

STATE OF MICHIGAN
COURT OF APPEALS

PIECES OF 8, INC., THOMAS CASSIDY, and
RAMONA CASSIDY,

UNPUBLISHED
November 1, 2002

Plaintiffs-Appellants,

v

No. 233904
Emmet Circuit Court
LC No. 00-005906-CK

INSURANCE BY BURLEY AGENCY INC., and
AUTO-OWNERS INSURANCE COMPANY,

Defendants-Appellants,

and

GARY MORSE,

Defendant.

Before: Hood, P.J., and Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Plaintiffs Pieces of 8, Inc., Thomas Cassidy, and Ramona Cassidy appeal as of right the trial court's orders granting the motions for summary disposition of defendants Insurance By Burley, Inc. and Auto-Owners Insurance Company under MCR 2.116(C)(8) and (10), and denying plaintiffs' motions for reconsideration and to amend the complaint. We affirm.

I. Basic Facts And Procedural History

This case arises from plaintiffs' claim for insurance benefits following a fire that destroyed their manufacturing facility. At the time of the fire, plaintiffs' facilities and equipment were insured under a policy issued by Auto-Owners through its agent, the Burley Agency.¹ Shortly after informing the Burley Agency of the fire, plaintiffs received a letter from Auto-Owners acknowledging notice of the loss and informing plaintiffs that, per their policy requirements, a sworn statement in proof of loss was required to be filed within sixty days from the date of loss. Although Auto-Owners granted an extension of the time period for filing the statement, plaintiffs failed to meet this deadline, prompting Auto-Owners to reject the statement

¹ Defendant Gary Morse, the Burley Agency representative who sold plaintiffs the policy, is not a party to this appeal.

when filed. Plaintiffs thereafter filed this suit, which the trial court dismissed on summary disposition.

II. Functional Equivalency

A. Standard Of Review

Plaintiffs argue that because it provided Auto-Owners with the “functional equivalent” of a sworn statement in proof of loss prior to expiration of the sixty-day period, Auto-Owners is unable to establish any prejudice as a result of plaintiffs’ failure to timely file a sworn statement in proof of loss, and the trial court therefore erred in granting defendants summary disposition. We review a trial court’s decision on a motion for summary disposition de novo.²

B. Prejudice

Initially, we note that this Court has previously held that “the failure to file a signed and sworn proof of loss within sixty days of the loss bars recovery on a claim without regard to whether the insurer is prejudiced by such failure.”³ Accordingly, plaintiffs are in error in suggesting that prejudice to Auto-Owners was a condition precedent to the proper grant of summary disposition. Plaintiffs’ reliance on such cases as *Wendel v Swanberg*⁴ and *Koski v Allstate Ins Co*,⁵ which state that an insurer who seeks to “cut off responsibility” on the ground that its insured did not comply with a contract provision requiring notice must establish actual prejudice, is misplaced, as those cases do not involve a contract of insurance with specific time limits for notice or proof of loss.⁶ As noted by the panel in *Dellar*, where, as here, the case involves a policy containing a provision requiring proof of loss within a specified time frame, a separate line of authority exists.⁷ Under these cases, an insured’s failure to timely file a sworn proof of loss is deemed a failure of a condition precedent to the insurer’s responsibility under the policy.⁸ Here, plaintiffs do not dispute that they failed to meet this condition, but nonetheless argue that under *Dellar*, strict compliance with such a condition is not necessarily fatal to an insured’s claim. Plaintiffs’ reliance on *Dellar* is, however, similarly misplaced.

² *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

³ *Dellar v Frankemuth Mut Ins Co*, 173 Mich App 138, 145; 433 NW2d 380 (1989), citing *Reynolds v Allstate Ins Co*, 123 Mich App 488; 332 NW2d 583 (1983).

⁴ *Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971).

⁵ *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998).

⁶ *Id.* at 444.

⁷ *Dellar*, *supra* at 144, citing *Helmer v Dearborn National Ins Co*, 319 Mich 696; 30 NW2d 399 (1948) and *Fenton v National Fire Ins Co*, 235 Mich 147; 209 NW 42 (1926).

⁸ *Helmer*, *supra* at 699-700; *Fenton*, *supra* at 150; see also, *Reynolds*, *supra* at 490-491.

C. Strict Compliance

While it is true that the panel in *Dellar* found that the information acquired by the insurer in that case constituted the “functional equivalent” of a sworn proof of loss,⁹ this was not the sole basis for its decision to reverse the trial court’s grant of summary disposition in favor of the insured on the ground that the insured had failed to timely file a sworn proof of loss.¹⁰ The panel also relied on the fact that the insurer had failed to inform the insured that a sworn proof of loss was required to be filed within sixty-days of the loss and, in failing to do so, had breached its statutory duty to inform the insured of the materials necessary to constitute a satisfactory proof of loss.¹¹ Also relevant to the panel’s decision was the insurer’s awareness that neither the insured nor her attorney had a copy of the insurance policy, and that steps were being taken to perfect a claim, but that a copy of the contract was necessary for that purpose. Yet the insurer failed to honor the insured’s repeated requests for a copy of the contract until after expiration of the sixty-day period for filing the proof of loss.¹²

In contrast, here, plaintiffs do not allege that they were without a copy of the insurance contract and it is not disputed that they were informed by letter, within only a few days after the loss, that a sworn statement in proof of loss was required to be filed within sixty days in order to secure coverage. Indeed, Auto-Owners even included with this letter two blank proof of loss forms to be used by plaintiffs to meet this requirement. Thus, unlike the plaintiff in *Dellar*, plaintiffs were not prevented from complying with the proof of loss provision by a course of action undertaken by the insurer.¹³ Accordingly, we reject plaintiffs’ reliance on *Dellar* as authority for concluding that its proofs were sufficient despite its failure to timely file a sworn statement in proof of loss. The trial court correctly granted summary disposition in favor of Auto-Owners.¹⁴

⁹ *Dellar, supra* at 148.

¹⁰ It is unclear whether the panel’s statement in this regard is, as argued by Auto-Owners, dicta. However, as explained below, because the panel did not rely solely on this finding to reverse the trial court’s grant of summary disposition in favor of the defendant insurer, we need not consider the issue as *Dellar* is factually distinguishable from the present case. Further, we are not bound by *Dellar*, see MCR 7.215(I)(1), and question its conclusion that information received from an insured can constitute the “functional equivalent” of a sworn statement in proof of loss. See *Barnes v State Farm Fire & Casualty Co*, 623 F Supp 538, 540 (ED Mich, 1985) (the purpose of requiring a sworn proof of loss is to bind an insured to a stated set of facts).

¹¹ *Dellar, supra* at 143-144; see also MCL 500.2006(3) (“An insurer [must] specify in writing the materials which constitute satisfactory proof of loss not later than 30 days after receipt of a claim of loss unless the claim is settled within 30 days.”).

¹² *Dellar, supra* at 146-148.

¹³ See also *Struble v National Liberty Ins Co of America*, 252 Mich 566; 233 NW 417 (1930), cited by the panel in *Dellar, supra* at 147.

¹⁴ Plaintiffs do not argue, and therefore we do not address, the propriety of the trial court’s order granting summary disposition in favor of defendant Burley Agency.

III. Amendment Of The Complaint

A. Standard Of Review

Plaintiffs argue that the trial court erred in denying their motion to amend the complaint to allege that Auto-Owners had waived, and was therefore estopped from enforcing, the policy requirement that plaintiffs file a sworn statement in proof of loss within sixty days. The trial court denied plaintiffs' motion to amend after concluding that amendment to allege waiver and estoppel would be futile. We review for an abuse of discretion a trial court's decision to deny leave to amend a complaint on the ground that amendment would be futile.¹⁵

B. Course Of Conduct

In challenging the trial court's decision to deny amendment of the complaint, plaintiffs rely primarily on our Supreme Court's opinion in *Morales v Auto-Owners Ins Co*¹⁶ to argue that an insurer can waive a policy requirement through its statements or course of conduct. In *Morales*, the Court held that an insurer, through its "consistent acceptance" of late premium payments over the course of several years, had waived, and was therefore estopped from enforcing, an automatic nonrenewal provision to deny coverage on the basis of late payment.¹⁷ In doing so, the Court remarked that the insured "was justified in believing that [the insurer] would accept his late premiums, and, consistent with its prior practice, . . . would then renew the contract for another . . . term."¹⁸

Here, by contrast, there was no course of conduct from which plaintiffs could reasonably believe that the provision at issue would not be enforced. Contrary to plaintiffs' assertion, nothing in Auto-Owners representative Len Wentworth's alleged oral assurances that the claim would be honored can be construed as a waiver of plaintiffs' obligation, under the express terms of the policy, to provide a timely sworn statement in proof of loss as a condition precedent to payment on their claim.

That Wentworth also sought to take statements from the insureds past the time period in which a sworn statement in proof of loss was required to be filed similarly provides no basis for concluding that Auto-Owners waived its right to enforce strict compliance with the proof-of-loss deadline. Indeed, in honoring plaintiffs' request that the initial time period for filing of such statement be extended, Wentworth expressly reserved such right. Accordingly, unlike the insured in *Morales*, plaintiffs had no basis for believing that Auto-Owners had waived compliance with the provision at issue. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to amend because amendment would have been futile.¹⁹

¹⁵ *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998).

¹⁶ *Morales v Auto-Owners Ins Co*, 458 Mich 288, 296; 582 NW2d 776 (1998).

¹⁷ *Id.* at 297-298.

¹⁸ *Id.* at 298.

¹⁹ *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996).

IV. Reconsideration

A. Standard Of Review

Plaintiffs argue that the trial court erred in denying their motion to reconsider its decision to grant defendants summary disposition and deny plaintiffs' motion to amend the complaint. This Court reviews a trial court's decision on a motion for reconsideration for abuse of discretion.²⁰ An abuse of discretion occurs when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion.²¹

B. Reconsidering Similar Arguments

In moving for reconsideration, plaintiffs relied on the same arguments previously rejected by the trial court. Although plaintiffs are correct that, pursuant to MCR 2.119(F)(3), a trial court has discretion to grant a motion for reconsideration even though the motion raises the same issue previously ruled on by the court,²² because, as discussed above, the trial court correctly decided the motions for which reconsideration was sought, it cannot be said that it abused its discretion in denying reconsideration.²³

We affirm.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Peter D. O'Connell

²⁰ *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

²¹ *Id.*

²² See *Midwestern Bank-Midwest v DJ Reynaert, Inc*, 166 Mich App 630, 646; 419 NW2d 439 (1988).

²³ *Churchman, supra.*