaintiff’s claim against Kobish, on condition that plaintiff sign a release of any further claims plaintiff might have against Kobish and GMAC Insurance. Plaintiff’s attorney requested that Farm Bureau provide written consent to the proposed settlement with GMAC and Kobish. Farm Bureau’s counsel responded, outlined plaintiff’s duties under the policy, and requested a creditor’s exam of Kobish.

Plaintiff filed a motion to compel Farm Bureau’s written consent for her to settle with GMAC and Kobish. Farm Bureau opposed the motion and requested that the court order

plaintiff to add Kobish as a defendant so that Farm Bureau could take her deposition in order to ascertain whether or not Farm Bureau should give written permission to plaintiff to accept the money from GMAC and sign the proposed release. The trial court granted plaintiff's motion and ordered Farm Bureau to give plaintiff written consent for plaintiff to settle her claim with Kobish.

Farm Bureau filed a motion for relief from the order regarding written consent to settle, arguing that under the clear policy language, plaintiff agreed to preserve Farm Bureau's subrogation rights. Farm Bureau asked the court to reverse its earlier order and to order plaintiff to add Kobish to the action as a party defendant. The trial court denied the motion.

After granting Farm Bureau's application for leave to appeal,¹ this Court reversed,² reasoning that the release would potentially negate defendant's contractual right to pursue subrogation against Kobish. This Court reasoned that "[b]y ordering defendant to grant its consent to the settlement requested by plaintiff, the trial court effectively rewrote the [insurance] contract." This Court then remanded for further proceedings to determine defendant's liability to plaintiff under the insurance policy.

On remand, defendant filed its first motion for summary disposition under MCR 2.116(C)(10). Farm Bureau argued that plaintiff's settlement and release violated several provisions of the insurance contract and prejudiced Farm Bureau's rights of subrogation; that plaintiff's claim for UIM coverage was excluded under the policy due to her settlement and release; that there was no dispute as to any material fact; and that Farm Bureau was entitled to judgment as a matter of law. Plaintiff responded and argued that Farm Bureau's refusal to give its consent breached the underinsured motorist policy and constituted constructive fraud. Plaintiff also filed a motion to amend her complaint to add a count for constructive fraud. The trial court denied Farm Bureau's motion for summary disposition and granted plaintiff's motion to amend the complaint. Plaintiff filed an amended complaint that included a claim for constructive fraud.

Farm Bureau filed a motion for summary disposition of the amended complaint, under MCR 2.116(C)(8) and (10), contending that plaintiff released Kobish without its permission and that the settlement with Kobish and the release of Kobish from liability prejudiced Farm Bureau's subrogation rights, violated the Farm Bureau policy, and voided UIM coverage.

Plaintiff responded and argued that Farm Bureau presented no argument for summary disposition of the constructive fraud claim and that under *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459; 663 NW2d 447 (2003), the Farm Bureau policy terms were ambiguous, creating a

¹ *Feldkamp v Farm Bureau Ins Co*, unpublished order of the Court of Appeals, issued September 3, 2004 (Docket no. 255185).

² *Feldkamp v Farm Bureau Ins Co*, unpublished opinion of the Court of Appeals, issued February 23, 2006 (Docket no. 255185).

question of fact regarding their interpretation and meaning. Plaintiff argued that one part of the policy would allow Farm Bureau to compel litigation, but another part of the policy would only allow it after the payment of UIM benefits, and therefore, the policy terms were in conflict and the contract was ambiguous.

Farm Bureau filed a reply brief, arguing that the trial court lacked jurisdiction to entertain plaintiff's unpled, new claim that the insurance contract was ambiguous. Farm Bureau also argued that under *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), the issue of whether the Farm Bureau policy contained inconsistent, ambiguous or misleading clauses was solely for the commissioner of insurance and that the trial court was not free to invade the jurisdiction of the commissioner of insurance.

The trial court denied the motion, finding ambiguity in the Farm Bureau policy. Farm Bureau filed an application for leave to appeal with this Court, which denied it.³ Farm Bureau filed an application for leave to appeal to the Supreme Court, which, in lieu of granting leave to appeal, reversed the judgment of this Court, and remanded to this Court for consideration as on leave granted. *Feldkamp v Farm Bureau Ins Co*, 480 Mich 916; 739 NW2d 870 (2007).

II

Farm Bureau first argues that the trial court erred in denying its motion for summary disposition as regards the breach of contract claim. We agree. This Court reviews summary disposition rulings de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

The Farm Bureau policy has a main policy form (form 39) and several relevant endorsements. In relevant part, policy form 39 provides an exclusion from coverage and a condition of coverage (bold in original; italics added):

PART IV – FAMILY PROTECTION COVERAGE

(Innocent Victim)

* * *

Exclusions: *This policy does not apply under Part IV:*

* * *

(b) to bodily injury to an insured with respect to which such insured, his legal

³ *Feldkamp v Farm Bureau Ins Co*, unpublished order of the Court of Appeals, issued March 29, 2007 (Docket no. 272855).

representative or any person entitled to payment under this coverage shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor;

* * *

CONDITIONS

* * *

5. Assistance and Cooperation of the Insured

* * *

Part IV: *After notice of claim under Part IV, the company may require the insured to take such action as may be necessary or appropriate to preserve the insured's right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; and in any action against the company, the company may require the insured to join such person or organization as a party defendant.*

6. Action Against Company

* * *

Parts II, III and IV: *No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of the policy*

Endorsement 1352, which extends coverage to apply to underinsured automobiles, provides, in relevant part:

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following: PART IV – FAMILY PROTECTION COVERAGE (INNOCENT VICTIM)

EXTENDED FAMILY PROTECTION COVERAGE (INNOCENT VICTIM)

UNDERINSURED AUTOMOBILES

In consideration of the additional premium paid, it is agreed that, with respect to such insurance as is afforded by the policy for damages because of bodily injury caused by accident and arising out of the ownership, maintenance, or use of an uninsured automobile, subdivision (a) of the definition of “uninsured automobile” is amended to include “underinsured automobile,” subject to 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.

* * *

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.

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.*

All other provisions of this policy apply.

Endorsement 2013 expands coverage to include damage caused by uninsured automobiles, and provides, in relevant parts:

AMENDATORY ENDORSEMENT – FAMILY AUTO POLICY

* * *

PART IV – FAMILY PROTECTION COVERAGE (INNOCENT VICTIM)

Coverage G – Family Protection (Damages for Bodily Injury): Part (1) is replaced by the following:

To pay compensatory damages which the insured or his legal representative is legally entitled to recover as damages from the owner or operator of an uninsured automobile. The damages must result from bodily injury, sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile.

If the insured or such legal representative is legally entitled to recover damages, the amount of those damages may be determined by agreement between the

insured or such legal representative and the company. The company will not be bound by any judgments for damages obtained or settlements made without our written consent.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issue of liability of such person or organization or of the amount of damages to which the insured is legally entitled, unless such judgment is entered pursuant to all action prosecuted by the insured with the written consent of the company.

In light of these terms and conditions, plaintiff argues that an ambiguity exists in the policy that precluded summary disposition in favor of Farm Bureau. We disagree.

Michigan courts enforce contracts. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007). We enforce contracts according to their terms, as a corollary of the parties' liberty of contract. *Rory*, *supra* at 468. We examine contractual language and give the words their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law," and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Courts may not impose an ambiguity on clear contract language. *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005).

A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp*, *supra* at 467, or "when [a term] is equally susceptible to more than a single meaning," *City of Lansing Mayor v Pub Service Comm'n*, 470 Mich 154, 166; 680 NW2d 840 (2004). Whether a contract is ambiguous is a question of law. *Wilkie*, *supra* at 47. Only when contractual language is ambiguous does its meaning become a question of fact. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

The terms in the Farm Bureau policy do not conflict with one another. Paragraph 6 of endorsement 1352 merely provides that, in the event of loss, Farm Bureau steps into the shoes of its insured, plaintiff, with respect to recovering from the tortfeasor (Kobish), and that the insured may do nothing to prejudice such rights. This last provision is not qualified by the clause "In the event of any payment under this policy . . ." Therefore, the insured's obligation to do nothing to prejudice Farm Bureau's subrogation rights is not triggered by a payment by Farm Bureau, and not contingent thereon. We see no conflict between endorsement 1352 and any other provision of the policy, and plaintiff has not specifically identified any such provision.

Paragraph 3 of endorsement 1352 prevents Farm Bureau from becoming liable to pay UIM benefits to its insured, until its insured has exhausted the tortfeasor's policy limits. This does not conflict with paragraph 6 of endorsement 1352. Indeed, these paragraphs complement one another, by limiting Farm Bureau's liability for UIM benefits, but by doing so in different ways.

Paragraph 5 prohibits an insured from settling with the tortfeasor without Farm Bureau's consent and voids coverage if an insured settles with a tortfeasor for less than the tortfeasor's coverage. This provision is complimentary to paragraph 6. Both limit the liability of Farm Bureau, though in different ways.

Because the Farm Bureau policy provisions do not conflict with one another, they are not ambiguous. Therefore, the trial court's opposite ruling is reversed.

Farm Bureau had a clear contractual right to have its insured join the tortfeasor. Policy form 39, under "CONDITIONS," in paragraph 5, provides:

[T]he company may require the insured to take such action as may be necessary or appropriate to preserve the insured's right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; *and in any action against the company, the company may require the insured to join such person or organization as a party defendant.*

Plaintiff presents no valid argument to rebut the conclusion that she violated this provision. Under policy form 39, violation of this provision amounts to a failure by plaintiff to fulfill a pre-condition of Farm Bureau's duty to provide coverage.

Because plaintiff took action that triggered an exclusion from coverage under policy form 39, coverage is excluded under the clear language of the policy. Also, because plaintiff failed to take action to fulfill a condition precedent to Farm Bureau's duty to provide coverage, Farm Bureau's duty to provide UIM coverage was not triggered.

III

Farm Bureau next argues that the trial court erred in denying its motion for summary disposition as regards the constructive fraud claim. We agree.

The elements of constructive fraud are set forth in *Gen Electric Credit Corp v Wolverine Ins Co*, 420 Mich 176; 362 NW2d 595 (1984). That decision explains that the distinction between actual fraud and constructive fraud is that actual fraud is an intentional misrepresentation that a party makes to induce detrimental reliance, while constructive fraud is a misrepresentation that causes the same effect, but without a purposeful design to defraud. *Id.* at 188-190. In either case, there has to be a misrepresentation. This is the missing element in plaintiff's claim. There is no well-pleaded allegation of fact that Farm Bureau made any representation of any kind, false or otherwise, to plaintiff. Therefore, plaintiff failed to state a claim for constructive fraud, and the trial court erred in failing to grant summary disposition under subrule (C)(8).

In addition, there is no dispute about the facts and no evidence of a misrepresentation by Farm Bureau when it opposed plaintiff's motion to compel written consent to settle. Therefore, the trial court erred in denying summary disposition of the constructive fraud claim under subrule (C)(10).

IV

Finally, Farm Bureau argues that the trial court erred when it held that *Rory* is not applicable. Questions of law are reviewed de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006). But in light of our holding that Farm Bureau is entitled to summary disposition of both the breach of contract and constructive fraud claims, this issue is moot. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 278 Mich App 51, 61; 744 NW2d 174 (2007).

Reversed and remanded for entry of an order granting Farm Bureau's motion for summary disposition of the amended complaint. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Peter D. O'Connell

/s/ William C. Whitbeck