

STATE OF MICHIGAN
COURT OF APPEALS

DALE OSBURN, INC., OSBURN INDUSTRIES,
INC., and TRUCKWAY SERVICE INC. OF
MICHIGAN,

UNPUBLISHED
November 18, 2003

Plaintiffs-Appellants,

v

AUTO OWNERS INSURANCE COMPANY,
GARAN LUCOW MILLER & SEWARD, P.C.,
f/k/a GARAN LUCOW SEWARD COOPER &
BECKER, P.C., and THOMAS L. MISURACA,

No. 242313
Wayne Circuit Court
LC No. 98-836716-CK

Defendants-Appellees.

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

In this breach of contract and legal malpractice action, plaintiffs Dale Osburn, Osburn Industries, Inc. and Truckway Service Inc. of Michigan appeal as of right from the June 9, 2002 and June 12, 2002 trial court orders granting defendants Auto Owners Insurance Company (Auto Owners), Garan, Lucow, Miller & Seward, P.C. (Garan Lucow), and Thomas L. Misuraca summary disposition. We affirm in part and reverse in part.

I. Basic Facts And Procedural History

This Court previously set forth the relevant facts and procedural history of this case in *Detroit Edison Co v Dale Osburn Trucking Inc.*¹:

Edison is a producer and supplier of energy. One of the byproducts of its energy generation process is a substance known as fly ash. Since February 1, 1989, MFC's² operations have included the removal and sale of limestone from

¹ *Detroit Edison Co v Dale Osburn Trucking, Inc.*, unpublished per curiam opinion of the Court of Appeals, issued October 2, 2001 (Docket No. 218260).

² MFC refers to Michigan Foundation Company, Inc.

Sibley Quarry in Trenton, Michigan. Sibley Quarry is owned by Edison and used as a disposal site for its fly ash. Under a contract known as the Sibley Quarry Agreement, MFC manages both the mining and ash disposal operations at the quarry, while Edison is responsible for the expenses associated with the ash disposal operation, and has certain other duties. At the heart of the arbitration action . . . is a reciprocal indemnity provision in the Sibley Quarry Agreement, whereby MFC and Edison agreed to indemnify each other for risks associated with "their respective activities." . . .

Osburn is a trucking/hauling company that entered into a contract with Edison ("the Fly Ash Contract") to haul fly ash from Edison's energy generation facilities to the Sibley Quarry for disposal. A term of that contract expressly provided that Osburn would defend and indemnify Edison for a broad category of claims or charges that might be visited on Edison by virtue of Osburn's performance of the Fly Ash Contract. Shortly after the Fly Ash Contract went into effect, one of Osburn's truck drivers, Dennis Claffey, was injured when he fell from the top of an Edison-owned and MFC-provided water tanker truck that he was using to hose out his dump truck in accord with the terms of the Fly Ash Contract. Claffey and his wife sued MFC and Edison ("the Claffey suit"), alleging that his injuries were the result of their negligence.

In the Claffey suit, Edison filed a cross-claim for indemnity against MFC, but invoked its contractual right to arbitrate the dispute after MFC moved to do likewise. Edison also filed a third-party complaint against Osburn, invoking the indemnity provision of the Fly Ash Contract. Initially, Osburn opposed the third-party action, but eventually entered into a specific agreement to defend Edison in the Claffey suit ("the Defense/Settlement Agreement"). Thereafter, Osburn (through its insurer) paid \$100,000 to the Claffeys in settlement of their claims against Edison. Sometime after that, Amerisure paid \$150,000 to the Claffeys to settle their claims against MFC.

Following its payment to the Claffeys, Amerisure sought indemnity, as subrogee to MFC, by instituting an arbitration action against Edison. In turn, Edison made a demand on Osburn to defend and indemnify Edison in the arbitration action brought by Amerisure. Osburn refused, which led to the . . . Edison [lawsuit], [in which Edison was] claiming breach of the indemnity provision of the Fly Ash Contract, followed by Osburn's countersuit, alleging breach of the Defense/Settlement Agreement. The trial court ultimately held that the indemnity provision of the Fly Ash Contract was broad enough to encompass actions against Edison seeking contractual indemnity for losses associated with Osburn's performance, and that the Defense/Settlement Agreement, by its own terms, did not reduce Osburn's indemnity duties with regard to Amerisure's claim against Edison.

This Court affirmed the trial court's decision in the Edison lawsuit. As a result, plaintiffs submitted Edison's indemnification claims to Auto Owners, who denied payment on the grounds that Auto Owners did not provide coverage for Edison's contractually assumed claims. Plaintiffs filed a complaint seeking a declaration regarding the scope of coverage under the liability

insurance policy, as well as asserting breach of contract claims against Auto Owners and legal malpractice claims against Misuraca and Garan Lucow.

Auto Owners, Misuraca, and Garan Lucow all moved for summary disposition. The trial court concluded that plaintiffs' obligation to indemnify Edison for its contractual liability to MFC was not covered under Auto Owners' insurance policy. The trial court further concluded that plaintiffs were informed of this in a reservation-of-rights letter that Auto Owners sent plaintiffs and in the defense agreement that plaintiffs signed. The trial court therefore granted Auto Owners summary disposition pursuant to MCR 2.116(C)(8) and (10).

The trial court also dismissed plaintiffs' claims against Misuraca and Garan Lucow, essentially adopting their argument that, because plaintiffs were already obligated to defend and indemnify Edison under the Fly Ash Agreement, Misuraca and Garan Lucow's alleged negligent representation could not have been the proximate cause of plaintiffs' damages. The trial court therefore granted Garan Lucow and Misuraca summary disposition pursuant to MCR 2.116(C)(10).

II. Summary Disposition In Favor Of Auto Owners; Waiver Of Defenses

A. Standard Of Review

Plaintiffs argue that summary disposition in favor of Auto Owners was improper because Auto Owners waived its defenses under the policy exclusion. Although Auto Owners asserts that we need not review plaintiffs' waiver argument because plaintiffs failed to argue this issue below, plaintiffs did argue during the motion hearing that Auto Owners never told plaintiffs it would not cover all of their claims, an argument that forms the basis for their assertion of waiver on appeal. Because this Court can still address an issue not decided below if it is one of law for which all the necessary facts were presented,³ we will address the issue. We review de novo the trial court's decision on a summary disposition motion.⁴

B. Reasonable Notice

Where an insurer undertakes to defend its insured, it must give the insured reasonable notice that it is "proceeding under a reservation of rights," or the insurer will be "estopped from denying its liability."⁵ In *Meirthew*,⁶ the Michigan Supreme Court concluded that the insurer did not give "reasonable notice" both because the insurance company waited until after the judgment in the underlying tort case was entered before asserting the relevant policy exclusion and because

³ *D'Avanzo v Wise & Marsac PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997).

⁴ *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

⁵ *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999), citing *Meirthew v Last*, 376 Mich 33, 39; 135 NW2d 353 (1965).

⁶ *Meirthew*, *supra* at 39.

the reservation-of-rights letter “left [the insured] in the dark as to the nature of the policy defense or defenses the insurer had in mind . . .”

Since *Meirthew*, this Court has held that a delay of four months between the initiation of the underlying action and the date that insurer sends the reservation-of-rights letter is “as a matter of law, not an unreasonable length of time.”⁷ Here, Auto Owners issued its reservation-of-rights letter on January 6, 1995, less than four months after Dennis Claffey filed his October 7, 1994 lawsuit against Edison and MFC. Thus, we conclude the letter was timely.

C. Specificity

Nevertheless, we conclude that, because Auto Owners’ reservation-of-rights letter was not sufficiently specific to inform plaintiffs of the policy defenses the insurer might assert, that letter did not constitute “reasonable notice.” In *Meirthew*, the unreasonably vague reservation-of-rights letter that the insurer sent to its insured provided, in part, as follows:

[T]he Company in undertaking your defense, does so under a reservation of rights, and without prejudice, and subject to the conditions, limitations, exclusions and agreements of said policy, and subject to the express understanding that by so doing the Company does not waive any of its rights to rely upon the provisions of said policy, and does not waive any defense it may have to any claimed liability under said policy.⁸

An example of a reservation of rights that is sufficiently specific so as to provide reasonable notice can be found in *Allstate Ins Co v Harris*.⁹ There the reservation-of-rights letter set forth the specific policy exclusions and defenses that the insurer might later assert:

[I]t is Allstate's belief that you were not a resident of the household of a named insured on January 22, 1993 and, accordingly, do not fall within the above-quoted definition of an "insured person".

It is also Allstate's position that the bodily injury allegedly sustained by the Estate of Gwendolyn Harris did not arise from an accident and, thus, falls outside of the coverage provisions of the Allstate policy. Further, either one or more of the exclusions quoted above applies to the allegations directed against you.¹⁰

Here, the reservation-of-rights letter provided that Auto Owners was agreeing to defend plaintiffs “under a full Reservation of Rights pending any factual information that may show that

⁷ *Fire Ins Exchange v Fox*, 167 Mich App 710, 714; 423 NW2d 325 (1988).

⁸ *Meirthew*, *supra* at 33.

⁹ *Allstate Ins Co v Harris*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2001 (Docket No. 215264).

¹⁰ *Harris*, *supra* at 3.

the bodily injury to Mr. Claffey resulted solely from the negligence of Detroit Edison and/or **that other policy exclusions apply.**” The language in this letter is more like the unreasonably vague letter at issue in *Meirthew* than the letter at issue in *Harris*. The “and/or that other policy exclusions apply” language in Auto Owners’ reservation-of-rights letter does not satisfy the specificity requirement in *Meirthew* because the policy leaves the insured “in the dark as to the nature of the policy defense or defenses that the insurer had in mind.”¹¹ Accordingly, because the reservation-of-rights letter here fails the “reasonable notice” standard set forth in *Meirthew*, we conclude that Auto Owners is estopped from denying its liability.¹²

D. The Defense Settlement Agreement

Auto Owners argues that the Defense Settlement Agreement plaintiffs signed informed plaintiffs of Auto Owners’ proposed defenses. We find this argument unpersuasive. Auto Owners was not a party to the Defense Settlement Agreement. Further, the Defense Settlement Agreement never mentions Auto Owners or the indemnity liability exclusion in the insurance policy. Although the Defense Settlement Agreement may have settled the indemnity dispute between Edison and plaintiffs regarding claims brought against Edison for its or its employee’s tortious conduct, it does not disclose any potential defense that Auto Owners might later assert under the policy.

Equally telling is the affidavit of Richard Osburn, an officer and director of Dale Osburn, Inc. There, Osburn averred that he never received anything from Auto Owners stating that any part of Edison’s claims was not covered under the Auto Owners insurance policy. He further averred that no one told him plaintiffs should hire a separate attorney to represent them because Auto Owners disputed coverage of certain claims.

Because neither the reservation-of-rights letter nor the Defense Settlement Agreement provided notice that Auto Owners would refuse to cover MFC’s claims under the exclusion for indemnity liability, we conclude that the trial court’s decision to grant Auto Owners summary disposition was improper and that, pursuant to *Meirthew*, Auto Owners is estopped from asserting that exclusion. Further, pursuant to MCR 2.116(I)(2), we conclude that summary disposition in favor of plaintiffs was appropriate.

III. Summary Disposition In Favor Of Auto Owners; Coverage

A. Standard Of Review

Plaintiffs argue that the trial court erred in granting Auto Owners summary disposition because Auto Owners’ liability insurance policy covered plaintiffs’ liability to Edison for MFC’s claims. Again, we accord this issue de novo review.¹³

¹¹ *Meirthew*, *supra* at 39.

¹² *Id.*

¹³ *Dressel*, *supra* at 561.

B. Policy Provisions

The “coverage” section of the insurance policy sets forth its coverage of bodily injury and property damage liability:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies

Among the policy exclusions is an exclusion for indemnity liability; this exclusion, in turn, has exceptions. The exclusion and the relevant exception to the exclusion provide:

This insurance does not apply to:

- b. “Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) Assumed in a contract or agreement that is an “insured contract.”

An “insured contract” is expressly defined in the policy as:

That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

As the insurance policy makes clear, it covers indemnity liability in contracts where plaintiffs assume a third party’s tort liability, or “liability imposed by law in the absence of any contract or agreement.”

C. Edison’s Liability To MFC; Contractual Versus Tort Liability

Here, because Edison’s liability to MFC arises from a reciprocal indemnity provision in the Sibley Quarry Agreement, Edison’s liability to MFC is liability imposed by contractual agreement. In 1989, Edison and MFC entered into an agreement that permitted MFC to mine and maintain the ash disposal operation at the Sibley Quarry. In that agreement, the indemnification provision provides that MFC and Edison agree to assume liability from “their respective activities” and that they shall defend and hold each other harmless for liability or costs from damage to people or property at the quarry.

Although plaintiffs’ argument on appeal seeks to characterize the liability at issue as “tort liability claims” by focusing on the nature of the Claffey claims that led to MFC’s liability, plaintiffs confuse the issue. The exception to the exclusion in the policy is for contracts in which plaintiffs assume the tort liability of a third party. Here, the only contract where plaintiffs assume tort liability, or any liability, of a third party is the Fly Ash Agreement that plaintiffs entered into with Edison. Thus, it is the character of *Edison’s* liability to MFC that determines

coverage. Were it not for the reciprocal indemnity provision in the Sibley Quarry Agreement, Edison would not be responsible for payments of MFC or its subrogee in the Claffey settlement.

As the Michigan Supreme Court has held, clear and specific exclusions in an insurance policy must be enforced.¹⁴ Because we find that, absent the Sibley Quarry Agreement, Edison would not be responsible for MFC's settlement payments, we conclude that Edison's liability to MFC is contractual liability and not tort liability and therefore that plaintiffs' obligation to indemnify Edison for its contractually assumed claims is expressly excluded under the policy.

D. Failure Of Reasonable Notice

We conclude that the policy excludes from coverage plaintiffs' obligation to indemnify Edison for its contractual liability. However, because we conclude above that Auto Owners, because of its failure to give reasonable notice, cannot rely on that policy exclusion, we conclude that the trial court erred in granting Auto Owners summary disposition.

IV. Summary Disposition In Favor Of Auto Owners; Ambiguity

A. Standard Of Review

Plaintiffs contend that the trial court erred in granting summary disposition because the insurance policy exclusion that advised plaintiffs that the claims were excluded from coverage is ambiguous. Whether the language in an insurance policy is ambiguous is a question of law that we review de novo on appeal.¹⁵

B. Policy Provisions

Plaintiffs argue that the exclusion and its exception are confusing and ambiguous because one would have to have an attorney's knowledge to understand the concept of tort liability defined in the policy. An insurance contract is ambiguous if, after reading the entire contract, its language can be reasonably understood in differing ways.¹⁶

The exception to the indemnity liability exclusion in the policy provides: "Tort liability means a liability that would be imposed by law in the absence of any contract or agreement." Here, the language of the exclusion and its exception is not susceptible to two different interpretations. An insurance contract is clear if it fairly admits of but one interpretation.¹⁷ Further, if a clear contract does not contravene public policy, the contract will be enforced as written, however inartfully worded or clumsily arranged the contract might be.¹⁸ Because the

¹⁴ *Group Ins Co v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992).

¹⁵ *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

¹⁶ *Id.* at 566-567.

¹⁷ *Id.* at 566.

¹⁸ *Id.*

contract's exception is susceptible to only one interpretation, we conclude that it is clear and must be enforced as written. Thus, we find no merit to this issue.

V. Summary Disposition In Favor Of Auto Owners; Bad Faith

A. Standard Of Review

Plaintiffs argue that the trial court erred in granting Auto Owners summary disposition because Auto Owners acted in bad faith when it refused to settle all of Edison's claims. Again, we review de novo the trial court's decision to grant Auto Owners summary disposition.¹⁹

B. Plaintiffs' Argument

Plaintiffs have provided this Court with no authority in support of their argument that an insurer acts in bad faith when it fails to settle claims for which it has not provided coverage. An appellant may not give issues cursory treatment with little or no citation of supporting authority.²⁰ Accordingly, we find plaintiffs' argument unavailing.

VI. Summary Disposition In Favor Of Misuraca And Garan Lucow; Negligent Representation

A. Standard Of Review

Plaintiffs contend that the trial court erred in granting Misuraca and Garan Lucow summary disposition because they provided negligent representation and because their negligence was the proximate cause of plaintiffs' damages. Again, we review this issue de novo.²¹

B. Elements Of Legal Malpractice

In a legal malpractice action, a plaintiff has the burden of establishing four elements: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged."²²

C. Proximate Causation

Because Misuraca and Garan Lucow concede, for the purpose of argument, that they provided negligent representation, the issue on appeal is whether plaintiffs presented prima facie evidence that this negligent representation was the proximate cause of their damages. Regarding

¹⁹ *Dressel, supra.*

²⁰ *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

²¹ *Dressel, supra.*

²² *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994).

proximate causation, the plaintiff has the burden of proving that, but for the negligence, the outcome of the case would have been favorable to the plaintiff.²³

Plaintiffs argue that their injuries were caused by the failure of Misuraca and Garan Lucow to notify them of developments in the Claffey litigation, including Claffey's claims against MFC, Auto Owners' belief that MFC's claims for indemnity were outside the policy, and the opportunity to settle Claffey's claims against MFC. Plaintiffs further assert that this negligent representation resulted in plaintiffs having to pay for fees and costs associated with the Edison lawsuit and the arbitration, as well as the arbitration award and the interest from that award.

However, plaintiffs have failed to establish how they could have avoided these costs in the absence of the negligence of Misuraca and Garan Lucow. Although plaintiffs correctly point out that an attorney's failure to disclose and discuss offers to settle with his client is "a breach of the professional standard of care,"²⁴ plaintiffs have not established proximate causation.

Generally, proximate cause is an issue for the trier of fact.²⁵ But if reasonable minds could not differ, then the issue becomes one of law for the court.²⁶ Summary disposition is proper if all reasonable persons would agree that the injury to the plaintiff was too insignificantly connected to or too remotely affected by the negligence of the defendants.²⁷

Here, we conclude that reasonable persons would agree that plaintiffs' liability for Edison's liability to MFC was an injury "too insignificantly connected to or too remotely affected by" the negligence of Misuraca and Garan Lucow. Even if Misuraca had properly informed plaintiffs of Claffey's claims against MFC, of Auto Owners' refusal to provide liability coverage for MFC's claims, or of plaintiffs' opportunity to settle those claims, there is no indication that plaintiffs would have avoided liability to Edison for Edison's liability to MFC.

Further, there is no indication that Claffey would have accepted the proposed \$250,000 settlement that the trial court was urging. To the contrary, in Misuraca's September 13, 1996 letter to Auto Owners, he explained that Claffey's counsel demanded \$465,000 to settle, and that, "at the Final Pretrial Conference on September 6, 1996 . . . [p]laintiff remained adamant at her demand."

Nor is there any indication that MFC would have settled its claims with Edison arising from the reciprocal indemnity provision of the Sibley Quarry Agreement, instead of seeking indemnification from Edison. Given this uncertainty, plaintiffs have failed to establish that, but

²³ *Radtko v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996).

²⁴ *Joos v Auto Owners Ins Co*, 94 Mich App 419, 424; 288 NW2d 443 (1979).

²⁵ *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998).

²⁶ *Id.*

²⁷ *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 479; 491 NW2d 585 (1992).

for the negligence, plaintiffs would not have been liable to Edison for MFC's claims. Further, we agree with the trial court that plaintiffs' liability to Edison arose from their agreement to indemnify Edison under the Fly Ash Agreement, an agreement that plaintiffs signed years before Misuraca and Garan Lucow were ever retained.

For the above reasons, we conclude that summary disposition was proper. Accordingly, we reverse the trial court's entry of summary disposition in favor of Auto Owners and direct entry of summary disposition in favor of plaintiffs on the question of coverage pursuant to MCR 2.116(I)(2). We affirm the trial court's entry of summary disposition in favor of Misuraca and Garan Lucow. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio