STATE OF MICHIGAN

COURT OF APPEALS

KEVIN BENCHECK II, Plaintiff-Appellee,	UNPUBLISHED October 6, 2011
v ESTATE OF ROBERT M. PAILLE, Defendant-Appellee, and INTEGON NATIONAL INSURANCE COMPANY, Defendant-Appellant.	No. 298334 Clare Circuit Court LC No. 08-900097-NI

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant Integon National Insurance Company (Integon) appeals by right the trial court's order finding it in contempt of court and imposing fines and sanctions. We reverse.

In March 2005, plaintiff was driving his vehicle in Clare County. An automobile driven by Robert M. Paille (Paille) crossed the centerline and struck plaintiff's vehicle, allegedly causing plaintiff to sustain injuries. At the time of the accident, plaintiff was insured under a policy issued by Integon for underinsured motorist benefits in the amount of $50,000.

Plaintiff filed suit in the Clare Circuit Court. Plaintiff alleged that he had suffered a serious impairment of body function as a result of the accident and sought tort damages from Paille's estate. Plaintiff also claimed that Paille had been underinsured at the time of the accident and sought underinsured motorist benefits from Integon.

The trial court scheduled a settlement conference for May 19, 2009. The court's notice regarding the conference stated that "[a]ll parties with full authority to settle must be present." Integon appeared at the scheduled settlement conference with its representative, Suzanne Clarkson (Clarkson). Clarkson had been given authority to settle, but only after the primary insurer in the matter had offered its policy limits. The trial court commented that Clarkson "does not have full authority," and angrily remarked that Integon had sent "somebody that was told by their supervisor not to settle, not to give any money." The court found Integon in contempt of

court and fined the company $500. The court adjourned the settlement conference for two days, ordering that the person with authority to settle on behalf of Integon appear on May 21, 2009, or a bench warrant would issue for that person's arrest.

On May 21, 2009, when the settlement conference reconvened, Integon appeared with another representative, Warren Kasmer. The trial court discovered that Kasmer possessed the same authority as Clarkson, having been instructed by Integon that he could settle, but not until the primary insurer had first offered its policy limits. The court again held Integon in contempt, fining the company an additional $500. The court also sanctioned Integon $1,500 for plaintiff's costs and $250 for the costs of Paille's estate. The court explained from the bench that "whenever you get a settlement notice from this Court, that means somebody that has full authority to settle the case, it is their decision alone, their decision alone to put money on the table, nobody else's."

Integon moved for reconsideration and the trial court ultimately set aside the $500 fine assessed on May 19, 2009. However, the court left in place the $500 fine and $1,750 in sanctions ordered on May 21, 2009. Eventually, the case was dismissed by stipulation.

We review for an abuse of discretion the trial court's decision to hold a party in contempt. *In re Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). We similarly review for an abuse of discretion the trial court's decision to sanction a party. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). An abuse of discretion has occurred if the trial court's decision falls outside the range of principled outcomes. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

We conclude the trial court abused its discretion by holding Integon in contempt of court and by assessing fines and sanctions against Integon in this case. It is true that a trial court may order the parties to appear for a settlement conference, MCR 2.401(A), and may order that the parties, including insurance companies, send a representative to the conference who possesses full authority to settle, MCL 2.401(F)(2); *Henry v Prusak*, 229 Mich App 162, 168; 582 NW2d 193 (1998). If a person with full authority to settle does not appear at the conference as ordered, the court may find the offending party in contempt of court. *Id*. at 196 n 4. However, as explained by the *Henry* Court, "[a] court cannot 'force' settlements upon parties." *Id*. at 170; see also *Woods v Murdock*, 177 Mich App 210, 213; 441 NW2d 63 (1989).

Because underinsured motorist coverage is optional and not required by statute, the rights and limitations under such coverage are governed purely by the insurance contract and are construed without reference to the no-fault act. *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005); *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 19; 592 NW2d 379 (1998). Turning to the present case, the underinsured motorist provision in the contract of insurance provided in pertinent part, "[Integon] will pay under the underinsured motorists coverage only after the limits of liability under any applicable . . . policies have been offered, or with [Integon's] permission paid." In other words, according to the plain language of the insurance contract itself, Integon would incur no liability in this case until after the underlying policy limits had been offered or paid by the primary insurer.

It is clear that both Clarkson and Kasmer had full authority to settle in this case, provided that the primary insurer first offered or paid its policy limits. However, because both Clarkson and Kasmer were instructed to settle only after the underlying policy limits were offered or paid, the trial court concluded that the representatives' authority to settle was limited and that Integon had violated the court's order. We cannot agree.

By requiring Integon to send a representative to the conference with full authority to settle, even before the underlying policy limits had ever been offered or paid, the trial court essentially ordered Integon to consider settling for a liability that it never assumed. The court was without authority to do this. It is well settled that a court may not require an insurer to undertake a risk that it did not assume. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992); *Mich Basic Prop Ins Ass'n v Wasarovich*, 214 Mich App 319, 323; 542 NW2d 367 (1995). Nor may a court assess penalties against a party or its representative for failing to make a settlement offer. *Henry*, 229 Mich App at 170. In this case, Integon assumed the risk that it would become liable to plaintiff for underinsured motorist benefits "*only after* the limits of liability under any applicable . . . policies have been offered, or with [Integon's] permission paid." (Emphasis added.) In other words, the primary insurer's offer or payment of its own policy limits was a condition precedent to Integon's liability under the underinsured motorist policy with plaintiff. The trial court was without authority to disregard the plain and unambiguous language of the insurance contract. See *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008); *Rory*, 473 Mich at 468-469. Integon was fully entitled to rely on this contractual language and to instruct its representatives not to settle until *after* the underlying policy limits had been offered or paid.

As explained previously, the record makes clear that both of Integon's representatives had full authority to settle, *provided* that the underlying policy limits were first offered or paid by the primary insurer. The trial court was not empowered to unilaterally dispense with this condition precedent, which was clearly stated in the language of the insurance policy. Quite simply, we conclude that Integon did not violate the trial court's order because it did not send representatives to the settlement conference who lacked "full authority to settle." The trial court therefore erred by finding that Integon violated its order in this case. We further conclude that the trial court abused its discretion when it relied on this erroneous finding to hold Integon in contempt of court and to assess fines and sanctions. We reverse the trial court's decision to hold Integon in contempt of court, to fine Integon $500, and to assess sanctions in the amount of $1,750.

Reversed. We do not retain jurisdiction. As the prevailing party, defendant Integon may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio