STATE OF MICHIGAN

COURT OF APPEALS

CHERYL SHERMAN and GERALD SHERMAN,

Plaintiffs-Appellees,

v

GREGORY M. EBERLEIN,

Defendant-Appellee,

and

AUTO OWNERS INSURANCE COMPANY

Intervenor-Appellant.

UNPUBLISHED
November 21, 1997

No. 199105
Alpena Circuit Court
LC No. 94-001079 NI

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Auto Owners Insurance Company appeals by right a post-judgment order of the Alpena Circuit Court, denying Auto Owners' motion to intervene in this tort litigation. This case is being decided without oral argument pursuant to MCR 7.214(E).

The Shermans were injured in a motor vehicle collision with a second vehicle driven by defendant Eberlein, who for present purposes must be assumed to be the insured under a no-fault policy issued by Citizens Insurance Company, and an umbrella or excess insurance policy issued by Auto Owners. Auto Owners learned of the initiation of litigation at or near its commencement, but chose to sit on the sidelines rather than invoke its contractual right under its policy to "associate with the insured in the handling of any claim or suit likely to involve us." Citizens Insurance provided a defense for its insured, and the Shermans and Eberlein agreed to submit their dispute to binding arbitration, which they had a legal right to do under MCL 600.5001(1); MSA 27A.5001. Although Auto Owners objected to arbitration by letter, its legal basis for doing so was not specified with its objections or developed in its brief in this Court. Since the cited statute authorizes the parties to civil litigation to agree to binding arbitration, and the insurer of an alleged tortfeasor is not such a party, see Insurance Code §3030,

inasmuch as Auto Owners had failed to invoke its right under the insurance policy to require the insured to associate with it in the handling of the claim and to "fully cooperate" with Auto Owners, no legal impediment to the arbitration appears on this record.

After the circuit court confirmed the arbitration award, Auto Owners finally sought to intervene in the matter. The circuit court properly rejected the motion to intervene as untimely. Where, as here, an excess insurer has notice that its insured is charged with liability subject to policy coverage, there is some burden on the insurer to act to protect its interests or those of its insured. The carrier will not be permitted to benefit by sitting idly by, knowing of the litigation, and watching its insured become prejudiced. *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989); *Burgess v American Fidelity Fire Ins Co*, 107 Mich App 625, 630; 310 NW2d 23 (1981). Citizens Insurance Company owed a duty only to its insured, not to the excess insurer, although if Citizens was guilty of bad faith in the defense of the claim, Auto Owners may be able to sue Citizens on a theory of equitable subrogation, which requires first that Auto Owners become subrogated to its insured's rights by satisfying that portion of the arbitration award which comes within the limits of the excess insurance policy. *Commercial Unity Ins Co v Medical Protective Co*, 426 Mich 109; 393 NW2d 479 (1986). Citizens is not a party to this appeal and such issues are not currently properly before this Court. As the excess insurer, however, Auto Owners is bound to pay any reasonable settlement. *Admiral Ins Co v Columbia Ins Co*, 194 Mich App 300, 306; 486 NW2d 351 (1992).

What is clear is that Auto Owners has failed to identify any legal error in the circuit court's decision not to permit post-judgment intervention.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Robert P. Young, Jr.