STATE OF MICHIGAN

COURT OF APPEALS

THE CINCINNATI INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED November 10, 2005
V	No. 254333 Ottawa Circuit Court
JOSEPH J. BOTT, Defendant-Appellant.	LC No. 03-048040-CK

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying defendant's cross-motion for summary disposition. Because neither notice nor claim was made to the insurer for underinsured motorist coverage before the claimant settled his residual bodily injury claim, and he otherwise failed to obtain the consent of his insurer before settling and releasing the tortfeasor, we affirm.

Defendant was injured in an automobile accident while driving his employer's vehicle. His employer had policies of insurance with plaintiff for no-fault coverage, underinsured motorist coverage, and worker's compensation coverage. Although the driver of the other vehicle involved in the accident did not have insurance coverage, the owner of the other vehicle was insured through Allied Insurance. Defendant settled his claim against the owner and driver of the other vehicle for $100,000, the amount of Allied's policy limit, and executed a release. Prior to settlement of the residual bodily injury claim, defendant determined and obtained an acknowledgment from plaintiff of non-reimbursement of the worker's compensation payments made to defendant. Well after the settlement, defendant for the first time made a demand for underinsured motorist benefits pursuant to the policy with plaintiff. Plaintiff filed this declaratory action seeking a determination that defendant was barred from recovering underinsured motorist benefits because defendant did not comply with the terms of the policy before settling the claim. Following cross-motions for summary disposition, the trial court denied defendant's motion and granted plaintiff's motion pursuant to MCR 2.116(C)(10) on the basis of defendant's failure to obtain plaintiff's consent to the settlement.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff's insurance policy excludes coverage for "[a]ny claim settled without our consent." Viewed in the light most favorable to defendant, the evidence, although subject to contradiction by plaintiff, indicates that defendant's attorney informed plaintiff's claims adjuster of defendant's intention to settle the case against Allied for the policy limits. The adjuster did not inform defendant's counsel of the policy requirement that plaintiff consent to the proposed settlement. There is no dispute that defendant did not obtain plaintiff's express consent before settling.

Defendant argues that there is at least a question of fact concerning whether plaintiff waived or is estopped from asserting the consent requirement because plaintiff failed to alert defendant of the requirement, even when defendant's attorney informed plaintiff of defendant's intention to settle the case with the tortfeasor. According to defendant, "an insurer has a duty to bring important clauses to an insured's attention whenever there is reason to believe that the insured will not be aware of the clause on his own; and that breach of that duty amounts to a waiver of the requirement, or an estoppel to assert the requirement."

Defendant's position that an insurer has a duty to inform an insured of the terms of the policy and that failure to do so estops the insurer from asserting a defense was rejected in *Naparstek v Citizens Mut Ins Co*, 19 Mich App 53; 172 NW2d 205 (1969). In that case, the plaintiff was a guest passenger in a vehicle insured by the defendant and was injured in a collision with an uninsured motorist. The plaintiff informed the defendant of pending litigation against the tortfeasor, and the defendant advised that it did not want to be involved in the litigation. The plaintiff obtained a judgment against the tortfeasor. The plaintiff then sought to recover under the uninsured motorist provision of the policy. The defendant argued that coverage was excluded because the plaintiff did not obtain written consent to prosecute the action against the tortfeasor to judgment. The plaintiff argued that the defendant waived or was estopped to assert the exclusion because the defendant had a duty to inform the plaintiff's counsel of the terms of the policy and failed to do so. *Id.*, 60-61. This Court explained that an insured must be presumed to have known the terms and conditions of the policy, and the fact that an insured had not seen the policy was immaterial where it was not kept from him by the insurer. *Id.*, 62-63. The Court rejected the plaintiff's argument that the defendant waived its right to or was estopped from asserting the exclusionary clause. As in *Naparstek*, we conclude that the adjuster's failure to alert defendant's counsel concerning the terms of the policy is not a basis for application of the principles of waiver or estoppel.

Defendant's reliance on *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 145; 433 NW2d 380 (1988) and *Struble v National Liberty Ins Co of America*, 252 Mich 566; 233 NW 417 (1930), is misplaced. In those cases, the insureds failed to timely submit a proof-of-loss but were allowed to proceed on under theories of waiver or estoppel because the insurers refused to provide copies of the policies to the insureds until after the period for submitting a proof-of-loss had expired. The decisions indicate that if an insurer prevents the insured's compliance with the policy by refusing to provide the policy, the insurer could not be heard to assert noncompliance as a defense. But in this case, defendant does not assert that plaintiff refused a request for a copy of the policy.

Defendant also argues that there is a question of fact regarding plaintiff's consent because, under certain circumstances, silence permits an inference of consent. Defendant cites *Osner v Boughner*, 180 Mich App 248; 446 NW2d 873 (1989), and *Tanis v Eding*, 280 Mich

440; 273 NW 761 (1937) (concerning owners' implied consent to allow others to drive a vehicle), *Benson v Morgan*, 50 Mich 77; 14 NW 705 (1883) (failure to object deemed a waiver of the spousal privilege), and *Stamadianos v Stamadianos*, 425 Mich 1, 13; 385 NW2d 604 (1986) (legislative acquiescence). Defendant has not cited any decisions in which an insurer's consent to an insured's settlement was inferred or implied from the insurer's silence or inaction, and we decline to adopt his novel legal argument in this case. Just as an insurer's mere silence is not a waiver of the right to approve a settlement, *Moore v First Security Casualty Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997), an insurer's mere silence is not a basis for implying consent to a settlement.

Finally, defendant argues that the trial court erred in granting summary disposition because discovery was incomplete. He contends that the production of plaintiff's claims file may produce relevant evidence. However, the flaw in defendant's position is that his counsel's affidavit does not state that plaintiff communicated its consent to the settlement. Neither counsel's affidavit, nor earlier letter to the insurer cite to the insurer's consent to settle. Counsel's letter, which pre-dates the settlement, acknowledges that plaintiff as defendant's no-fault (personal injury protection) and worker's compensation insurer does not have a lien against defendant's automobile negligence claim. The underinsured motorist claim is not referenced. Although discovery was incomplete, summary disposition was appropriate if the trial court determined as it did here that further discovery does not stand a fair chance of uncovering factual support for the asserted proposition.[1] *Gara v Woodbridge Tavern*, 224 Mich App 63, 68; 568 NW2d 138 (1997). Given the claims adjuster's affidavit and produced copy of the claim log, defendant's attempt to find support for the contention that plaintiff impliedly consented in plaintiff's claims file is nothing more than a promise to offer evidence. An unsupported promise to offer evidence will not create a justiciable question of fact preventing a grant of summary disposition. *Maiden, supra* at 121; *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

[1] The claims adjuster's log entries were produced and before the trial court at the time of disposition.