STATE OF MICHIGAN

COURT OF APPEALS

ANITA WHITEHORN, Plaintiff-Appellant/Cross Appellee,	UNPUBLISHED March 15, 2005
v	No. 246255 Wayne Circuit Court
LIBERTY MUTUAL INSURANCE COMPANY, Defendant-Appellee/Cross Appellant.	LC No. 00-025306-NZ

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from orders granting defendant summary disposition under MCR 2.116(C)(10) and case evaluation sanctions. We affirm. Defendant cross-appeals from a previous order denying defendant's initial motion for summary disposition under MCR 2.116(C)(7). In light of our holding, we need not reach this alternative ground for affirming the trial court's decision.

This action arises from an August 7, 1997, automobile accident in which plaintiff was hit by another vehicle driven by an underinsured driver who ran a red light. On August 16, 1999, plaintiff executed a release in favor of the underinsured driver, Shameka Hogains, in consideration of $20,000. Having received the maximum amount payable on her third-party claim against Hogains, plaintiff then filed a complaint alleging that defendant wrongfully denied her claim for underinsured benefits, breaching her insurance contract with defendant.

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that when plaintiff signed a release in favor of Hogains, she also effectively released any and all claims against defendant. The trial court denied the motion. Subsequently, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff failed to notify defendant of any tentative settlement between plaintiff and Hogains' insurer, as required by the contract, so that defendant could preserve its rights against Hogains or her insurer. The trial court agreed and dismissed the case. Thereafter, the trial court granted defendant's motion for case evaluation sanctions under MCR 2.403(O), awarding defendant $11,620.73.

On appeal, plaintiff argues that defendant was notified of plaintiff's settlement with Hogains and, regardless, the insurance contract is ambiguous with respect to whether plaintiff was required to give notice under the circumstances. After de novo review of the entire contract to determine whether its language is ambiguous, we conclude that it cannot reasonably be understood in different ways. See *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).

Plaintiff claims that the insurance policy is ambiguous because two paragraphs in the underinsured motorists coverage endorsement irreconcilably conflict. The disputed provision provides:

> We will pay under this coverage only if 1. or 2. below applies:
>
> 1. The limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements; or
>
> 2. A tentative settlement has been made between an "insured" and the insurer of the "underinsured motor vehicle" and we:
>
> a. Have been given prompt written notice of such tentative settlement; and
>
> b. Advance payment to the "Insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

Plaintiff argues that paragraphs one and two conflict because paragraph one states that defendant will provide coverage if the limits of liability have been exhausted by settlement and is not qualified by the mandatory notice requirement clearly applicable to paragraph two. Thus, according to plaintiff, it is ambiguous whether plaintiff was required to give notice when the limits of Hogains' liability were exhausted by settlement. Plaintiff asserts that under paragraph one, by exhausting the limits of Hogains' policy, she was entitled to recover on her underinsured motorist claim, irrespective of notice. We disagree.

The insurance contract is not ambiguous on the issue of notice. The first paragraph requires that the insured pursue, and be legally entitled to, the limits of any applicable bodily injury liability bonds or policies before coverage is available. The second paragraph clearly obligates the insured to notify defendant of any *tentative* settlement – meaning *before* the settlement is agreed to and finalized – and to allow defendant thirty days to pay the settlement and preserve its right to subrogation. The first provision is not contradictory to this obligation because, by stating that defendant "will pay under this coverage *only* if 1. or 2. below applies," that provision merely establishes that the insured will not be able to recover *unless* either of the two scenarios are met. It is not an affirmative statement that the insured *will* be able to recover *if* either of the two scenarios are met. However, even if this provision was confusing, the notice requirement was made clear in another provision in the contract entitled, "ADDITIONAL DUTIES," which states:

> A person seeking coverage under this endorsement must also promptly:
>
> 1. Send us copies of the legal papers if a suit is brought; and
>
> 2. Notify us in writing of a tentative settlement between the "insured" and the insurer of the "underinsured motor vehicle" and allow us 30 days to advance payment to that "insured" in an amount equal to the tentative settlement to preserve our rights against the insurer, owner, or operator of such "underinsured motor vehicle".

Reading the entire contract, it is clear that notice of tentative settlements related to applicable bodily injury liability policies was required. See *Farm Bureau Mut Ins Co, supra*.

We also agree with the trial court that there was no question of fact that plaintiff failed to provide proper notice. Defendant does not dispute that on September 9, 1999, it received a letter dated September 1, 1999, notifying it of plaintiff's intent to claim underinsured benefits. But this "notice" was ineffective because, at that point, plaintiff had already released Hogains from liability without defendant's consent or knowledge, thereby destroying defendant's right to subrogation. Because plaintiff's claim was officially settled on August 16, 1999, plaintiff had an obligation to notify defendant of the tentative settlement thirty days before that, or on July 16, 1999. Without concluding whether it constituted valid notice, we note that the earliest evidence of any type of prior notice was the July 20, 1999, letter from Hogains' attorney to plaintiff's counsel indicating that defendant's counsel has knowledge of the release. Accordingly, the trial court properly granted defendant summary disposition because there is no question of material fact that plaintiff breached the unambiguous notice requirement of her insurance policy when she released Hogains, and, thereby, forfeited her right to claim underinsured motorist benefits.

Next, plaintiff argues that the trial court erred in granting defendant's motion for case evaluation sanctions. Plaintiff asserts that the award was erroneous because the matter did not proceed to trial and because defendant should not be rewarded for having submitted false statements and grossly exaggerated billing statements. We find no merit in either assertion. A trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O) presents a question of law which we review de novo. *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). The construction and interpretation of court rules is a question of law also reviewed de novo. *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000).

Plaintiff's argument ignores § (2)(c) of the court rule which states that a verdict includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). In *Johnson v State Farm Mut Auto Ins Co*, 183 Mich App 752, 767; 455 NW2d 420 (1990), this Court held that mediation sanctions (now known as case evaluation sanctions) may be imposed where a case is summarily decided on motion, after mediation, but prior to the commencement of trial. *Id*. at 769. Thus, plaintiff's argument on this ground is without merit. Further, plaintiff's allegations of false statements and exaggerated billing are unsupported and without merit.

In light of our agreement with the trial court on the resolution of these dispositive issues, we need not address the merits of defendant's cross-appeal.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh