

STATE OF MICHIGAN
COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 188201

CHERYL LABO, Personal Representative of,
the Estate of ANGELA LABO,

Otsego Circuit Court
LC No. 94-006160-NZ

Defendant-Appellant.

Before: Saad, P.J., and Neff and Jansen, JJ.

SAAD, P.J. (dissenting):

I respectfully dissent.

Defendant is the personal representative of the estate of Angelo Labo, who died when her vehicle collided with another motor vehicle. Defendant entered into a settlement agreement with AAA, the insurer of the owner of the vehicle that collided with Labo's vehicle, for the limits of that insurance policy. Defendant then made a claim against Auto-Owners, Labo's insurer, for underinsured motorist coverage. In response, Auto-Owners filed a complaint for declaratory relief, contending that: (1) Labo's settlement agreement with AAA was entered into without Auto-Owners' knowledge or written consent, (2) the settlement destroyed Auto-Owners' subrogation rights against the driver and owner of the other vehicle, and (3) pursuant to the contract between Auto-Owners and defendant Labo (which provided that settlements affecting Auto-Owners' right of subrogation must be approved by plaintiff in writing) defendant was barred from making a claim against Auto-Owners for underinsured motorist benefits.

On appeal, defendant argues that Auto-Owners either waived its contractual right to require written approval of the settlement, or, Auto-Owners should have been estopped from asserting this right. Specifically, defendant contends that, in a telephone conversation immediately prior to the settlement, Auto-Owners' agent told defendant to "go ahead" with the agreement. However, the affirmative defenses of waiver and estoppel, and the facts underlying such defenses, were not presented

in defendant's response to plaintiff's complaint as required under MCR 2.111(F)(3). Therefore, defendant waived these defenses. *Sherman v DeMaria Bldg Co, Inc,*

203 Mich App 593, 599; 513 NW2d 187 (1994). Accordingly, I would affirm the trial court's grant of summary disposition.

/s/ Henry William Saad